COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0787 **Cir. Ct. No. 01CV3767**

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

CINCINNATI INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

TORKE COFFEE ROASTING COMPANY AND GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Cincinnati Insurance Company (Cincinnati) appeals from the trial court's order granting summary judgment to Torke Coffee Roasting Company (Torke) and Torke's insurance carrier, General Casualty Company of Wisconsin (General Casualty). The trial court concluded that an indemnification agreement between Heinemann's Candy Company

(Heinemann's), Cincinnati's insured, and Torke barred Cincinnati's claims that allege Torke breached its duty to ensure the continuing safe and proper operation of equipment it leased to Heinemann's by failing to adequately inspect and maintain the equipment.

¶2 Cincinnati contends that the trial court erred in granting summary judgment because the indemnification agreement contained in the contract between Heinemann's and Torke lacked the specificity required to indemnify Torke for its own negligence. Because there is no express provision in the agreement indemnifying Torke for liability occasioned by its own negligence, we conclude that the trial court erred and reverse its grant of summary judgment.

I. BACKGROUND.

¶3 On November 16, 1995, Heinemann's entered into a "Contract for Equipment Service" with Torke. According to the terms of the contract, Torke would provide Heinemann's with a coffee machine at no cost, provided that Heinemann's agreed to purchase all of its coffee products from Torke. Torke maintained ownership of the coffee equipment and agreed to check and service the machine at periodic intervals to ensure the safe operation of the equipment.

¶4 On July 9, 2000, a water supply line connected to a Torke coffee machine broke loose and sprayed large amounts of water, causing property damage and lost profits to Heinemann's. Pursuant to an insurance policy in place between Cincinnati and Heinemann's, Cincinnati paid Heinemann's $9,490.37. Subsequently, Cincinnati brought suit against Torke seeking reimbursement.

¶5 On November 21, 2001, Torke and General Casualty moved for summary judgment, arguing that Cincinnati's claims were barred by the economic

loss doctrine and an indemnity agreement contained in the "Contract for Equipment Service."[1] The trial court granted the motion for summary judgment, concluding that the indemnification clause in the "Contract for Equipment Service" barred Cincinnati's claims.

II. ANALYSIS.

¶6 We review a trial court's grant of summary judgment *de novo*, owing no deference to the trial court's decision. ***Deminsky v. Arlington Plastics Mach.***, 2001 WI App 287, ¶8, 249 Wis. 2d 441, 638 N.W.2d 331. Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). Thus, we will reverse a decision granting summary judgment if either (1) the trial court incorrectly decided legal issues, or (2) material facts are in dispute. *See* ***Deminsky***, 2001 WI App 287 at ¶9.

¶7 We have upheld the validity of indemnity contracts. *See* ***Spivey v. Great Atl. & Pac. Tea Co.***, 79 Wis. 2d 58, 63, 255 N.W.2d 469 (1977). "A contract agreeing to indemnify a party against the consequences of [its] own negligence is not against public policy." ***Id.*** (citations omitted). However, "[t]he 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." ***Id.*** This rule is based on a belief that a contracting party is unlikely either to have good

[1] The trial court concluded that the economic loss doctrine was inapplicable. The issue is not a subject of this appeal.

information about the propensity of the other party to behave negligently, or to be in a position to prevent such behavior, and so is unlikely to have agreed to insure the other party against the consequences of that party's negligence. *See* ***Sutton v. A.O. Smith Co.***, 165 F.3d 561, 563 (7th Cir. 1999).

¶8 Thus, "the obligation to indemnify an indemnitee for its own negligence must be clearly and unequivocally expressed in the agreement. General language will not suffice." ***Spivey***, 79 Wis. 2d at 63.

> If the agreement clearly states that the indemnitee is to be covered for losses occasioned by his own negligent acts, the indemnitee may recover under the contract. Additionally, if it is clear that the purpose and unmistakable intent of the parties in entering into the contract was for no other reason than to cover losses occasioned by the indemnitee's own negligence, indemnification may be afforded.

Id. at 63-64.

