COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2002

Cornelia G. Clark
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. 01-2779 **Cir. Ct. No. 00 CV 37**

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

CURTIS J. FRAHM,

PLAINTIFF,

V.

GENERAL MOTORS CORPORATION,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

TRANSCONTINENTAL INSURANCE COMPANY,

DEFENDANT,

V.

EISENMANN CORPORATION AND J.P. CULLEN AND SONS, INC.,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. General Motors Corporation (GMC) appeals from the orders dismissing its third-party complaint against Eisenmann Corporation and J.P. Cullen and Sons, Inc. GMC contends that the circuit court erred in dismissing its claims that Eisenmann, retained by GMC as a contractor, breached its contract requiring it to "provide primary insurance against all liability arising out of the work performed under the contract [with GMC]" and to "indemnify and hold [GMC] harmless from any and all claims … not caused solely and exclusively by the negligence of [GMC]." GMC also contends that the circuit court erred in dismissing its claims that Cullen, retained by Eisenmann as a subcontractor, was negligent and, further, that Cullen also breached its contract requiring it to "provide primary insurance against all liability arising out of the work performed under the contract" and to "indemnify and hold [GMC] harmless from any and all claims … caused in whole or in part by the negligence of [Cullen]." Eisenmann and Cullen respond that summary judgment was properly granted because their respective contract and subcontract relieved them of any duty to indemnify GMC for losses such as those in this case. We agree and, therefore, affirm.

I. BACKGROUND

¶2 GMC retained Eisenmann as a contractor; the terms and conditions of the retention were set out in GMC's construction general conditions (GM 1638). Item 22 of GM 1638 provided, in relevant part:

> LIABILITY AND WORKER'S COMPENSATION INSURANCE REQUIREMENTS

> Contractor [Eisenmann] shall as a minimum maintain insurance coverage referenced in Chart A, as may be applicable to Contractor's [Eisenmann's] activities, including all conditions specified on page 2 of Chart A.[1]
>
> In addition, Contractor [Eisenmann] agrees to require that all of its Subcontractors as a minimum maintain insurance coverage referenced in Chart A, and to secure and maintain in its records all certificates of insurance from all Subcontractors.

(Footnote added.) Item 20, addressing Eisenmann's liability and indemnification of GMC, provided, in relevant part:

> 20.1. Except as otherwise provided in Item 23 entitled "Property and Casualty Insurance[,"] the Contractor [Eisenmann] assumes all risks of damages or injuries, including death, to any property or persons used or employed on or in connection with the work,[2] and all risks of damages or injuries, including death, to any property or persons wherever located, resulting from any action, omission or operation under the Contract or in connection with the work.
>
> 20.2 The Contractor [Eisenmann] shall indemnify, hold harmless and defend the Owner [GMC], its employees, agents, servants and representatives from and against any and all losses, damages, expenses, claims, suits and demands of whatever nature, resulting from damages or injuries, including death, to any property or persons, caused by or arising out of any action, omission or operation under the Contract or in connection with the work attributable to the Contractor [Eisenmann], any Subcontractor, any Materialmen, any of their respective employees, agents, servants and representatives, or any other person, including the Owner [GMC], its employees, agents, servants and representatives; *provided, however, that the Contractor [Eisenmann] shall not be required to indemnify the Owner [GMC], its employees, agents, servants and representatives hereunder for any damages or injuries including death, to any property or persons, caused solely and exclusively by the negligence of the Owner*

[1] One of the conditions specified under the insurance requirements on page 2 of Chart A was that GMC be named as an additional insured.

[2] According to GM 1638, the "[w]ork shall consist of the provision of all supervision, labor, material, equipment and services required to complete the project."

> *[GMC], its employees, agents, servants and representatives*.

(Footnote and emphasis added.)

