FILED
APR 14 1977
261
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GYLE N. CONRAD, )
Plaintiff, )
v. )
ROBERT N. FORSYTH, )
Appellant, )
v. )
CASS COUNTY, IOWA, )
Appellee. )

Filed April 14, 1977

50
2-57736

---

Appeal from Audubon District Court - R. Kent Martin, Judge.

Appeal by defendant-appellant from dismissal of his cross-petition against Cass County, third-party defendant, in which he sought indemnification or contribution for attorney fees incurred in his successful defense of plaintiff's action. Reversed and remanded for new trial.

Robert Kohorst, Louis, Moore & Kohorst, of Harlan, for appellant, Robert N. Forsyth.

Ronald W. Feilmeyer, Jones, Cambridge, Carl, Feilmeyer and Landsness, of Atlantic, for appellee, Cass County, Iowa.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

262

ALLBEE, C.J.

Robert Forsyth appeals trial court's ruling denying him attorney's fees against Cass County for his successful defense of Gyle Conrad's action for damages.

On June 17, 1969, Lloyd Billings a motor patrol operator for Cass County was grading a gravel road, commonly referred to as Ridge Road, in Cass County. In front of Robert Forsyth's dirt driveway, he partially graded up a previously buried steel cable. Although Mr. Billings noticed the cable had looped 12 inches in the air, he did not attempt to pull it from the ground or mark it with a flag. Later that same day, Gyle Conrad was driving his tractor with a front mounted cultivator when the cultivator shank hooked the looped cable. The tractor spun into the ditch throwing Mr. Conrad to the ground seriously injuring his back.

In June, 1971, Conrad filed a petition for his damages against Forsyth alleging that Forsyth had been negligent in burying the cable in his driveway. Conrad also alleged that Forsyth had been negligent in constructing the driveway or failing to inspect the driveway for hazardous conditions. On September 21, 1973, Forsyth cross-petitioned against Cass County for indemnity or contribution alleging Billing's negligence or *that Cass County was the party which buried the cable.* Forsyth also petitioned for his reasonable attorney fees and court costs. Cass County moved to dismiss the cross-petition on grounds that notice of its alleged liability had not been given within 60 days as mandated by section 613.A5, The Code. The motion was overruled and the case proceeded to trial.

At trial, much of the evidence concerned the exact placement of the cable. Conrad's witnesses testified that the cable was buried in Forsyth's driveway. Forsyth testified concerning the

manner in which he had constructed the driveway. He also denied that any cable had been deliberately or inadvertantly placed in the driveway. Additionally, Forsyth testified that after the cable had been completely removed, the bulk of it came from the area of the roadbed itself which was deeper than his driveway fill. Evidence was presented by Forsyth that it was customary for county road crews to bury their worn cable in the roadbed during its construction.

The issue of Forsyth's negligence in burying the cable was submitted to the jury. All other counts of negligence - failure to inspect, negligent construction - were dismissed by the judge. No issue of Conrad's contributory negligence or of Billing's negligence being a superseding cause was submitted. In short, the sole issue for the jury was - did Conrad meet his burden in proving Forsyth buried the cable. The jury was further instructed that the issue of Cass County's liability for indemnity contribution to Forsyth for Billing's negligence could only be considered if it found Forsyth liable. Forsyth timely objected that Cass County's liability for his reasonable attorney fees should be determined by the jury even if he was found not liable, which trial court overruled. The jury verdict found Forsyth not liable for Conrad's injuries.

After trial, Cass County moved for judgment on the cross-petition. Trial court sustained the motion relying on Rauch v. Senecal, 253 Iowa 487, 112 N.W.2d 886 (1962), thereby denying Forsyth's cross-petition for reasonable attorney fees and court costs.

On appeal, Cass County has filed a motion to dismiss alleging that Forsyth's prayer for "reasonable attorney fees" and costs does not show that the jurisdictional amount of $1000 is in

issue. Cass County's motion to dismiss is overruled. *See* Benttine v. Jenkins Truck Lines, Inc., 182 N.W.2d 374, 376 (Iowa 1970). Similarly, Cass County's contention that Forsyth's failure to give it notice of the claim within 60 days as required by § 613.A5 mandates an affirmance, is likewise without merit. *See* Olson v. James, 209 N.W.2d 64 (Iowa 1973).

Having overcome the jurisdictional hurdle, we initially note that trial court's refusal to submit the indemnity issue to the jury has the effect of ruling as a matter of law that Forysth had shown no evidence which would entitle him to attorney fees from Cass County since the factual basis for indemnity is to be determined by the trier of fact. *See* Stowe v. Wood, 199 N.W.2d 323, 327 (Iowa 1972). Because there was competent evidence that Cass County rather than Forsyth buried the cable which, if believed, would entitle Forsyth to attorney fees, trial court erred in not submitting the issue to the jury. *See* Stowe v. Wood, supra. Turner v. Zip Motors, Inc., 245 Iowa 1091, 65 N.W.2d 427 (1954).

