COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP305 **Cir. Ct. No. 2004CV10222**

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

GERALD STENULSON,

PLAINTIFF,

WEST BEND MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

HUNZINGER CONSTRUCTION COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

ONEIDA ERECTING, INC. AND WEST BEND MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-APPELLANTS.

APPEAL from orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. Oneida Erecting, Inc. appeals from orders entered after the trial court granted summary judgment in favor of Hunzinger Construction Company dismissing Oneida's employee, Gerald Stenulson's, personal injury claim against Hunzinger on the basis of an indemnification provision in the contract between Hunzinger and Oneida. Oneida contends that the contract relied on was not in effect at the time of the injury, and that the indemnification clause was not sufficiently conspicuous. Because the contract was in effect and the indemnification clause was sufficiently conspicuous, we affirm the orders of the trial court.

BACKGROUND

¶2 On December 5, 2001, Stenulson, an employee of Oneida, was working as an ironworker constructing the Harley-Davidson Product Development Center. He was assisting in building the west wall of the Center. As he was ascending the wall to tie wire near the top, he reached for a horizontal steel beam (a.k.a. a "waler"). The beam, however, had not been secured to the wall, became loose and caused Stenulson to fall. The beam then landed on Stenulson's knees, causing him injury.

¶3 Stenulson filed a personal injury lawsuit against Hunzinger, which was the general contractor on the project and the party responsible for securing the waler. Hunzinger, in turn, sued Oneida as a third-party defendant, alleging that

Oneida had agreed to indemnify Hunzinger for any loss or injury caused by Oneida or Hunzinger's negligence.

¶4 Both parties filed motions seeking summary judgment. The trial court granted judgment in favor of Hunzinger, ruling that the contract was in effect, and the indemnification clause was sufficiently conspicuous under the law to make it enforceable. Oneida now appeals from that judgment.

DISCUSSION

¶5 This appeal comes to us following the grant of summary judgment. We review summary judgments independently, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do value any analysis that the trial court has placed in the record. We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).[1]

A. Contract in Effect.

¶6 Oneida's first contention is that the trial court erred in ruling that the contract here was in effect at the time of the accident, and argues that it was not executed until after the date of the accident. We are not convinced. As noted by the trial court in its written decision:

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> The contract in fact addresses when it becomes effective, and this portion of the contract betrays Oneida's position. The agreement provides at its very outset that it is "made as of Twentieth (20th) day of November in the year of Two Thousand One (2001)." Affidavit of Rebecca Lizdas Ullenberg, Ex. 7 at 1. Further, section 9.1 of the contract states that the date of commencement of the contract "shall be the date of the Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor." … Oneida submits no evidence to suggest that the parties settled on a commencement date other than November 20, 2001. Finally, right above the signature of Oneida's Vice-President William Raasch, the contract states, "This Agreement entered into as of the day and year first written above." ... The day and year first written above is November 20, 2001.

¶7 We agree with the trial court's analysis and adopt it as our own. The language of the contract plainly states that the intent of the parties was to have the contract go into effect on November 20, 2001. On appeal, Oneida places much emphasis on the fact that the contract-effective date preceded the execution of the contract. We have considered that argument and reject it based on the plain language contained within the contract quoted above. Parties are not barred from setting a contract-commencement date to take effect before the separate signatures of the parties are actually affixed to the contract itself.

¶8 Further, it is undisputed that both parties did, in fact, execute the contract which specified a commencement date of November 20, 2001, and thus, are obliged to assume the obligations contained within that contract.

¶9 Based on the foregoing, we hold that the contract was in effect at the time the injury occurred in this case and, thus, the trial court did not err in so ruling.

B. Conspicuous.

¶10 Oneida's second argument is premised on its belief that the indemnification provision contained within the contract is not sufficiently conspicuous in order to shift Hunzinger's liability to Oneida. We reject this contention.

¶11 It is undisputed that the indemnification clause in the contract at issue provides that Oneida will indemnify Hunzinger for its own negligence. The law in Wisconsin is skeptical of liability-shifting provisions like these, which attempt to protect a party against its own negligence. ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶22, 259 Wis. 2d 587, 657 N.W.2d 411. Parties, however, are not prohibited from agreeing to such provisions.

¶12 The trial court analyzed whether the indemnity provision was sufficiently conspicuous and concluded that it was. The trial court addressed the standards, noting that liability-shifting contractual provisions must be conspicuous to the person against whom they are being enforced. ***Id.***, ¶22.

> In judging whether a contract provision is too inconspicuous to enforce, *Deminsky* teaches that the contract should be tested against the standards governing UCC contracts, under WIS. STAT. § 401.201(10). Contracts meeting those standards can be said to "unmistakably inform the signer of what rights are being waived" and "clearly and unequivocally communicate to the signer the nature and significance of the document being signed.

Id., ¶28. In determining whether something is "conspicuous," WIS. STAT. § 401.201(10) provides:

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous.

> Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color.

¶13 Applying these standards to the facts of this case, we agree with the trial court's analysis that the indemnification provision here was sufficiently conspicuous to be enforceable. The heading of the indemnification provision is in all caps, larger font and bold typeface. Thus, it stands out from the other words. We are not persuaded by Oneida's contention that the contract's other headings also contained the same all caps, larger font and bold typeface. As noted by the trial court, if the presence of other similar conspicuous type in a contract rendered the indemnification provision inconspicuous, "such a standard would preclude parties from making more than one provision of their contract 'conspicuous.'" We are also persuaded by the fact that the critical language at issue here is underscored—so as to draw attention to it. In reviewing the contract, we conclude that the formatting of the heading of the indemnification provision should have drawn Oneida's attention to the indemnification provision and the liability-shifting amendment to that section.

¶14 We further reject Oneida's argument that other portions of the contract were underlined or stricken and the contract was nineteen pages long thus, nullifying any conspicuousness of the underscoring. As aptly stated by the trial court: "the underscored and stricken passages are so few in number that a reasonable reader could not be heard to complain that the indemnity provisions are somehow buried among too many other changes."

¶15 We agree with the trial court's conclusion that the contract at issue here was "written that a reasonable person against whom it is to operate ought to have noticed it." If Oneida has read the terms of the contract, it would have "no difficulty concluding that [it] would have ascertained the obligations of the

contract terms. Therefore, the [contract] fulfilled the requirement to communicate the nature and significance of the indemnity provision." ***Deminsky***, 259 Wis. 2d 587, ¶30.[2]

¶16 Based on the foregoing, we conclude that the contract was in effect at the time of the injury in this case, and that the indemnification provision, shifting Hunzinger's liability to Oneida, was sufficiently conspicuous to be enforceable. Accordingly, we affirm the orders of the trial court.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[2] We similarly reject Oneida's contention that because the contract was a "form" contract, it was subject to special rules. We adopt the trial court's analysis with respect to this argument. Further, we are not persuaded by Oneida's contention that because other contracts between Oneida and Hunzinger did not contain liability-shifting indemnification provisions, we should not construe the current contract to do so. We make our determination based on the contract in this case and the plain language set forth in that contract. We cannot conclude that the plain language set forth in the instant contract was not the intent of the parties because other contracts did not contain similar liability-shifting language.