¶3 Through a purchase-order agreement, Eisenmann retained Cullen as a subcontractor. The agreement stated, in part: "This is a fixed price contract to perform the work as defined, in this order, in the proposal documents, in the documents referenced below, and as defined in any applicable site visit." The 9/81 version of GM 1638 was one of the referenced documents listed on the purchase order.[3] The purchase order also specified that the general terms and conditions of Eisenmann's subcontractor agreements, dated 1/96, were "made a part of this agreement." Paragraph 15 of Eisenmann's subcontractor general terms and conditions provided that Cullen "shall comply with the requirements as dictated by [GMC] and laid out in the Purchase Order."[4]

¶4 Paragraph 16.1 of Eisenmann's subcontractor general terms and conditions provided:

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[3] The appellate record contains only the 12/95 version of GM 1638, not the 9/81 version referenced in the purchase order; thus our references to the language of GM 1638 are necessarily to the 12/95 version.

[4] Additionally, Item 16 on the back side of each page of the nine-page purchase order stated:

> INDEMNIFICATION: If Seller performs any work on Buyer's premises or utilizes the property of Buyer, whether on or off Buyer's premises, Seller shall indemnify and hold Buyer harmless from and against any liability, claims, demands or expenses (including reasonable attorney fees) for damages to the property of or injuries (including death) to Buyer, its employees or any other person arising from or in connection with Seller's performance of work or use of Buyer's property except for such liability, claim, or demand arising out of the sole negligence of Buyer.

> SUBCONTRACTOR [Cullen] shall indemnify and hold harmless OWNER [GMC], CONTRACTOR [Eisenmann] and the agents and employees of both of them from and against any claim, damage, loss or expense, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work[to be performed by Cullen, as specified in the purchase order], and attributable to bodily injury, sickness, disease or death, or damage to or destruction of property, including loss of use or consequential damage resulting therefrom *but only to the extent caused in whole or in part by the negligent acts or omissions of the SUBCONTRACTOR [Cullen], the SUBCONTRACTOR's Sub-Contractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim damage, loss or expense caused in part by a party indemnified thereunder.* This indemnification obligation shall include, but is not limited to, all claims against an indemnity by an employee or former employee of SUBCONTRACTOR [Cullen].

(Emphasis added.)

¶5 On June 8, 1997, Curtis J. Frahm, a Cullen employee working under the Eisenmann/Cullen subcontract, was installing a conveyor at the GMC assembly plant in Janesville while GMC employees were spraying a chemical cleaner in the vicinity. Frahm, alleging that the chemical cleaner was used in a negligent manner that caused him to sustain permanent damages as a result of ingesting the cleaner's fumes, sued Cullen's worker's compensation insurance carrier, Transcontinental Insurance Company, and GMC.

¶6 GMC, seeking indemnification under the GMC/Eisenmann and Eisenmann/Cullen contracts, filed a third-party complaint against Eisenmann and Cullen. In the complaint, GMC denied any negligence with respect to Frahm's injuries, asserting that "any injuries or damages claimed or incurred by [Frahm] are the result of the negligence, if any negligence there be," of Cullen, Eisenmann, and Frahm himself.

¶7 Cullen moved for summary judgment and dismissal from the action, claiming that under WIS. STAT. § 102.03(2), it was "immune from suit" by GMC regarding Frahm's on-the-job injuries because it did not contractually waive its immunity.[5] Following a hearing, Judge John Franke denied Cullen's motion.[6]

¶8 Eisenmann then cross-claimed against Cullen, seeking "indemnification and/or contribution in regard to any damages resulting from the action of the plaintiff." GMC then filed a motion for summary judgment, seeking dismissal of Frahm's complaint, with prejudice. About a week later, Eisenmann filed a motion for summary judgment, requesting that GMC's third-party complaint against it be dismissed with prejudice; on the same date, Cullen filed a

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[5] WISCONSIN STAT. § 102.03(2) (1999-2000) provides, in relevant part: "Where such conditions exist the right to the recovery of compensation under this chapter [Worker's Compensation Act] shall be the exclusive remedy against the employer, any other employee of the same employer[,] and the worker's compensation insurance carrier." The text of § 102.03(2) has not changed since Frahm sustained his injuries. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