The general rule in Iowa is that attorney fees are not recoverable by a successful litigant from his adversary. Turner v. Zip Motors, Inc., supra at 1098. But an early exception to this rule is articulated in Turner v. Zip Motors, Inc., supra. In *Turner*, defendant converted plaintiff's car and sold it to a third party. Plaintiff was involved in litigation with the third party over possession of the car. After the successful conclusion of this litigation, plaintiff sued defendant for his attorney fees and costs of litigation against the third party. The trial court ruled in favor of recovery and our Supreme Court affirmed noting:

> If A sues B, generally. . . the successful party cannot recover his expenses of litigation such as lost time, attorney fees, and other special items other than court costs. But if through the tort of A, B is in good faith involved in litigation with C, the exception comes into play, and B may then recover the reasonable value of his expense for employment of counsel, and other proper items, from A. *Turner* at 1098, 431.

Significantly the *Turner* court also expressly approved the position taken by the Restatement, Torts, § 914 (1939) concerning the recoverability of attorney fees:

> A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney fees, and other expenditures thereby suffered or incurred. *Turner* at 1097; see also, New Hampshire Ins. Co., v. Christy, 200 N.W.2d 834, 839 (1972) - approval of Restatement § 914.

*Turner* held that it was irrelevant whether the main action was prosecuted or defended, the only qualifications necessary for plaintiff's recovery were that (1) the third party litigation was caused by a tortious act of another, (2) the litigation was conducted in good faith, and (3) there was a reasonable ground for belief in a successful outcome by plaintiff. Turner v. Zip Motors, Inc., supra at 1101, 433.

The exception to *Turner* was enunciated in Rauch v. Senecal, 253 Iowa 487, 112 N.W.2d 886 (1962), a case relied upon for the denial of Forsyth's claim for attorney fees by trial court and the dissenter. In *Rauch*, plaintiff sued three different defendants over a water heater explosion. The same specifications of negligence, including failure to warn and failure to inspect, were alleged against all three defendants. Senecal sought the costs of litigation and attorney fees against American Radiator and Standard Sanitary Corporation, a co-defendant. Although Senecal was found not liable in the original action while American

was held liable, the trial court denied recovery, which our Supreme Court upheld. The court held that where an indemnitee is defending against an allegation of primary independant negligence arising from *his own* act, indemnity would not lie. Rauch v. Senecal, supra at 492. Senecal, unlike *Turner*, was defending against an allegation that he failed to inspect or warn, and, therefore, American was not responsible for the litigation. Rauch v. Senecal, supra at 493-494.

Our Supreme Court created an exception to *Rauch* and also placed it in perspective in Peters v. Lyons, 168 N.W.2d 759 (Iowa 1969). In *Peters*, plaintiff brought suit against Lyons and the S. S. Kresge Company for injuries sustained from an attack by Lyon's dog. It was established the dog got loose and attacked plaintiff because of a defectively welded choker chain sold by Kresges. Mrs. Lyons settled plaintiff's claim and cross-petitioned for indemnity and attorney fees from Kresge. The trial court denied allowance of attorney fees and our Supreme Court reversed. The court analyzed *Turner* and *Rauch* and held that *Rauch* was limited to its facts. Peters v. Lyons, supra at 769. The court held *Rauch* applied only to situations where the acts for which the indemnitee was being held to answer were primary acts of negligence. Peters v. Lyons, supra at 770. Since Mrs. Lyons' acts were secondary in nature to Kresge's primary wrong and Lyons' liability flowed wholly from Kresge's wrong, Lyons could recover her attorney fees. Peters v. Lyons, supra at 770-771.

The aspect of *Peters* crucial to the instant case is its handling of the *Rauch* dicta which declares that the allegations of plaintiff's petition are conclusive as to whether the indemnitee is defending against his own primary wrong. At least one court, Judge Hanson in Epley v. Patti Construction Co., 228

F. Supp. 1 (S.D. Iowa 1964), a case heavily relied upon by the dissenter, has held the allegations of the petition control under *Rauch*. In the case at bar if Conrad's allegations against Forsyth are conclusive, Forsyth is entitled to no relief since failure to inspect and negligent construction of the driveway are allegations of primary negligence. In this connection the *Peters* court met the *Rauch* dicta head on and summarily rejected it:

> Is the determination of recoverability of attorney fees to be based on the charges made by the injured party or on the facts as found by the court or jury? As noted by Judge Hanson, under Rauch v. Senecal, supra, *it may be argued the determination is to be made on whether primary acts are alleged. We reject this basis for such determination.* . . . [T]he determination of this matter as between indemnitor and indemnitee should not rest on the presence or absence of such pleading by a third party, who through an overabundance of caution or optimism alleges more (or less) than he can prove. *The decision must be made on the facts as found by the trier thereof. Peters* at 770. (emphasis added.)

*Peters* recognizes, then, the modern state of civil litigation. Because of statutes of limitation, in a complex case an injured plaintiff often will sue everyone in sight under every theory of recovery he can think of and then utilize our liberal discovery rules to determine who is liable and under what theory. The rights of indemnitee and indemnitor as between themselves should not hinge on "shotgun" allegations by a private third person with no legal relationship to them. *Accord*, New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834, 839-840 (Iowa 1972).

