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Summary of Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., 127 Nev. Adv. Op. No. 26

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Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.,
127 Nev. Adv. Op. No. 26 (June 2, 2011)[1]

CONTRACTS—INDEMNITY

Summary

An appeal of the district court's judgment regarding an indemnity clause between the general contractor and subcontractor in a construction defect action.

Disposition/Outcome

The Supreme Court of Nevada held that: (1) the parties' contract did not explicitly or expressly state that Appellant would have to indemnify Respondent for Respondent's own negligence, (2) there was conflicting evidence of Appellant's liability, and (3) any award of attorney fees to Respondent should have been limited to those fees and damages incurred defending against the causes of action concerning Appellant's scope of work. Consequently, the Court reversed the district court's judgment and remanded the matter for a new trial.

Factual and Procedural History

Plaster Development Company, Inc. ("Plaster") was the developer and general contractor for the Marble Canyon residential construction project in Las Vegas, Nevada. Plaster contracted with Bill Young's Masonry, Inc. to construct and backfill the retaining walls and to construct sidewalls. Plaster also contracted with Reyburn Lawn & Landscape Designers, Inc. ("Reyburn")[2] to perform the rough and final grading of the building lots.[3] However, Reyburn did not design or construct any of the retaining walls or sidewalls in Marble Canyon. Once Bill Young's Masonry finished building the sidewalls, Reyburn completed its duties by clearing away any excess materials.

Soon after homeowners moved into Marble Canyon in 1996, they made several complaints about both the retaining walls and sidewalls. In May 2000, the homeowners filed a class action complaint against Plaster, alleging that the perimeter retaining walls and sidewalls were defective as a result of improper design, preparation, materials, and construction. In March 2002, Plaster brought a third-party complaint against Reyburn and Bill Young's Masonry for

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[2] The contract contained an indemnification clause, which stated "Subcontractor agrees to save, indemnify, and keep harmless Contractor against any and all liability, claims, judgments or demands, including demands arising from injuries or death of persons…and damage to property, arising directly or indirectly out of the obligation herein undertaken or out of the obligations conducted by Subcontractor, save and except claims or litigation arising through the sole negligence or sole willful misconduct of Contractor, and will make good to and reimburse of Contractor of any expenditures, including reasonable attorney's fees. If requested by Contractor, Subcontractor will defend any such suits at the sole cost and expense of Subcontractor."

[3] Rough grading occurs after the concrete pad or foundation of the home has been poured and establishes the basic elevation and drainage of the lot. Finish grading occurs near the end of construction and, in this case, required Reyburn to apply four inches of sand or topsoil on the lot and grade it to allow water to drain away from the home, retaining walls, and sidewalls.

indemnity and/or contribution.[4] Plaster also asserted a breach of contract claim against Reyburn for failing to defend. Reyburn answered, denying any liability.

In the spring of 2004, the homeowners, Plaster, and Reyburn proceeded to trial, which focused on the homeowner's claims.[5] Nevertheless, Plaster made arguments pertaining to Plaster's third-party complaint against Reyburn, claiming that Reyburn contributed to the retaining walls' defectiveness by obstructing drainage at the base of the wall when it performed the final grading of the building lot. Reyburn's owner conceded in his trial testimony that a contractor should not cover a wall's drainage system with sand and that, if his employees had covered the drainage openings with sand, it would have been a mistake.[6]

As a result, Plaster orally moved for judgment as a matter of law against Reyburn on the contractual indemnity and breach of contract causes of action. The district court granted to motion after minimal argument by counsel and without any briefing on the issues, explaining that the evidence demonstrated that Plaster was not solely negligent in causing the damages and that the lack of sole negligence triggered the indemnity clause between the parties.[7] The jury ultimately awarded damages to the homeowners, attributing one percent fault to the homeowners and a ninety-nine percent fault to Plaster.

Following the verdict, all parties filed post-trial motions. The district court held a hearing on the motions in August 2004 and made an oral ruling denying Reyburn's motion for a new trial. The court held a supplemental hearing on the remaining post-trial motions in June 2005, but none of the pending motions were resolved because the trial judge resigned from the district court in December 2006. The case was reassigned to Judge Barker in 2007, and the parties renewed their post-trial motions. Judge Barker ultimately resolved the renewed motions in 2009, denying Reyburn's motion for new trial and finding that Reyburn was required to indemnify Plaster for all of the homeowners' claims.[8]

Reyburn appealed, arguing that the trial judge erred by granting Plaster's motion for judgment as a matter of law on the indemnity and breach of contract claims, and that it was error to order Reyburn to pay all of Plaster's attorney fees and costs related to the suit.

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[4] Prior to trial, Bill Young's Masonry settled with the homeowners and was removed from the action.

[5] These claims included whether the design of the retaining walls was adequate, their conformance to the specifications and design, waterproofing and backfilling, and appropriate drainage. The homeowners also complained about the design of the sidewalls.

[6] However, he also testified that even if sand was deposited over the drainage openings, sand is permeable and would have permitted the water the drain.

[7] Therefore, the district court limited the scope of Reyburn's closing argument, precluded submission of jury instructions or a verdict form, and barred the jury from determining Reyburn's liability, if any.

[8] The district court entered judgment for Plaster, awarding attorney fees and costs against Reyburn in the sum of $952,813.26 and interest in the amount of $582,264.18 based on Reyburn's failure to defend contract claim.

