COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1894 **Cir. Ct. No. 2013CV1021**

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

MILLERCOORS LLC,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

MILLIS TRANSFER INC. AND ZURICH AMERICAN INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Millis Transfer, Inc. (Millis) and its insurer, Zurich American Insurance Company (Zurich), appeal a summary judgment awarding money damages in favor of MillerCoors LLC (MillerCoors). Millis and Zurich argue the circuit court erred in determining Millis breached its contractual duty to

MillerCoors by failing to defend and indemnify MillerCoors in a negligence suit brought by one of Millis's employees. MillerCoors cross-appeals seeking additional damages. We affirm.

BACKGROUND

¶2 Millis provides transportation and related services to its customers. MillerCoors brews, packages, and markets beer for sale to independent distributors. Millis and another entity, Schneider Logistics, Inc., entered into a Master Transportation Services Agreement and a Transportation Schedule, whereby Millis agreed to transport MillerCoors's product to various locations.[1]

¶3 While transporting MillerCoors's product in 2008, a Millis employee was injured in a single-vehicle accident. In April 2010, the employee filed suit against Millis and MillerCoors, alleging that negligence by each caused his injuries. Pursuant to an indemnification provision in the Master Transportation Services Agreement, MillerCoors first tendered its defense to Millis on May 18, 2010. However, the Millis employee voluntarily dismissed his negligence claim against Millis on June 23, 2010. As a result, Millis refused to defend MillerCoors. In November 2011, MillerCoors again tendered its defense to Millis, which Millis denied on December 2, 2011. Eventually, MillerCoors reached a $200,000

[1] Although the Master Transportation Services Agreement is between Millis and Schneider Logistics, Inc., the agreement also encompasses Schneider Logistics, Inc.'s customers. There is no dispute that MillerCoors is Schneider Logistics, Inc.'s customer and, therefore, is an indemnitee under the agreement.

settlement with the injured employee. Millis contributed $50,000 toward that settlement amount.[2]

¶4 MillerCoors then filed this lawsuit, asserting that Millis had breached the indemnification provision in the Master Transportation Services Agreement by failing to defend and indemnify MillerCoors with regard to the Millis employee's lawsuit. Millis filed a counterclaim for the $50,000 it contributed toward the settlement. The circuit court denied the parties' cross-motions for summary judgment, concluding it could not determine whether Millis or MillerCoors was entitled to recovery without a fact-finder first determining whether the Millis employee's injuries were caused by either Millis's or MillerCoors's alleged negligence, or the negligence of both, and, if so, apportioning liability between the parties.

¶5 The parties then entered into two stipulations under which the parties agreed: (1) MillerCoors was not negligent with respect to the accident; (2) the Millis employee's injuries were not caused by MillerCoors's conduct; and (3) the reasonable defense and settlement costs incurred by MillerCoors were $825,000. Based on the parties' previous arguments and the new stipulations, the circuit court entered summary judgment against Millis and Zurich and in favor of MillerCoors. Additional facts are set forth below as necessary.

[2] Millis's $50,000 settlement contribution was separate from what it paid the employee under the Worker's Compensation Act.

DISCUSSION

¶6 Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2) (2015-16).[3] First, we examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503 (citing ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶30, 259 Wis. 2d 181, 655 N.W.2d 718). "If they do, then we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial." ***Id.*** (citation omitted). "We review the grant or denial of summary judgment de novo, and we apply the same standard as does the trial court." ***Mach v. Allison***, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766.

¶7 "Interpretation of an indemnification agreement, like any other written contract, begins with the language of the agreement." ***FABCO Equip., Inc. v. Kreilkamp Trucking, Inc.***, 2013 WI App 141, ¶6, 352 Wis. 2d 106, 841 N.W.2d 542 (citations omitted). "'Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms,' and consistent with 'what a reasonable person would understand the words to mean under the circumstances.'" ***Id.*** (quoting ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶¶26, 28, 348 Wis. 2d 631, 833 N.W.2d 586). "The interpretation of a contract

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

is a question of law which we review de novo." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990).