The dissent's distinguishment of the *Peters* language to apply to situations only where the indemnitee has unsuccessfully defended the main action is unpersuasive. Neither *Peters* nor *Rauch* contain such a limitation. Secondly, such an interpretation is contrary to the qualifications for indemnity as set forth in Turner v. Zip Motors, Inc., 245 Iowa 1091, 1101, 65 N.W.2d 427, 433 (1954) in that *Turner* does not list lack of success as a

prequisite to indemnity, only that the litigant have a reasonable ground for belief in a successful outcome. Third, our Supreme Court has affirmed an allowance of attorney fees between indemnitee-potential indemnitor when the main action has not yet been concluded so as to make it impossible to determine whether the indemnitee's defense will be unsuccessful. *See* New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834, 839-840 (Iowa 1972). Lastly, an adoption of the dissent's position would give rise to anomalous and illogical results. An indemnitee who is alleged and proven to be secondarily negligent could receive indemnity for his attorney fees from an indemnitor who has committed primary acts of negligence. *See* Peters v. Lyons, 168 N.W.2d 759, 768-771 (Iowa 1969). Similarly, an indemnitee who is alleged to have committed both primary and secondary acts of negligence and successfully defends against the primary allegations but loses on the secondary allegations could receive indemnity for his attorney fees. But an indemnitee who successfully defends against only allegations of primary negligence, regardless of how frivolous or preposterous, would receive no relief. *Peters* rejects this failure of logic and limits *Rauch* to those situations where the indemnitee is in fact defending his own independent primary negligence. Thus, Conrad's allegations of primary negligence against Forsyth, stricken by trial court for want of supportive evidence at trial, are irrelevant to Forsyth's claim for indemnity.

The issue remains, however, is Forsyth entitled to relief if he can prove Cass County buried the cable? That is, would such a factual showing fit *Turner* or *Rauch*? Although it is apparent from our analysis of the *Turner-Rauch-Peters* trilogy that factually this is a case of first impression, we believe

*Turner* controls this situation. If Cass County did bury the cable, Forsyth, wholly because of Cass County's tort, was forced to defend an action to protect his own interests, and consequently was forced to expend money which in justice Cass County should have spent. Turner v. Zip Motors, Inc., supra; Restatement, Torts § 914, illus. 2 (1939).

On the other hand, *Rauch* is limited to those situations where independent primary acts of negligence of both the indemnitee and indemnitor are submitted to the jury. This is different from a case in which, as here, the indemnitee is being held to answer for the indemnitor's act due to confusion over the identity of the tortfeasor. Forsyth's allegations carry *Rauch* one step farther from the situation in which the successful defendant merely sues his unsuccessful co-defendant as in *Rauch* - to the actual attempt to show the co-defendant committed the disputed acts. This is even a stronger factual showing than made in *Peters*, in that the indemnitee's liability does not flow from the primary wrong of the indemnitor, but Forsyth alleged that the indemnitee's alleged negligent acts were, in fact, the indemnitor's. It would be stretching *Rauch* beyond recognition to hold that the single act of burying the cable was both an act of primary and secondary negligence. Trial court erred in not submitting the indemnity issue to the jury considering the state of pleadings, the circumstantial evidence supporting Forsyth's cross-petition, and timely objection plainly pointing to trial court's failure. *See* Stowe v. Wood, 199 N.W.2d 323, 327 (Iowa 1972). Trial court's judgment on the cross-petition is reversed and remanded for a new trial.

DONIELSON, SNELL and OXBERGER, JJ., concur; CARTER, J., dissents.

CARTER, J. (dissenting)

I dissent. I cannot reconcile the result reached by the majority with the holding of the court in Rauch v. Senecal, 253 Iowa 487, 112 N.W.2d 886 (1962), and the subsequent reaffirmation of that holding in Peters v. Lyons, 168 N.W.2d 759 (Iowa 1969).

The majority relies upon Turner v. Zip Motors, Inc., 245 Iowa 1091, 65 N.W.2d 427 (1954) to permit Forsyth to claim attorney fees from the third party defendant, Cass County. If we look only at the language of that case, Forsyth's claim might conceivably find support in what is said there. Among other things, the court states (245 Iowa at 1098, 65 N.W.2d at 431):

> "If A sues B, generally, as noted above, the successive party cannot recover his expenses of litigation such as lost time, attorney fees, and other special items other than court costs. But if through the tort of A, B is in good faith involved in litigation with C, the exception comes into play, and B may then recover the reasonable value of his expense for employment of counsel, and other proper items from A."

In further amplification of this rule, the court stated (245 Iowa at 1101, 65 N.W.2d at 433):

> "It matters not whether the litigation with the third party was prosecuted or defended; the only qualifications are that it must have been caused by a tortious act or breach of contract of the defendant in the suit for recovery of fees or other proper expenses and must have been conducted in good faith and with reasonable grounds for belief in a successful outcome."

The holding in the *Turner* case allowed plaintiff to recoup attorney fees incurred in successfully defending a replevin action seeking return of an automobile which had been converted by defendant's agent. