COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0916

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

OSCAR J. BOLDT CONSTRUCTION CO. AND UNITED STATES FIDELITY & GUARANTY CO.,

PLAINTIFFS-RESPONDENTS,

V.

N.J. SCHAUB & SONS, INC. AND WEST BEND MUTUAL INSURANCE CO.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed in part and reversed in part.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 NETTESHEIM, P.J. A subcontractor agreement between Oscar J. Boldt Construction Co. (Boldt), the general contractor, and N.J. Schaub & Sons, Inc. (Schaub), the subcontractor, included an indemnification provision that

required Schaub to indemnify Boldt for damages or liability arising out of Schaub's work under the contract. Schaub appeals from a judgment ordering it to indemnify Boldt for 67% of a settlement that Boldt had previously paid to Jeffrey Schaub, a Schaub employee, who was injured in an accident at the construction site. The judgment also directed Schaub to indemnify Boldt for 67% of Boldt's attorney's fees. The judgment was based on a jury's determination that Schaub was 67% responsible for the accident.

¶2 The principal issue on appeal is whether the trial court erred by barring any consideration of Jeffrey's alleged contributory negligence at the jury trial, thereby limiting the issues to the negligence of Boldt and Schaub. We hold that the trial court properly limited the issues because: (1) Boldt was potentially liable to Jeffrey; (2) Boldt had negotiated a reasonable settlement with Jeffrey on that basis; and (3) Boldt had previously tendered the defense of Jeffrey's claim to Schaub and had invited Schaub to join the settlement negotiations.

¶3 Schaub raises two other issues. It claims that the trial court erred by refusing to instruct the jury on the element of "control" under the safe-place law and by awarding attorney's fees to Boldt. We hold that the trial court did not err by declining to instruct the jury on the "control" element under the safe-place law. However, we conclude that the trial court erred by awarding attorney's fees.

¶4 We affirm in part and reverse in part.

FACTS

¶5 While this case has a lengthy history, the controlling facts are largely undisputed. Boldt was the general contractor on the Waukesha West High School construction project. Boldt subcontracted with Schaub for the drywall and soffit

work on the project. The subcontract agreement required Schaub to indemnify Boldt for damages or liability arising out of Schaub's work under the subcontract.

¶6 Jeffrey was employed by Schaub and was injured on January 21, 1993, in the high school's indoor pool area where Schaub employees were working on overhead ducts. The accident occurred when Jeffrey drove an elevated scissors lift he was working on through a cut-out depression in the unfinished deck of the pool. This action caused the lift to become unstable and eventually tip over and crash into the empty pool. As a result of the accident, Jeffrey suffered severe injuries.

¶7 Jeffrey sued Boldt alleging negligence under the safe-place statute. Based on the indemnification agreement, Boldt tendered the defense of the action to Schaub and also demanded indemnification from Schaub. If Schaub declined, Boldt advised that it would defend the matter as it saw fit and later seek indemnification for any money it might pay to Jeffrey. After receiving no response from Schaub, Boldt filed a third-party complaint against Schaub seeking indemnification and related expenses.

¶8 Following extensive pretrial proceedings, Judge Mark S. Gempeler ruled that the exclusivity provisions of the worker's compensation law barred Boldt's third-party claim against Schaub. We reversed this ruling upon appeal. We held that the indemnity agreement waived Schaub's immunity. ***Schaub v. West Bend Mut.***, 195 Wis. 2d 181, 186-87, 536 N.W.2d 123 (Ct. App. 1995). We remanded for further proceedings on Boldt's third-party complaint.

¶9 After remand, Boldt conducted depositions and other discovery. Eventually, Boldt decided to seek a settlement with Jeffrey. On March 18, 1997, Boldt's counsel faxed a letter to Schaub's counsel advising that Boldt and its

insurer had an opportunity to settle Jeffrey's claim for $925,000. The letter requested that Schaub and its insurer respond by March 21, 1997, as to "whether they approve of the subject settlement, or whether they would take over the further defense of the action and agree to hold [Boldt and its insurer] harmless from any loss, cost, fees or expense in excess of $925,000.00." Another fax was sent by Boldt to Schaub later on the afternoon of March 18, 1997, to confirm an earlier phone conversation in which Schaub and its insurer rejected Boldt's tender of settlement. Without Schaub's participation, Boldt then settled Jeffrey's claims for $925,000.