I. Millis and Zurich's Appeal

¶8 Millis and Zurich first argue the circuit court erred in granting summary judgment to MillerCoors because the Millis employee's negligence suit against MillerCoors did not trigger the indemnification provision in the Master Transportation Services Agreement. That provision states, in relevant part:

> **Indemnification.** [Millis] agrees to indemnify, defend and hold [MillerCoors] harmless from and against any and all liabilities, damages, fines, judgments, penalties, costs, claims, demands and expenses … of whatever type or nature, including damage or destruction of any property, or injury (including death) to any person, arising out of or related to: (i) any act or omission by [Millis], its agents, employees and/or subcontractors, including but not limited to any negligent act or omission, (ii) any claims or actions by [Millis's] employees, agents and/or subcontractors, including but not limited to any based upon negligence except to the extent such negligence is that of [MillerCoors], (iii) the failure of [Millis], its employees, agents, and/or contractors to comply with this Agreement, a Transportation Schedule, and/or any applicable provincial, federal[,] state or local law, rule or regulation that affects the obligations of [Millis] under this Agreement or a Transportation Schedule, or (iv) [Millis's], or [Millis's] employees, agents and/or subcontractors, performance of this Agreement and/or any Transportation Schedule.

According to Millis and Zurich, the underlined portion of the indemnification provision excepted Millis and Zurich from any duty to defend or indemnify MillerCoors because once Millis was voluntarily dismissed as a defendant, the

Millis employee's complaint alleged only that MillerCoors was negligent, causing the employee's injuries. We disagree.[4]

¶9 It is well-established that when determining whether a party has breached its duty to defend, we compare the allegations contained within the four corners of the complaint to the terms of the parties' contract. ***Water Well Sols. Serv. Grp. v. Consolidated Ins. Co.***, 2016 WI 54, ¶15, 369 Wis. 2d 607, 881 N.W.2d 285. In addition, the allegations in the complaint are to be liberally construed in favor of the indemnitee. *See* ***id.***

¶10 After Millis was voluntarily dismissed as a defendant, the Millis employee's complaint alleged that he was injured while transporting MillerCoors product from North Carolina to Massachusetts for Millis. More specifically, the employee alleged that when his vehicle entered a construction zone with three lanes merging into one lane, he was "traveling in the right most lane when a vehicle suddenly merged in front of him from the left lane causing [him] to stop suddenly in order to avoid hitting the vehicle," which precipitated his injuries.

¶11 Construing these allegations liberally in favor of MillerCoors, as we must, *see* ***id.***, the allegations arguably raised a reasonable inference that the employee was negligent by failing to exercise a proper lookout for the merging

[4] We rejected a similar argument in a case where the underlying negligence suit only alleged negligence against the indemnitee. *See* ***FABCO Equip., Inc. v. Kreilkamp Trucking, Inc.***, 2013 WI App 141, ¶10, 352 Wis. 2d 106, 841 N.W.2d 542. We held the allegations in the complaint triggered the indemnitor's duty to defend the indemnitee, even though the complaint did not explicitly allege the indemnitor was negligent, because the allegations arguably showed that the indemnitor—through one of its employees—was in part responsible for the employee's death. *See* ***id.***, ¶¶9-12. However, based on language in the indemnification agreement, we noted that the indemnitee's right to recovery against the indemnitor for the indemnitor's failure to defend was limited by the indemnitee's portion of causal negligence. *See* ***id.***, ¶13.

vehicle and by failing to maintain proper control of his vehicle when stopping suddenly, *see* ***Schoenberg v. Berger***, 257 Wis. 100, 107-09, 42 N.W.2d 466 (1950) (discussing a driver's duties to others). Subsection (ii) of the indemnification provision required Millis to defend and indemnify MillerCoors from all claims, liabilities, and judgments that arose out of or were related to claims or actions filed by Millis's employees/agents, except that Millis's duty to defend and indemnify MillerCoors from such claims/actions was limited by MillerCoors's share of causal negligence. *See infra* ¶¶12-15. Because the allegations contained within the four corners of the Millis employee's complaint arguably showed the employee was negligent, the employee's negligence suit triggered Millis's duty to defend under subsection (ii) of the indemnification provision.[5] *See* ***FABCO Equip.***, 352 Wis. 2d 106, ¶9 (analyzing similar indemnification agreement and determining duty to defend was triggered by allegations in the complaint arguably showing that the death of indemnitor's employee was caused, in part, by the employee's actions).

