**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 25, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**

**NOTICE**

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

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2008AP1326**

**Cir. Ct. No. 2006CV64**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

---

**MATHY CONSTRUCTION COMPANY, INC. AND**
**ST. PAUL FIRE & MARINE INSURANCE COMPANY,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**WEST BEND MUTUAL INSURANCE COMPANY**
**AND DAN-ASH TRUCKING, INC.,**

**DEFENDANTS-RESPONDENTS.**

---

APPEAL from an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Dan-Ash Trucking, Inc. subcontracted with Mathy Construction Company, Inc. to haul material for a road resurfacing project

on which Mathy was the general contractor. As part of the hauling agreement between the parties, Dan-Ash agreed to defend and indemnify Mathy against claims caused by the negligence of Dan-Ash or its subcontractors. The issue in this case is whether Dan-Ash was obligated to defend and indemnify Mathy for costs Mathy incurred in defending against and settling two lawsuits brought by the estate of David Holmes and his heirs after Holmes was killed after falling under the wheels of a semi-truck driven by a Dan-Ash subcontractor while riding his bicycle through the resurfacing project construction zone. The circuit court concluded that, based on the allegations made against Mathy in the two complaints, Dan-Ash had no duty to defend and indemnify Mathy under the agreement. We agree.

¶2 The second issue in this appeal is whether Mathy's status as an "additional insured" under Dan-Ash's commercial general liability policy with West Bend Mutual Insurance Company required West Bend to defend and indemnify Mathy in the two negligence suits. We conclude that, because Mathy's liability did not arise from Dan-Ash's work, the complaints did not trigger West Bend's duty to defend Mathy as an "additional insured" under the policy's terms. We therefore affirm the summary judgment order entered in favor of Dan-Ash and West Bend.

## BACKGROUND

¶3 The following facts are taken from the parties' summary judgment submissions.[1] Mathy, a general contracting company, was awarded a contract to

[1] The fact section of Mathy's brief-in-chief is peppered with argument. WISCONSIN STAT. § 809.19(1)(d) and (e) (2007-08) requires that briefs include a separate statement of facts relevant to the issues being reviewed. The fact section of a brief is no place for argument. ***Arents***

(continued)

resurface a county road in Scott County, Iowa. Mathy subcontracted with Dan-Ash, a trucking company, to transport materials for the project. The parties executed a hauling agreement, which contained an indemnification provision. The agreement also required Dan-Ash to purchase liability insurance. Accordingly, Dan-Ash purchased insurance from West Bend, listing Mathy as an additional insured.

¶4 Dan-Ash subcontracted with RT&T Trucking, Inc. to haul materials, which, in turn, subcontracted with truck driver William Hartmann. On the day of the traffic accident, one lane of the county road was closed for resurfacing, creating a one and one-half mile long "bottleneck." Traffic was being controlled by flag persons at either end of the blocked-off lane and by a "pilot car," which led cars through the bottleneck. The pilot car was driven by a Mathy employee, Elizabeth Rogers.

¶5 David Holmes approached the construction zone on a bicycle and was allowed to enter the bottleneck. Rogers led a line of vehicles through the bottleneck, including a semi-truck driven by Hartmann, which was hauling asphalt to the project site. As the row of vehicles passed Holmes on the right, Holmes lost control of his bike and fell under the rear wheels of Hartmann's truck. Holmes died from injuries sustained in the accident.

¶6 Holmes' heirs filed two wrongful death suits in Scott County, Iowa (the "Iowa suits"), against Mathy, RT&T Trucking, Rogers, Hartmann and Scott

---

***v. ANR Pipeline Co.***, 2005 WI App 61, ¶5 n.2, 281 Wis. 2d 173, 696 N.W.2d 194. "[F]acts must be stated with absolute, uncompromising accuracy. They should never be overstated—or understated, or 'fudged' in—any manner." Judge William Eich, *Writing the Persuasive Brief*, WISCONSIN LAWYER MAGAZINE, Vol. 76, No. 2 (Feb. 2003).