¶10 Boldt then moved to voluntarily dismiss its third-party complaint against Schaub without prejudice. Judge Gempeler granted this motion, but required Boldt to pay Schaub certain costs as a condition precedent to Boldt refiling its action. Boldt complied with these conditions and then commenced the instant action against Schaub. As with its earlier action, Boldt sought indemnification from Schaub. This case was assigned to Judge Kathryn Foster, and we review Judge Foster's rulings on this appeal.

¶11 Prior to trial, Boldt moved for a declaratory order limiting the scope of the evidence and the issues that would be put before the jury. Specifically, Boldt sought to preclude Schaub from introducing evidence of Jeffrey's contributory negligence, thereby limiting the issues to the negligence of Boldt and Schaub. In support, Boldt cited to ***Barrons v. J.H. Findorff & Sons, Co.***, 89 Wis. 2d 444, 278 N.W.2d 827 (1979), where the supreme court held that an indemnitee need prove only its potential, not its actual, liability in an action against the indemnitor where the indemnitee had tendered the defense of the underlying action or given the indemnitor the choice of approving the settlement. ***Id***. at 455-56. Since Boldt had made those overtures to Schaub and Schaub had

rejected them, and because the settlement was otherwise reasonable in light of Jeffrey's possible contributory negligence and Boldt's own exposure, Boldt argued that Jeffrey's contributory negligence was off limits in the jury trial. The trial court agreed. The court limited the issues at the jury trial to the negligence of Boldt and Schaub and ruled that the amount of indemnity owed by Schaub to Boldt would be measured by the amount of Schaub's causal fault, if any, that contributed to the accident.

¶12 The matter proceeded to jury trial. However, the jury did not reach a verdict due to the conduct of a disruptive juror. As a result, the trial court declared a mistrial. A second—and uneventful—trial was held in December 1999. The jury determined that Boldt was 33% causally negligent and Schaub 67% causally negligent. The court entered judgment in favor of Boldt, directing Schaub to indemnify Boldt for 67% of the settlement amount, Boldt's attorney's fees, and related expenses. Schaub appeals.

DISCUSSION

1. Potential Liability and Contributory Negligence

¶13 The lead issue is whether the trial court erred by refusing to allow evidence of Jeffrey's alleged contributory negligence at the jury trial.[1] As noted, the court based this ruling on the fact that Boldt was potentially liable to Jeffrey,

[1] In its brief, Schaub breaks this issue into subissues, arguing that the trial court erred by excluding consideration of Jeffrey's possible contributory negligence and barring reference or inquiry into the amount of the settlement paid to Jeffrey. These additional arguments are covered by our discussion of the main issue.

that Jeffrey's contributory negligence was a factor in the settlement and that the settlement was reasonable.[2]

¶14 In ***Barrons***, our supreme court discussed the concepts of potential and actual liability in an indemnification setting and explained when an indemnitee need show only potential liability:

> [A]n indemnitee that had given the indemnitor the choice of approving the settlement or taking over the defense of the action need only show potential, rather than actual, liability to the plaintiff and that the settlement was reasonable.

Id.

¶15 We do not read Schaub to dispute that Boldt's potential liability, as opposed to its actual liability, was the appropriate standard of proof in this case. Instead, Schaub contends that Jeffrey's alleged contributory negligence was a necessary inquiry at the jury trial assessing the parties' respective responsibility for the accident.

¶16 In light of Schaub's argument and in further light of ***Barrons***, we wonder why Boldt suggests that the law of actual liability/potential liability in an indemnity setting is unsettled in Wisconsin. Boldt states, "Wisconsin law hints at approval of, but has yet to expressly adopt these well settled indemnity principles."[3] We disagree. ***Barrons*** unequivocally holds that where the

[2] The trial court did not expressly determine that the settlement was reasonable. However, the court implicitly made this determination when it ruled that ***Barrons v. J.H. Findorff & Sons, Co.***, 89 Wis. 2d 444, 278 N.W.2d 827 (1979), was the governing law and that the requisites of ***Barrons*** (tender of defense or opportunity to approve the settlement and reasonableness of the settlement) were satisfied. ***Id***. at 455-56.

[3] Unlike its appellate stance, in the trial court Boldt solidly rested its case on ***Barrons***.

indemnitee has given the indemnitor the opportunity to take over the defense of the action or approve the settlement, the indemnitee need only prove its potential liability in an action against the indemnitor.[4] We view the law as settled on this question.

¶17 The logic of this law is more fully explained in cases from other jurisdictions. In ***Valloric v. Dravo Corp.***, 357 S.E.2d 207 (W. Va. 1987), the West Virginia Supreme Court said:

> The resolution of this issue of whether actual or potential liability must be shown depends on whether the indemnitor … had actual notice of the underlying claim, an opportunity to defend it, and the right to participate in settlement negotiations. These conditions are generally held to be prerequisites for an indemnitee to have the benefit of the potential liability standard along with the further element that the settlement amount must be deemed to be reasonable in view of the potential liability.

Id. at 211.

¶18 In cases where these prerequisites have been met, "courts have concluded that the … indemnitee should not be required to prove the plaintiff's actual ability to recover the amount paid in the settlement. It is sufficient if the … indemnitee proves that he [or she] was potentially liable to the plaintiff." ***Id***. at 211-12. The lesser burden afforded by the potential liability standard is premised on the legal policy of encouraging settlements. ***Id.*** at 212. This lower burden encourages settlement by relieving indemnitees of the obligation to prove the case against himself or herself. ***Morrisette v. Sears, Roebuck & Co.***, 322 A.2d 7, 10 (N.H. 1974). If this were not so, there would be little incentive for an indemnitee

[4] While it does not appear that the indemnitor in ***Barrons*** disputed that potential liability was the appropriate level of proof, the language we have quoted nonetheless represents an affirmative statement from the supreme court as to the law in this area.

to settle a case because it "would be better served to force a plaintiff to prove his [or her] case and then enforce the judgment against the indemnitor." ***Valloric***, 357 S.E.2d at 212 (emphasis omitted). This policy of encouraging settlement is balanced against the equitable consideration that the indemnitor have the opportunity to show that the indemnitee was not liable to the original plaintiff, but rather, paid the claim as a volunteer. ***Id.***; ***Morrisette***, 322 A.2d at 10.

¶19 In contrast, where the indemnitor received no notice of the litigation, nor an opportunity to participate in settlement negotiations, most courts hold the indemnitee to an actual liability standard. ***Valloric***, 357 S.E.2d at 212. Such was the case in ***Jennings v. United States***, 374 F.2d 983 (4th Cir. 1967), where that court said: "The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements." ***Id***. at 986 (implied indemnity case). However, if the indemnitor "declines to [defend the action or approve the settlement,] the indemnitee will only be required to show potential liability to the original plaintiff in order to support his [or her] claim … against the indemnitor." ***Parfait v. Jahncke Serv., Inc.***, 484 F.2d 296, 305 (5th Cir. 1973) (implied indemnity case).

¶20 In this case, the undisputed facts show that Boldt tendered defense of Jeffrey's action to Schaub and further invited Schaub to participate in the settlement talks. Thus, Boldt was only required to establish its potential liability to Jeffrey if the settlement was otherwise reasonable.

¶21 That brings us to the question of whether Jeffrey's alleged contributory negligence was a relevant factor on the question of Boldt's potential liability and the reasonableness of its settlement with Jeffrey. ***Barrons*** did not

address this question because contributory negligence was not an issue in that case.