¶12 Millis and Zurich contend that subsection (ii) of the indemnification provision is materially different from the indemnification provisions analyzed in

[5] MillerCoors argues that it was also entitled to a defense and indemnification from Millis under subsections (i) and (iv) of the indemnification provision. However, subsections (i) and (iv) of the indemnification provision—which, respectively, required Millis to defend and indemnify MillerCoors from all claims related to: (1) acts or omissions by Millis employees/agents; and (2) Millis's performance of the Master Transportation Services Agreement—are broader than, and conflict with, subsection (ii) of the indemnification provision—which only required Millis to defend and indemnify MillerCoors from claims and actions by Millis employees/agents, *except* to the extent the claim or action is based on MillerCoors's actual negligence. Because subsections (i) and (iv) conflict with subsection (ii)—which is a more specific provision than subsections (i) and (iv)—subsection (ii) controls. *See* ***Isermann v. MBL Lite Assur. Corp.***, 231 Wis. 2d 136, 153, 605 N.W.2d 210 (Ct. App. 1999) (where there is an apparent conflict between a general and a specific provision, the latter controls).

FABCO Equipment and ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, 342 Wis. 2d 29, 816 N.W.2d 853. Specifically, Millis and Zurich argue Millis's duty to defend MillerCoors under subsection (ii) of the indemnification provision did not extend to negligence claims or actions against MillerCoors in which a Millis employee/agent alleged MillerCoors was solely negligent. We reject Millis and Zurich's contention.

¶13 The indemnification provision in ***Estate of Kriefall*** provided:

> [Excel] agrees to defend, indemnify and hold harmless Buyer and its ... customers (individually, an "Indemnitee") from all actions, suits, claims and proceedings ("Claims"), and any judgments, damages, fines, costs and expenses (including reasonable attorneys' fees) resulting therefrom:
>
> ….
>
> (ii) brought or commenced by any person or entity against any Indemnitee for the recovery of damages for the injury, illness and/or death of any person or damage to property arising out of or alleged to have arisen out of (a) the delivery, sale, resale, labeling, use or consumption of any Product, or (b) the negligent acts or omissions of [Excel]; provided, however, that [Excel's] indemnification obligations hereunder shall not apply *to the extent* that Claims *are caused by* the negligent acts or omissions of Buyer or any other third party.

Estate of Kriefall, 342 Wis. 2d 29, ¶48 (emphasis added). Our supreme court concluded this indemnification provision did not limit the indemnitor's duty to defend; however, the indemnitor's duty to indemnify was limited by the indemnitee's share of causal negligence under the indemnification provision. *See* ***id.***, ¶¶58, 63.

¶14 Similarly, the indemnification provision in ***FABCO Equipment*** provided:

> [Kreilkamp] agrees that it will defend, indemnify, and hold harmless [FABCO] from and against all claims, lawsuits, demands, liability, costs and expenses, including reasonable attorney's fees and other costs of defense, caused by, arising out of, or connected with the performance of [Kreilkamp] hereunder and which result in any injury to, or the death of any persons, damage to or loss of property, including cargo, and any disputes involving the performance of services hereunder by third parties; provided, however, that [Kreilkamp] shall not be required to defend, indemnify or hold harmless [FABCO] *to the extent* any claims, lawsuits, demands, liability, cost or expenses *are the result of* [FABCO's] negligence.

FABCO Equip., 352 Wis. 2d 106, ¶7 (emphasis added). We concluded the indemnitor's duty to defend and indemnify was limited by the indemnitee's share of causal negligence under the indemnification provision. *See* ***id.***, ¶13.

¶15 Here, subsection (ii) of the indemnification provision provided:

> [Millis] agrees to indemnify, defend and hold [MillerCoors] harmless from and against any and all liabilities, damages, fines, judgments, penalties, costs, claims, demands and expenses … of whatever type or nature, including damage or destruction of any property, or injury (including death) to any person, arising out of or related to … (ii) any claims or actions by [Millis's] employees, agents and/or subcontractors, including but not limited to any based upon negligence except to the extent such negligence is that of [MillerCoors] ….