Commenting that GMC was relying on Paragraph 16.1 of Eisenmann's subcontractor general terms and conditions of the Eisenmann/Cullen contract, Cullen noted that the paragraph contained some ambiguous language: "This indemnification obligation shall include, but is not limited to, all claims against an *indemnity* by an employee or former employee of SUBCONTRACTOR [Cullen]." (Emphasis added.) Cullen argued that the circuit court should not revise Paragraph 16.1 by changing its wording to reach the result desired by GMC. Cullen also argued, however, that if the circuit court interpreted Paragraph 16.1 to constitute a waiver of Cullen's statutory immunity, it "should rule that any indemnification duty on the part of Cullen under Paragraph 16.1 extends only 'to the extent' of any act or omission of Cullen or Cullen employees apart from that of Curtis Frahm himself."

Relying on ***Crown Life Insurance Co. v. LaBonte***, 111 Wis. 2d 26, 36, 330 N.W.2d 201 (1983), GMC argued in its brief in opposition to Cullen's summary judgment motion, that "[t]here can be no reasonable doubt that the parties to the contract containing ¶ 16.1 intended that the phrase 'all claims against an indemnity' should have read 'all claims against an indemnitee.'" As we will explain, in this case, the distinction makes no difference.

[6] According to the circuit court docket, the motion was denied *without* prejudice. The order denying the motion, however, states that Cullen's motion for summary judgment was denied *with* prejudice and that Cullen's alternative motion for declaratory relief was denied *without* prejudice. The appellate record contains no transcript of the motion hearing at which the court issued its oral decision.

motion for summary judgment on the grounds that, as matters of law, it had no duty to provide liability insurance coverage to GMC and Frahm's injuries were not attributable "in whole or in part" to "any negligent acts or omissions" of Cullen or its employees. Following a pretrial conference, the court ordered the parties to submit the matter to mediation; on the same date, the parties were notified that the case was being transferred from Judge Franke to Judge Moroney, who heard the three motions for summary judgment on August 13, 2001.

¶9 Denying GMC's motion, the court concluded that there were factual issues regarding GMC's alleged common-law negligence and safe-place-statute violation. The court, however, also granted Cullen's motion and Eisenmann's motion, thus leaving GMC as the only defendant in the case. GMC then moved the court to reconsider its grants of summary judgment to Cullen and Eisenmann. Following a hearing, the court signed the orders from which GMC now appeals.

¶10 Frahm, GMC, and Transcontinental subsequently reached a stipulation stating, in part, that GMC's liability for Frahm's injuries and damages had been settled and that Frahm's cause of action could be dismissed upon the merits. The circuit court signed an order approving the settlement and dismissing Frahm's cause of action.

II. DISCUSSION

A. Standard of Review

¶11 Summary judgment methodology is used to determine whether a legal dispute requires a trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). As the supreme court has recently reiterated: "An appellate court reviews a decision granting summary

judgment independently of the circuit court, benefiting from its analysis. The appellate court applies the same two-step analysis the circuit court applies pursuant to Wis. Stat. § 802.08(2)." ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶21-23, 241 Wis. 2d 804, 623 N.W.2d 751.

¶12 Reviewing the summary judgment decisions in this case, we must consider the circuit court's interpretation of certain contractual indemnity provisions. A circuit court's interpretation of a contract also is subject to our *de novo* review. ***Woodward Communications, Inc. v. Shockley Communications Corp.***, 2001 WI App 30, ¶9, 240 Wis. 2d 492, 622 N.W.2d 756.