¶22 Schaub contends that the law of potential liability required the jury to explore Jeffrey's contributory negligence. Without such an inquiry, Schaub reasons that the settlement cannot be deemed reasonable. But Schaub's argument does not jibe with the way it tried this case. Schaub did not seek to have the jury decide whether Boldt was potentially liable or whether the settlement was reasonable. Schaub did not propose, and the special verdict did not include, any questions addressing these topics. The same is true regarding the jury instructions. Therefore, although the parties structured the case as one of Boldt's potential liability and the reasonableness of its settlement with Jeffrey, the case was not submitted to the jury on that basis. Instead, the jury was presented with conventional negligence and causation questions. Thus, the jury's verdict was a determination of the parties' *actual liability*, albeit without factoring in Jeffrey's alleged contributory negligence.

¶23 It thus appears to us that the parties tried the wrong issues to the jury. Because this was a ***Barrons*** case, the issues for the jury should have been whether Boldt was potentially liable, and, if so, the reasonableness of its settlement with Jeffrey. But instead of the jury, the trial court decided these issues pretrial when it addressed Boldt's motion for a declaratory order limiting the jury trial issues. While Schaub took strong issue with the court's contributory negligence ruling, it did not argue that the jury, rather than the court, should decide whether Boldt was potentially liable and whether the settlement was reasonable.

¶24 Despite our misgivings about how the case was tried, we will address the issue as Schaub casts it: that the trial court erred by barring evidence of Jeffrey's contributory negligence at the jury trial. This ruling was premised upon the court's determinations that Boldt's settlement with Jeffrey was reasonable and that Boldt needed to establish only potential liability because it had tendered the defense to Schaub and had otherwise invited Schaub to participate in the settlement negotiations.

¶25 In considering settlement, the indemnitee must demonstrate that it "was exposed to liability which could reasonably be expected to lead to an adverse judgment." ***Valloric***, 357 S.E.2d at 214. The ***Valloric*** court emphasized that "[t]he focus must remain on what was a reasonable judgment in light of the circumstances *at the time the settlement was made*." ***Id***. at 213 (emphasis added). In our case, Boldt's pretrial request for a declaratory ruling as to the scope of the issues detailed its assessment of Jeffrey's case at the time of settlement. Boldt pointed to the letter from Jeffrey's attorney explaining how counsel had arrived at a valuation of the claim at $1,425,000 for its case, but offering to settle for $997,500. Boldt also pointed to the deposition testimony of Jeffrey's attorney recognizing that a jury could find up to 30% contributory negligence on Jeffrey's part. In summary, Boldt's evaluation demonstrated that it potentially was at risk for approximately 70% of a very sizeable claim.

¶26 In addition, the indemnitee must prove that the amount of the settlement was reasonable. ***Id***. at 214. Settlement reasonableness combines the concepts of exposure to liability and the fairness of the settlement amount. *See* ***Trim v. Clark***, 274 N.W.2d 33, 36-37 (Mich. Ct. App. 1979). The ***Trim*** court explained the point more fully:

> Potential liability actually means nothing more than that the indemnitee acted reasonably in settling the underlying suit. The reasonableness of the settlement consists of two components which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. If the amount of the settlement is reasonable in light of the fact finder's analysis of these factors, the indemnitee will have cleared this hurdle. *The fact that the claim may have been successfully defended by a showing of contributory negligence, lack of negligence or otherwise, is but a part of the reasonableness analysis and, therefore, subject to proof.* If it is shown that this suit would have been successfully defended, the indemnitee will not recover. The burden of presenting evidence on this point is on the indemnitor, but the ultimate burden of persuasion remains with the indemnitee to show that the settlement was reasonable under all the circumstances.

Id. (emphasis added; citations and footnote omitted).

¶27 As we have noted, the reasonableness of the settlement must be viewed as of the time of the settlement. ***Valloric***, 357 S.E.2d at 213. In response to a request for admissions, Schaub acknowledged that Boldt's settlement with Jeffrey was reasonable. Schaub stated that "[Boldt] had a right to settle at what they perceived to be a fair value of the case, and admit that $925,000 is a fair and reasonable settlement, but deny that these defendants owe any part of it." Later, Schaub acknowledged that "when [Boldt] made the settlement with [Jeffrey], those parties and their attorneys reasonably attempted to take into account [Jeffrey's] contributory negligence and admit that the $925,000 figure is less than the actual damages sustained by [Jeffrey]."