Discussion

Interpretation of the Indemnity Clause

In *George L. Brown Insurance v. Star Insurance Co.*,[9] the Court adopted the rule that, although the parties are free to contractually agree to indemnify another for its own negligence, an "express or explicit reference to the indemnitee's own negligence is required."[10] Therefore, "contracts purporting to indemnify a party against its own negligence will only be enforced if they clearly express such an intent and a general provision indemnifying the indemnitee 'against any and all claims,' standing alone, is not sufficient."[11] The Court repeated its approval of the express negligence doctrine, which requires "the intent of the parties [to] be specifically stated within the four corners of the contract."[12] After applying these principles to the case at bar, the Court concluded that since the indemnity clause was not explicit about whether Reyburn was required to indemnify Plaster even if Reyburn is not negligent, and whether the scope of the agreement includes indemnity for Plaster's contributory negligence, the clause necessarily covers only Reyburn's negligence.

Because the indemnity clause was not explicit, and because the Court must strictly construe the indemnity clause's language, the Court concluded that there must be a showing of negligence on Reyburn's part to trigger Reyburn's duty to indemnify Plaster. Moreover, the indemnity clause does not contain a clear and unequivocal statement of the parties' intent for Reyburn to indemnify Plaster for Plaster's own negligence. Therefore, the Court held that Reyburn was required to indemnify Plaster only for liability or damages that can be attributed to Reyburn's negligence.

Judgment as a Matter of Law—Contractual Indemnity

The Court reviews a district court's order granting judgment as a matter of law de novo.[13] If there is "conflicting evidence on a material issue, or if reasonable person could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court."[14]

The Court held that Reyburn's owner's testimony was not a clear, unequivocal statement of liability, and that he did not admit a fact adverse to Reyburn's claims. Rather, the owner's testimony was responsive to hypothetical conditions or practices. Thus, the Court concluded that the district court erred when it construed the owner's testimony as an admission of liability.

Additionally, the Court determined that a review of the record indicated that there was conflicting evidence regarding Reyburn's negligence. Because of the ambiguity in Reyburn's owner's testimony and the conflicting evidence presented by Plaster's and Reyburn's experts, the Court concluded that district court erred in granting judgment as a matter of law.

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[9] George L. Brown Insurance v. Star Insurance Co., 126 Nev. ___, 237 P.3d 92 (2010).
[10] *Id.* at 97.
[11] *Id.* (quoting Camp, Dresser & McKee v. Paul N. Howard, 853 So. 2d 1072, 1077 (Fla. Dist. Ct. App. 2003)).
[12] *Id.*
[13] Winchell v. Schiff, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008).
[14] Banks v. Sunrise Hospital, 120 Nev. 822, 839, 102 P.3d 52, 64 (2004).

Reyburn's Duty to Defend

An indemnity clause imposing a duty to defend is construed under the same rules that govern other contracts.[15] However, the "duty to defend is broader than the duty to indemnify" because it covers not just claims under which the indemnitor is liable, but also claims under which the indemnitor could be found liable.[16] Following standards enunciated in *Crawford v. Weather Shield Mfg. Inc.*[17] and *Henthorne v. Legacy Healthcare, Inc.*,[18] the Court held that, unless specifically stated otherwise in the indemnity clause, an indemnitor's duty to defend an indemnitee is limited to those claims directly attributed to the indemnitor's scope of work. Moreover, the indemnitor's duty to defend does not include defending against claims arising from the negligence of other subcontractors or the indemnitee's own negligence.

Given the conflicting evidence at trial as to whether Reyburn's work was implicated in the defective retaining walls and sidewalls, and viewing the evidence and inferences in Reyburn's favor, the Court held that a reasonable jury could have granted relief in favor of Reyburn. Thus, the Court concluded that the district court erred in granting Plaster's motion for judgment as a matter of law on the breach of contract cause of action.

Defense Costs

Because the Court held that an indemnitor's duty to defend an indemnitee is generally limited to those claims directly attributed to the indemnitor's scope of work and does not include defending against the negligence of other subcontractors or the indemnitee's own negligence, the district court also erred in awarding Plaster its total amount of attorney fees and costs without first apportioning those fees and costs actually incurred by Plaster in defending against those claims directly attributed to Reyburn's scope of work, if any.

Conclusion

In order to obligate a subcontractor to indemnify a general contractor pursuant to an indemnity clause, the clause must contain express language of indemnification for contributory negligence as well as the sole negligence of the indemnitor. Moreover, when the duty to defend extends only to claims connected with the subcontractor's potential negligence, any award of attorney's fees should be limited to those fees and damages incurred defending against the causes of action concerning the subcontractor's scope of work, not the entire amount of damages and all attorney fees and costs the general contractor incurred throughout the litigation.

[15] Crawford v. Weather Shield Mfg. Inc., 187 P.3d 424, 430 (Cal. 2008).
[16] United Nat'l Ins. Co. v. Frontier Ins. Co., 120 Nev. 678, 686, 99 P.3d 1153, 1158 (2004).
[17] *Crawford*, 187 P.3d 424.
[18] Henthorne v. Legacy Healthcare, Inc., 764 N.E.2d 751 (Ind. Ct. App. 2002).