B. Negligence - Cullen

¶13 GMC contends that the circuit court erred in dismissing its claim against Cullen because "genuine issues of fact existed concerning Cullen's negligence." On appeal, however, GMC does not address the elements of common-law negligence. Instead, GMC specifically relies only on Wisconsin's safe-place statute, WIS. STAT. § 101.11,[7] arguing: "Cullen, as Frahm's employer,

[7] WISCONSIN STAT. § 101.11 provides, in relevant part:

> **(1)** Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein … and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees ….
>
> **(2)** (a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing

(continued)

had a duty to warn employees, including Frahm, of any known dangers. There was evidence in the record that GMC warned a Cullen foreman that dangerous chemicals were about to be sprayed. Cullen failed to pass this warning on to Frahm and his injury ensued."

¶14 GMC's safe-place theory is flawed. "Injuries caused by the unsafe 'conditions' of an employer's premises come within the meaning of the safe-place statute while injuries caused by negligent or inadvertent acts do not." ***Stefanovich v. Iowa Nat'l Mut. Ins. Co.***, 86 Wis. 2d 161, 171, 271 N.W.2d 867 (1978). Here, GMC refers only to "injuries caused by negligent or inadvertent acts," not to "unsafe 'conditions' of an employer's premises." Thus, even if the summary judgment submissions supported GMC's factual premise, they would not support a negligence claim based on the safe-place statute. Therefore, we conclude, the court correctly granted summary judgment dismissing GMC's negligence claim against Cullen.

C. Indemnification - Eisenmann

¶15 GMC argues that "it should be held as a matter of law that Frahm's claims fell within the indemnification provision of the Eisenmann Contract." Maintaining that "Eisenmann's only escape from the indemnification clause of its contract was to show, as a matter of law, that Frahm's injuries were 'caused solely and exclusively' by GMC's negligence," GMC asserts that because Eisenmann "submitted no evidence" in this regard and thus failed to establish that GMC's negligence was 'solely and exclusively' responsible for Frahm's injuries,

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> reasonably necessary to protect the life, health, safety or welfare of such employees ….

The text of § 101.11 has not changed since Frahm sustained his injuries.

Eisenmann was not entitled to summary judgment on the indemnification claim. We disagree.

¶16 GMC alleged in its third-party complaint that "any injuries or damages claimed or incurred by [Frahm] are the result of the negligence, if any negligence there be," of Cullen, Eisenmann, and Frahm himself. GMC's appellate brief-in-chief, however, does not present any theory of negligence regarding Eisenmann or Frahm. Instead, GMC points out that Frahm's claims against it were settled and, therefore, the trial court never made a determination "as to GMC's liability." Thus, GMC merely argues that "the record before the trial court raised genuine issues of material fact with respect to at least one other party's negligence, that of Cullen."

¶17 As we have just explained, however, GMC's negligence theory with respect to Cullen, based solely on the safe-place statute, fails. Thus, GMC was left without a viable claim of negligence against Eisenmann, Frahm, or Cullen.

¶18 Not until its reply brief to this court does GMC present the theory that possibly no one, or perhaps someone other than Eisenmann, Frahm, or Cullen, could be responsible for Frahm's injuries. In its reply, GMC asserts:

> Thus, if at trial the jury finds that either no one was at fault for Frahm's injuries, or the chemical manufacturer was at fault for failure to warn, or that there exists [sic] multiple contributing factors, Eisenmann would still have liability to GMC under the indemnification clause. The only way Eisenmann avoids liability under the indemnification clause is to show that GMC was solely negligent for causing Frahm's injuries.

GMC's belated theory goes nowhere. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (party abandons trial court

issue it fails to present in its appellate brief-in-chief but attempts to resurrect in its reply brief).

¶19 Moreover, while "[w]e recognize that the issue of negligence is ordinarily a question for the jury, and that summary judgment is usually inappropriate when a party's negligence is alleged," ***Fifer v. Dix***, 2000 WI App 66, ¶15, 234 Wis. 2d 117, 608 N.W.2d 740, here GMC failed to set forth any facts demonstrating the negligence of any party other than itself. The summary judgment submissions, detailing the positions of the people involved, their communications and responses, and the distances between those issuing the warnings, those heeding the warnings, and Frahm, established that, of GMC, Eisenmann, Cullen, and Frahm, only GMC could possibly have been responsible for Frahm's injuries.[8] Further, while GMC has consistently denied any negligence, it agreed to a stipulation stating, in part, that its liability for Frahm's injuries had been settled; having done so, GMC cannot now demand that a judge or jury determine its negligence.