¶28 We acknowledge that Schaub made each of its admissions subject to its refusal to abandon pursuit of a contributory negligence defense. But that reservation is of no consequence under the law of potential liability. As we have

noted, the reasonableness of the settlement is measured as of the time of the settlement and in light of the risk exposure to the indemnitee. Also as noted, the law of potential liability seeks to quickly resolve liability issues and encourage settlements. Schaub's approach runs counter to those goals. Indemnitors like Schaub cannot sit back and ignore an indemnitee's tender of defense and offer to participate in settlement negotiations, and then turn around and assert defenses in an indemnification action that could have been asserted in the earlier settings. Since Schaub had spurned Boldt's tender of defense and invitation to participate in the settlement negotiations, Boldt was free to move forward with settlement negotiations, confident that the reasonableness of the settlement would not be second-guessed in a later, full-fledged, plenary trial of all the issues.

¶29 In conclusion, the undisputed facts showed that Boldt faced liability exposure to Jeffrey. Boldt was the general contractor with supervisory authority over the entire construction site. In addition, Boldt had created the cut-out depression into which Jeffrey drove the scissors lift. Therefore, Boldt reasonably factored its own exposure into its settlement decision. In addition, the undisputed facts also showed that Jeffrey's own conduct may have contributed to the accident. In light of that, both Boldt and Jeffrey reasonably factored such contributory negligence into the settlement decision. These facts rendered the settlement reasonable. And since Boldt had tendered the defense and otherwise invited Schaub into the settlement negotiations, Boldt was required to prove only its potential liability in this indemnification action. In light of that, there was no need for the ensuing jury trial to revisit the question of Jeffrey's possible contributory negligence. Instead, the court properly limited the jury trial issues to whether Schaub was causally negligent and, if so, the percentage of such negligence so that

the court could then compute the amount of Schaub's indemnification obligation to Boldt.

¶30 We uphold the trial court's pretrial determinations that Boldt was required to demonstrate only its potential liability and that the settlement was reasonable. We also uphold the trial court's limitation of the issues at the jury trial.

2. Safe-place and "Control" Instruction

¶31 Schaub argues that the trial court erred in refusing to instruct the jury pursuant to the safe-place "control" instruction. *See* WIS JI—CIVIL 1911. Schaub argues that the instruction was necessary because the accident took place in an area that was under Boldt's control. The matter of jury instructions is addressed to the trial court's discretion. *See* ***Nowatski v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996).

¶32 The "control" instruction for the safe-place statute reads in part:

> Before a person has a duty to furnish a safe-place of employment, the person must have the right to present control over the place so that the person can perform the duty to furnish a safe-place of employment. This control of the premises need not be exclusive, nor is it necessary to have control for all purposes in order to impose a duty to furnish a safe-place of employment.

WIS JI—CIVIL 1911. In short, once control has been found, whether joint or exclusive, a duty to furnish a safe place of employment exists.

¶33 In denying Schaub's request for the "control" instruction, the trial court stated:

> What we really have here is an area of joint control. Both parties here I think exercised control. And there hasn't been any testimony controverting what I perceive to be the crucial testimony that [Schaub] could have done something on its own to exercise control over that location or cause

> Boldt to do [so].… I clearly do not see any material issue of fact that the jury needs to resolve.… [W]hether they had the sole responsibility as pertains to control of this particular portion of the project near the pool area, I'm satisfied that that simply is not an issue. And to require the jury to make a ruling of fact is not necessary.

¶34 We conclude that there was ample and undisputed evidence showing that Boldt and Schaub both exercised control over the area in which the accident occurred. As to Boldt, the evidence showed that it had poured the pool deck, made the cut-out depression into which Jeffrey drove the scissors lift, placed PVC piping marking the holes, and placed fences and other safety measures in the pool area. In addition, Boldt was the general contractor with supervisory authority over the entire project. This evidence shows that Boldt exercised control over the area of the accident.