¶9 Therefore, "[i]t is a settled rule in this state that [indemnity] agreements are to be broadly construed where they deal with the negligence of the indemnitor, but strictly construed where the indemnitee seeks to be indemnified for his own negligence." ***Deminsky***, 2001 WI App 287 at ¶21 (citations omitted). Accordingly, "[t]here must be an express provision in the agreement to indemnify the indemnitee for liability occasioned by its own negligence. Such an obligation will not be found by implication." ***Id.*** (citations omitted). For example, in ***Deminsky***, we concluded that the following indemnity provision expressly obligated the idemnitor to indemnify the indemnitee for liability occasioned by the indemnitee's own negligence:

> Purchaser shall indemnify and hold harmless Seller ... from and against any and all losses, expenses, demands, and claims made against Seller ... by Buyer, any agent, servant, or employee of Buyer, any subsequent Purchasers ... any

> Lessor or Lessee ... or any other person because of injury or illness or alleged injury or illness (including death) or property damage actual or alleged *whether caused by the sole negligence of Seller*, the concurrent negligence of Seller with Buyer ... or any other person *or otherwise arising out of, resulting from, or in any way connected with the operation maintenance, possession, use, transportation, or disposition of the Articles ....*

Id. (emphasis in original). Thus, the agreement in ***Deminsky*** clearly and unequivocally stated that the seller would be held harmless for all losses, whether caused by its own negligence or that of the buyer.

¶10 Conversely, in the instant case, no such express provision exists. Rather, it is apparent that nothing in the indemnity agreement specifically purports to protect Torke in the event of damages sustained by *its own* negligence. *Cf.* ***Spivey***, 79 Wis. 2d at 64-65. The indemnity agreement between Heinemann's and Torke states:

> In consideration of the loan of the above equipment by the Torke Coffee Roasting Co., Customer [ ] (Heinemann's) agrees to indemnify and save harmless said Torke Coffee Roasting Co. from any and all claims for damages, or otherwise *arising out of the use of such equipment by Customer (Heinemann's), his (Heinemann's) employees or patrons.*

(Emphasis added.)

¶11 Absent any express provision related to negligence on behalf of the indemnitee, such as in ***Deminsky***, the instant provision does not clearly state that the indemnitee is to be covered for losses occasioned by its own negligent acts. Further, it is clear that the intent of the parties was for no other reason than to cover losses occasioned by the indemnitor's, Heinemann's, negligence. Thus, a reasonable conclusion is that the parties entered into the indemnification agreement in order to protect Torke from liability occasioned by Heinemann's

negligence on the part of its employees or customers in operating the equipment. However, because the obligation to indemnify Torke for its own negligence is not clearly and unequivocally expressed in the agreement, the general language intended to protect Torke from Heinemann's negligence will not suffice.[2] Accordingly, the trial court is reversed.

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[2] The trial court also concluded that Torke had no duty to service or maintain the coffee equipment in question, and, therefore, could not be found negligent for the accident. We conclude that this conclusion was, at best, premature.

First, given the lack of notice in the summary judgment papers regarding this issue, the trial court overextended its reach in ruling that Cincinnati could not prove either Torke's duty to maintain the equipment or its negligent breach of that duty. The brief in support of Torke's summary judgment motion dealt only with two issues: (1) the economic loss doctrine, and (2) the indemnification clause in the contract between Heinemann's and Torke. We conclude that Torke failed to adequately notify Cincinnati of any issues relating to Torke's own negligence or its duty to maintain the equipment. Thus, Torke's negligence was not an issue presented as the basis of summary judgment.

Second, our review of Cincinnati's complaint indicates that Cincinnati adequately pled the elements outlining Torke's negligence in order to withstand the summary judgment motion in question. Cincinnati's complaint states, in relevant part:

> 6. That defendant Torke Coffee Roasting Company retained ownership of the coffee machine that it provided to Heinemann's Candy Co., Inc., and further agreed to check and to service said coffee machine at periodic intervals in order to ensure the continuing safe and proper operation of the coffee machine.
>
> 7. That on July 9, 2000, a water supply line connected to the coffee machine provided … came loose and sprayed water about Heinemann's … causing extensive property damage.
>
> 8. That defendant Torke … owed to Heinemann's … a duty to ensure the continuing and safe operation of the coffee machine….
>
> 9. That defendant Torke … breached its duty to plaintiff's insured, Heinemann's Candy Co., Inc., by negligently failing to inspect the connections of the water supply line connected to the coffee machine, and by negligently failing to ensure that the water supply line was firmly and safely connected to the coffee machine so that the line would not become unattached.

(continued)

By the Court.—Order reversed.

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

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10. That the negligence of defendant Torke … was the proximate cause of the damages….