County.[2] Dan-Ash was not a defendant in the Iowa suits. Pursuant to the indemnification agreement, Mathy tendered its defense to Dan-Ash and its insurer, West Bend. Dan-Ash did not respond to the request. West Bend refused to defend Mathy in the suits after concluding that the facts alleged in the suits did not fall within Mathy's coverage as an additional insured.

¶7 Mathy's and Rogers' insurer, St. Paul Fire & Marine Insurance Company, and RT&T's and Hartmann's insurer negotiated separate settlement agreements with the heirs, and the suits were subsequently dismissed. Additional facts are set forth as necessary in the discussion section.

¶8 Mathy filed this declaratory judgment action against Dan-Ash and West Bend, alleging breach of contract against Dan-Ash and West Bend and seeking recovery of the amount paid to settle and defend against the Iowa suits pursuant to the indemnity agreement and West Bend's insurance policy with Dan-Ash. Mathy filed separate motions for summary judgment against Dan-Ash and West Bend, and Dan-Ash and West Bend filed a cross-motion for summary judgment against Mathy. After briefing and a hearing on the motions, the court, Judge Roger LeGrand presiding, granted Dan-Ash and West Bend's motion for summary judgment and dismissed Mathy's and St. Paul's action.

¶9 Mathy moved for reconsideration, arguing that the court's decision disregarded the plain language of the indemnification provision. On reconsideration, the court, Judge Todd Bjerke presiding, issued a seventeen-page

[2] One suit was brought by Holmes' widow, Tammy Holmes, and Holmes' Estate. The other was brought by Tracy Mahler, the mother of Holmes' three minor children, on the children's behalf. The two actions name the same defendants and assert the same claims. Apart from having different plaintiffs, the complaints in the two suits are identical.

"Findings of Fact, Conclusions of Law and Order,"[3] that, by its terms, reaffirmed and superseded the prior court's award of summary judgment to Dan-Ash and West Bend. Mathy appeals the order reaffirming the court's prior order granting Dan-Ash and West Bend's motion for summary judgment and denying its motions for summary judgment.

## STANDARD OF REVIEW

¶10 An appellate court reviews the circuit court's order on a motion for summary judgment de novo, applying the same methodology as the circuit court. ***Tensfeldt v. Haberman***, 2009 WI 77, ¶24, 319 Wis. 2d 329, 768 N.W.2d 641. Summary judgment is appropriate when there are no material issues of fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08). The summary judgment order in this case turns on the interpretation of the indemnification provision of the hauling agreement between Mathy and Dan-Ash, and the portion of West Bend's insurance contract with Dan-Ash listing Mathy as an "additional insured." Interpretation of a written contract is a question of law subject to our de novo review. ***State v. Kaczmarski***, 2009 WI App 117, ¶10, 320 Wis. 2d 811, 772 N.W.2d 702.

## DISCUSSION

¶11 The duty to defend "is determined by comparing the allegations of the complaint to the terms of the insurance policy." ***Estate of Sustache v.***

[3] We discourage the practice of issuing "Findings of Fact" in a summary judgment order because it increases the risk that the court will err by making a finding as to a disputed issue of fact on summary judgment. ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶11 n.5, 297 Wis. 2d 458, 725 N.W.2d 944.

***American Family Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845; ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis. 2d 824, 835, 501 N.W.2d 1 (1993) (whether a party has a duty to defend pursuant to an indemnification agreement "is triggered by the allegations contained within the four corners of the complaint"). In ascertaining whether there is a duty to defend and indemnify under the terms of an indemnification agreement, we assume the truth of the allegations in the complaints. *See* ***Trumpeter Devs., LLC v. Pierce County***, 2004 WI App 107, ¶7, 272 Wis. 2d 829, 681 N.W.2d 269.