¶35 As to Schaub, the evidence showed the accident occurred in Schaub's designated work area. Schaub's foreman on the site, Gerald Everett, had inspected the pool room the day before the accident and given the okay for his workers to begin their work there. Everett also admitted that he noticed the depressions, but concluded that they were not a hazard because they were readily visible and "out of the way." And while Everett did not think the holes posed a hazard, he admitted at trial that prior to the accident he actually entertained the thought that a tip-over accident could occur if a scissors lift drove through one of the holes. Finally, Everett admitted that he never raised any safety concerns with any of Boldt's on-site representatives. Thus, Schaub also exercised control over the area of the accident.

¶36 By declining to deliver the "control" instruction, the trial court functionally determined that control was established as a matter of law. Thus, the court determined that it was unnecessary to have the jury resolve which of the

parties had more control over the area of the accident. We agree. Where mutual control is established, the law of safe place does not inquire further as to whom has greater control. The function of a jury is to decide issues of contested fact. Once the evidence showed that both Boldt and Schaub exercised control over the accident area, both had duties under the safe place of employment statute. *See* WIS. STAT. § 101.11 (1999-2000). So the question was not whether the safe-place statute applied; it clearly did. Rather, the question was whether Boldt or Schaub, or both, had violated the statute. That was the dispute between the parties, and that was the very dispute submitted to the jury in the special verdict.[5]

¶37 We hold that the trial court did not err in the exercise of its discretion when declining to give the "control" instruction.

3. Attorney's fees

¶38 Schaub challenges the trial court's award of attorney's fees to Boldt. The court based this award upon the indemnification agreement. This issue presents a question of law that we review de novo. *See* ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, ¶15, 234 Wis. 2d 374, 610 N.W.2d 501.

¶39 We begin by observing that the parties' respective insurers provided the legal representation to each of their insureds. United States Fidelity & Guaranty Co. (USF&G) represented Boldt and West Bend Mutual Insurance Co. (West Bend) represented Schaub. Thus, USF&G is the real party in interest as to this attorney's fees claim.

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[5] Regarding Boldt, the special verdict asked whether Boldt had failed to furnish safe employment for Jeffrey and whether it had failed to maintain the premises as safe as the nature of its business would reasonably permit. Regarding Schaub, the special verdict asked whether Schaub had failed to construct or maintain the premises as safe as the nature of the business would reasonably permit.

¶40 The American Rule prohibits a successful party from being reimbursed for its costs or attorney's fees unless there is a contract or statute so providing. ***Id***. at ¶31. Here the American Rule was not altered by contract because there was no contract between USF&G and Schaub or West Bend. Nor does USF&G point to any statute that obligates Schaub or West Bend to pay attorney's fees.

¶41 To the extent that USF&G's request for attorney's fees may rest on equitable considerations, ***Riccobono*** holds that "[t]he payment of attorney's fees and costs in a coverage dispute between two insurance companies has never been awarded in Wisconsin on the basis of the doctrine of equitable indemnification and we decline to do so here." ***Id***. at ¶32. While the issue here was liability, not coverage, we conclude that the core idea of ***Riccobono*** nonetheless applies. Litigation expenses are a regular cost of doing business for an insurance company. As ***Riccobono*** observes, an insurer is presumed ready to absorb such costs. ***Id***. at ¶23.

¶42 We hold that the trial court erred in awarding attorney's fees to USF&G. We reverse this portion of the judgment.[6]

CONCLUSION

¶43 We hold that the trial court properly determined that Boldt was potentially liable to Jeffrey and that its settlement with Jeffrey was reasonable. As a result, the trial court did not err in limiting the issues at the jury trial to the comparative negligence of only Boldt and Schaub. We further hold that the trial

[6] From this, it follows that we reject USF&G's further request for its appellate attorney's fees.

court properly denied Schaub's request for the safe-place "control" instruction because it was not a fact at issue in the case. Finally, we hold that USF&G, as Boldt's insurer, was not entitled to indemnification for its attorney's fees.[7]

By the Court.—Judgment affirmed in part and reversed in part.

Not recommended for publication in the official reports.

[7] Having rejected all of Schaub's arguments, save attorney's fees, we reject Schaub's alternative request for a new trial on grounds that the real controversy was not tried.