The language contained in subsection (ii) is substantially similar to the language in the indemnification provision analyzed in ***FABCO Equipment***. We find no substantive difference between an agreement stating the indemnitor "shall not be required to defend, indemnify or hold harmless" the indemnitee "*to the extent* any claims, lawsuits, demands, liability, cost or expenses *are the result of* [the indemnitee's] negligence" and one requiring the indemnitor to provide a defense, indemnity or hold harmless the indemnitee against claims and actions based on negligence "except to the extent such negligence is that of [the indemnitee]." In

both instances, the indemnitor's duty to defend and indemnify the indemnitee is only limited by the indemnitee's share of causal negligence, including that of its employees.[6]

¶16 Millis and Zurich argue the exception in subsection (ii) of the indemnification provision provided that Millis did not have a duty to defend and indemnify MillerCoors in cases where negligence claims or actions by a Millis employee/agent were based solely on MillerCoors's *alleged* negligence. However, subsection (ii) of the indemnification provision refers to negligence; it does not refer to alleged negligence. "We will not read words into the contract that the parties opted not to include." ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2015 WI 65, ¶66, 363 Wis. 2d 699, 866 N.W.2d 679.

¶17 Millis and Zurich next argue subsection (ii) of the indemnification provision was not "a specific and express" agreement permitting MillerCoors to seek indemnification from Millis against the Millis employee's negligence claim.

[6] Millis and Zurich argue indemnification provisions that limit an indemnitor's duty to defend and indemnify an indemnitee by the indemnitee's share of causal negligence "incentivize bad behavior." However, policy arguments should be directed at the legislature, instead of this court. *See* ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶43, 350 Wis. 2d 411, 838 N.W.2d 119, *aff'd*, 2014 WI 56, 354 Wis. 2d 796, 848 N.W.2d 728. Additionally, any negative effects Millis incurred here could have been ameliorated by Millis either: (1) accepting MillerCoors's tenders of defense; (2) intervening in the Millis employee's suit and moving for bifurcation and a determination of liability; or (3) providing an initial defense to MillerCoors and then commencing a separate declaratory action. *See* ***Fire Ins. Exch. v. Basten***, 202 Wis. 2d 74, 90, 549 N.W.2d 690 (1996) (holding that "where the insurance coverage involves a party not named in the underlying lawsuit, coverage may be determined by utilization of either a bifurcated trial or a separate declaratory judgment action"); ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993) (noting that the usual procedure "to follow when coverage is disputed is to request a bifurcated trial on the issues of coverage and liability and move to stay any proceedings on liability until the issue of coverage is resolved"); *cf.* ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶62, 342 Wis. 2d 29, 816 N.W.2d 853 (citing ***Newhouse*** in the context of an indemnification agreement).

Millis and Zurich correctly note the Worker's Compensation Act prohibits an alleged negligent third party such as MillerCoors from seeking indemnification from an employer such as Millis, for an employee's negligence claim, unless the third party has entered into "a specific and express agreement" with the employer permitting the third party to seek indemnification from the employer for the employee's negligence claim. *See* ***Mulder v. Acme-Cleveland Corp.***, 95 Wis. 2d 173, 177-78, 290 N.W.2d 276 (1980). However, subsection (ii) of the indemnification provision expressly and specifically required Millis to defend and indemnify MillerCoors from all claims, liabilities, and judgments that arose out of or were related to claims or actions filed by Millis's employees/agents, except that Millis's duty to defend and indemnify MillerCoors from such claims/actions was limited by MillerCoors's share of causal negligence. This constitutes a "specific and express agreement" to consider the employee's own negligence, and we therefore reject Millis and Zurich's argument.