¶12 Interpretation of an indemnification agreement, like any other written contract, begins with the language of the agreement. *See* ***Williams v. Rexworks, Inc.***, 2004 WI App 228, ¶11, 277 Wis. 2d 495, 691 N.W.2d 897. "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***Ehlinger v. Hauser***, 2008 WI App 123, ¶19, 313 Wis. 2d 718, 758 N.W.2d 476 (citation omitted). "If a contract is unambiguous, [a court's] attempt to determine the parties' intent ends with the four corners of the contract." ***Milwaukee Bd. of Sch. Dirs. v. BITEC, Inc.***, 2009 WI App 155, ¶7, __ Wis. 2d __, 775 N.W.2d 127 (citation omitted).

¶13 "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." ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis. 2d 120, 124-25, 301 N.W.2d 201 (citation omitted); *see also* ***Barrons v. J. H. Findorff & Sons, Inc.***, 89 Wis. 2d 444, 454-55, 278 N.W.2d 827.

¶14 On appeal, Mathy argues that the plain language of the indemnification agreement requires Dan-Ash to defend and indemnify Mathy for

Mathy's costs to defend against and settle the Iowa claims. Mathy also argues it may recover its costs in the Iowa claims under the "insured contract" provision of West Bend's policy with Dan-Ash, or as a listed "additional insured" on the policy.[4] Dan-Ash asserts that it is not required to indemnify Mathy under the terms of the indemnification agreement because the basis for Mathy's liability in the Iowa suits arose from allegations of negligence on the part of Mathy and one of its employees, not from Dan-Ash's work or that of its subcontractors under the hauling agreement. Under Dan-Ash's construction of the indemnification agreement, its responsibility to defend and indemnify Mathy is limited to those circumstances where Mathy is being asked to pay for the negligence of Dan-Ash or its subcontractors. Dan-Ash further argues that West Bend's policy does not provide Mathy a means of recovery under either the "insured contract" provision or as an "additional insured." We address first the issue of whether Dan-Ash must indemnify Mathy for its costs to defend and settle the Iowa claims under the indemnification agreement.

¶15 The indemnification provisions of the hauling agreement between Dan-Ash and Mathy obligate Dan-Ash to:

> defend, indemnify and hold harmless Mathy … against all claims, including claims for which Mathy may be or claimed to be negligent or liable … arising out of or resulting from the performance of the work in this Agreement or occurring or resulting from the use by [Dan-Ash], [its] agents or employees of … equipment, …

[4] Mathy also contends that the circuit court's decision contains several examples of clear error requiring reversal. Specifically, Mathy argues that the circuit court committed the following errors, among others: Issuing findings as to disputed issues of fact, contrary to summary judgment methodology, and considering extrinsic evidence to ascertain the intent of the parties after concluding that the indemnification provision was "unambiguous." Because our review of the court's order on summary judgment is de novo, ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987), we do not address these arguments.

> provided that any such claim … is … [c]aused in whole or in part by any negligent act or omission of [Dan-Ash], [or] their subcontractors ….”[5]

The hauling agreement defines the “work to be performed” as follows: “Mathy or other Divisions, subsidiaries or affiliated companies of Mathy will, from time to time, tender to Hauler a load or loads of Materials for delivery by Hauler ….”

¶16 Mathy notes that the agreement broadly requires Dan-Ash to defend and indemnify Mathy “against all claims, including claims for which Mathy may

---

[5] The indemnification section of the hauling agreement provides in full:

> Indemnification. (a). To the fullest extent permitted by law, the Hauler shall defend, indemnify and hold harmless Mathy, its officers, stockholders and employees from and against all claims, including claims for which Mathy may be or claimed to be negligent or liable, for damages, losses and expenses, including, but not limited to attorneys’ fees, including legal fees and disbursements paid or incurred to enforce the provisions of this paragraph, arising out of or resulting from the performance of the work in this Agreement or occurring or resulting from the use by Hauler, his agents or employees of materials, equipment, instrumentalities or other property, whether the same be owned by the Hauler, Mathy or third parties, provided that any such claim, damage, loss or expense is:
>
> (i) Attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use therefrom, and
>
> (ii) Caused in whole or in part by any negligent act or omission of the Hauler, their subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, or
>
> (iii) Attributable to injuries sustained by any employee of the Hauler or its subcontractors of any tier during the performance of work under this Agreement, for any cause whatsoever.
>
> (b). Hauler shall obtain, maintain and pay for such Commercial General Liability insurance coverage as will insure the provisions of this paragraph 8, to the fullest extent available.