¶20 Therefore, because the GMC/Eisenmann contract relieved Eisenmann of any indemnification duty for damages or injuries "caused solely and exclusively by the negligence of [GMC], its employees, agents, servants and representatives," and because GMC has not shown that Frahm's injuries were

[8] While GMC disputes the trial court's conclusion, it offers almost nothing to counter Eisenmann's simple assertion: "All deponents, including the plaintiff, GMC's employees and GMC's own liability expert concurred that neither Eisenmann nor Cullen played any role in causing Frahm's injuries." And what little GMC offers makes no sense. While claiming that Cullen had a duty to warn Frahm, GMC cannot avoid the undisputed facts that: (1) the warnings GMC issued were to workers about twenty feet away from the spraying, and to no others; (2) those workers apparently heeded the warnings to GMC's satisfaction; and (3) Frahm was another eighty feet away from the spraying.

caused by anything other than GMC's negligence, summary judgment dismissing GMC's indemnification claim against Eisenmann was appropriate.[9]

D. Indemnification - Cullen

¶21 GMC also contends that "because genuine issues of fact existed concerning Cullen's negligence," the circuit court erred in dismissing GMC's indemnification claim against Cullen. Cullen, invoking Paragraph 16.1 of its agreement with Eisenmann, responds that it "agreed to indemnify [GMC] only for a claim, damage, loss or expense 'caused in whole or in part by the negligent acts or omissions of' J.P. Cullen, nothing more." It then asserts that GMC presented no evidence that Frahm's injuries were due in whole or in part to Cullen's negligence. Specifically, Cullen argues:

> Given that J.P. Cullen did not supply or use the chemical, only GM had the [material safety data sheet], the chemical used in GM's spraying … had nothing to do with the conveyor work that J.P. Cullen was performing under its subcontract with Eisenmann, and that J.P. Cullen and Eisenmann had no control over the cleaning that GM was performing, GM's argument that J.P. Cullen knew of the danger posed by GM's spraying is refuted by every witness who testified in the case.

(Record references omitted.) GMC does not refute this contention. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

¶22 Under Paragraph 16.1 of Eisenmann's subcontractor general terms and conditions, Cullen was required to indemnify GMC

> from and against any claim … arising out of or resulting from the performance of the Work[to be performed by

[9] Thus we need not address GMC's additional argument that Eisenmann breached its contract with GMC by failing to provide GMC with liability insurance covering Frahm's claims.

> Cullen, as specified in the purchase order], and attributable to bodily injury, … *but only to the extent caused in whole or in part by the negligent acts or omissions of [Cullen] … or anyone for whose acts they may be liable*, regardless of whether or not such claim damage, loss or expense caused in part by a party indemnified thereunder. This indemnification obligation shall include, but is not limited to, all claims against an indemnity by an employee or former employee of [Cullen].

(Emphasis added.)[10] As we have explained, nothing in the summary judgment submissions, and nothing in GMC's safe-place-statute negligence theory, supports any conceivable argument that any negligence of Cullen, "in whole or in part," caused Frahm's injuries.[11]

By the Court.—Orders affirmed.

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

[10] We note that the "regardless" clause is, at the very least, syntactically problematic, and that the word "indemnity," rather than "indemnitee," in the second sentence of Paragraph 16.1, contributes more confusion. These confusing portions of the contract, however, do not alter the clear meaning of the critical language relieving Cullen from its duty to indemnify.

[11] Thus, once again, we need not address GMC's additional argument—that Cullen also breached its contract by failing to comply with its agreement to provide liability insurance.