¶18 Finally, Millis and Zurich argue the circuit court erred in granting summary judgment because MillerCoors is equitably estopped from seeking a purported limited and conditional defense.[7] Specifically, because MillerCoors's defense tenders sought a "full and unconditional" defense, they argue MillerCoors

[7] Millis and Zurich assert that when MillerCoors tendered its defense to Millis multiple times, MillerCoors sought a full and unconditional defense, and that the circuit court determined MillerCoors was not entitled to a full and unconditional defense. Therefore, Millis and Zurich argue, MillerCoors's tenders of defense were "invalid" and, thus, Millis's duty to defend was never triggered. In support of their argument, Millis and Zurich cite ***Towne Realty, Inc. v. Zurich Ins. Co.***, 201 Wis. 2d 260, 271, 548 N.W.2d 64 (1996), for the general proposition that "a tender of defense is a condition precedent to the creation of a duty to defend." However, they do not adequately explain how this general proposition relates to the purported difference between an indemnitee requesting a *full* defense, as opposed to a *limited* defense. Therefore, we decline to address this argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

is now estopped from seeking a defense limited by its share of causal negligence. Contrary to their assertions, MillerCoors does not seek a limited and conditional defense; it sought a full defense and indemnification from Millis—and still does, at least to the extent it can show it was not contributorily negligent to any degree.

¶19 Furthermore, Millis's and Zurich's suggestion that an entity seeking a defense limited by its share of causal negligence necessarily seeks "a limited and conditional" defense, instead of a "full and unconditional" defense, ignores the unitary nature of the duty to defend. *See* ***Plastics Eng'g Co. v. Liberty Mut. Ins. Co.***, 2009 WI 13, ¶60, 315 Wis. 2d 556, 759 N.W.2d 613 (recognizing "there can be no pro rata approach to the duty to defend"). Once Millis's duty to defend MillerCoors was triggered, Millis was obligated to provide MillerCoors a *full* defense, *see* ***id.***, even though under subsection (ii) of the indemnification provision Millis would be entitled to reimbursement from MillerCoors for the reasonable defense and settlement costs it incurred that were attributable to MillerCoors's share of casual negligence, if any, *see* ***FABCO Equip.***, 352 Wis. 2d 106, ¶11-13.

II. MillerCoors's Cross-Appeal

¶20 MillerCoors cross-appeals the circuit court's summary judgment entered in its favor against Millis and Zurich. Although the court granted MillerCoors summary judgment based on the parties' stipulations and arguments, MillerCoors argues the court erred in denying its initial motion for summary judgment filed prior to the parties' stipulations. Specifically, MillerCoors argues it is entitled to recover the reasonable defense and settlement costs it incurred in the suit brought by the Millis employee, which it calculates to be $890,399.81, rather than the $825,000 originally stipulated. Additionally, because MillerCoors is the prevailing party in its cross-appeal against Millis and Zurich, it argues that

under the Master Transportation Services Agreement it is entitled to recover the costs and reasonable attorney fees it incurred in litigating this suit, which it calculates to be $92,029.24. We are unpersuaded by MillerCoors's arguments.

¶21 After the circuit court denied the parties' initial motions for summary judgment, the parties entered into two stipulations. As part of the stipulations, MillerCoors agreed that the reasonable defense and settlement costs it incurred in the suit brought by the Millis employee were $825,000. Given that stipulation, MillerCoors is unable to argue now that it is entitled to recover $890,399.81—$65,399.81 more than the court awarded it pursuant to the parties' stipulations. *See* WIS. STAT. § 807.05; *see also* ***GMAC Mortg. Corp. v. Gisvold***, 215 Wis. 2d 459, 470, 572 N.W.2d 466 (1998) (holding that written stipulation signed by the parties and approved by the court is binding on the parties).

¶22 The stipulations also demonstrate MillerCoors agreed that the prevailing party in this suit would not be entitled to the costs and reasonable attorney fees incurred in litigating this suit under the Master Transportation Services Agreement. Given this stipulation, MillerCoors is unable to argue now that it is entitled to recover $92,029.24 in reasonable defense and settlement costs in litigating this suit against Millis and Zurich. *See* WIS. STAT. § 807.05; *see also* ***GMAC Mortg. Corp.***, 215 Wis. 2d at 470.

¶23 No WIS. STAT. RULE 809.25(1) costs awarded to either party on appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).