be or claimed to be negligent or liable … provided that any such claim … is … [c]aused in whole or in part by any negligent act or omission of [Dan-Ash], [or] their subcontractors." Mathy appears to interpret this language to mean that, whenever Dan-Ash (or its subcontractors) and Mathy are co-defendants in a negligence suit arising from the same incident, Dan-Ash must indemnify Mathy because the damages sought were "caused in whole or in part by" Dan-Ash's negligence. We disagree.

¶17 The plain terms of the indemnification agreement limit Dan-Ash's obligation to defend and indemnify Mathy to those *claims* that are caused in whole or in part by the negligence of Dan-Ash or of its subcontractors. That is, Dan-Ash must defend and indemnify Mathy only for those claims brought against Mathy that the complaint alleges are caused at least in part by the negligence of Dan-Ash or its subcontractors. Mathy's construction of the indemnification agreement that it is protected against claims that arise solely from its own causal negligence is an unreasonable reading of the agreement. The fact that the Iowa complaints allege that Hartmann and RT&T were at least partially responsible for the plaintiffs' damages does not automatically trigger Dan-Ash's duty to defend and indemnify Mathy. Rather, the question of whether Dan-Ash must indemnify Mathy turns on whether the specific negligence claims against Mathy in the Iowa complaints alleged that the claims were "[c]aused … in whole or in part by any negligent act or omission" of Dan-Ash, or its subcontractors.

¶18 Turning to the two Iowa complaints, we observe that each complaint alleges two negligence claims: one against Mathy and its pilot car driver Rogers,

the other against RT&T and its subcontractor, Hartmann.[6] The complaints set forth the following allegations common to both claims: Rogers' pilot car passed Holmes on his bicycle, and led the traffic—which included Hartmann's truck—past Holmes. When Hartmann attempted to pass Holmes, Hartmann's truck collided with the bicyclist, killing him. As to RT&T and Hartmann only, the complaints alleged they breached their duty of care by

> passing David Holmes on a one-lane road … [and] in a construction zone; … failing to yield the right of way; [f]ailing to maintain a proper lookout; [f]ailing to keep an assured clear distance ahead; [e]ntering a one-lane construction zone with a bicyclist already present there; [f]ailing to exercise reasonably [sic] control; [f]ailing to exercise reasonable care under the conditions then and there existing; [f]ailing to operate at a speed which was reasonable and proper under the circumstances; [o]therwise failing to act within a reasonable degree of prudence and care in the circumstances.

As to Mathy and Rogers only, the complaints alleged they breached their duty of care by

> placing David Holmes in a perilous situation; … passing David Holmes in a construction zone; … leading other traffic past David Holmes in a construction zone and on a one-lane road; [f]ailing to yield the right of way; … leading others to a position where they would or could fail to yield the right of way; [f]ailing to maintain a proper lookout; ... leading others to a position where they might fail to maintain a proper lookout; [f]ailing to keep an assured distance ahead; ... leading others to a position where they might fail to maintain an assured clear distance ahead; [e]ntering a one-lane construction zone with a bicyclist already present there; … leading other traffic into a one-

---

[6] In his brief, Mathy states that the Iowa lawsuits "claimed that Mathy was liable *for failure to adequately supervise its subcontractor and for its failure to adequately control the job site* in such a way that Hartmann was able to drive over Holmes. (Emphasis added.) Mathy's reading of this part of the two complaints is inaccurate. As we see above, the claims against Mathy plainly do not allege these particular grounds for Mathy's negligence.

> lane construction zone with a bicyclist already present there; [f]ailing to exercise reasonably [sic] control; ... placing other traffic in a positions [sic] where they might fail to exercise reasonable control; [f]ailing to exercise reasonable care under the conditions then and there existing; … leading other traffic into a position where they might fail to exercise reasonable care under the conditions then and there existing; [f]ailing to operate at a speed which was reasonable and proper under the circumstances; … leading other traffic into a position where they might fail to operate a speed which was reasonable and proper under the circumstances; [f]ailing to adequately supervise and/or control traffic within a construction zone; [o]therwise failing to act within a reasonable degree of prudence and care under the circumstances[.]

¶19 The excerpts above show that the claims against Mathy and Rogers were not caused in whole or in part by the negligence of Dan-Ash's subcontractors, RT&T and Hartmann. Mathy's and Rogers' alleged negligence stemmed from Rogers' conduct in leading traffic past the bicyclist Holmes in a one-lane construction zone—a basis for negligence unrelated to the work of the hauling agreement or Hartmann's operation of a truck used to perform the work of the agreement. While some of the allegations of negligence against Mathy and Rogers are identical to those against RT&T and Hartmann—"passing David Holmes … in a construction zone … failing to yield the right of way," etc.—Mathy and Rogers are alleged to be negligent for Rogers' conduct, not the conduct of RT&T and Hartmann. Thus, we conclude that the claims against Mathy and Rogers do not trigger Dan-Ash's duty to defend and indemnify under the indemnification agreement.[7]

---

[7] Dan-Ash also points to extrinsic evidence that appears to confirm this interpretation of the indemnification agreement. Mathy's General Counsel David Coriden, the drafter of the hauling agreement, testified that the intent of the indemnification section was to protect Mathy from liability that might flow to it from work under the hauling agreement, not to require Dan-Ash to cover Mathy for Mathy's own causal negligence. However, our analysis has not taken this evidence into account, because we have concluded that the agreement is not ambiguous. ***Stone v.***

(continued)

¶20 Mathy next contends that West Bend breached its duty to defend Mathy as a listed "additional insured" under Dan-Ash's policy with West Bend, and seeks recovery from West Bend as an additional insured for the costs to defend and settle the Iowa claims. West Bend's policy limits coverage for the additional insured to "liability arising out of: a. Your [Dan-Ash's] premises; b. 'Your [Dan-Ash's] work' for that additional insured; or c. Acts or omissions of the additional insured in connection with the general supervision of 'your [Dan-Ash's] work.'" The policy defines "your work," referring to the work of the primary insured, Dan-Ash, as "a. Work or operations performed by you or on your behalf; and b. Materials, parts or equipment furnished in connection with such work or operations."

¶21 We conclude that Mathy's coverage as an additional insured is not triggered by the Iowa claims because *Mathy's liability* does not arise out of Dan-Ash's work for Mathy or Mathy's acts or omissions in connection with its supervision of Dan-Ash's work. As explained, Mathy's liability in this case arose from Rogers' operation of the pilot car in leading the traffic past the bicyclist Holmes on a one-lane road in a construction zone; its liability was unrelated to Dan-Ash's work.

## CONCLUSION

¶22 In sum, we conclude that the claims against Mathy in the Iowa suits do not trigger Dan-Ash's duty to defend and indemnify Mathy under the

---

***Acuity***, 2008 WI 30, ¶67, 308 Wis. 2d 558, 747 N.W.2d 149 ("If the agreement is not ambiguous, ascertaining the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.") (citation omitted).

indemnification agreement. We further conclude that the claims in the Iowa suits do not trigger West Bend's duty to defend Mathy as an additional insured on Dan-Ash's policy with West Bend. Thus, we conclude that Dan-Ash and West Bend are entitled to judgment as a matter of law, and affirm the circuit court's order granting Dan-Ash and West Bend's motion for summary judgment and denying Mathy's motion for summary judgment.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.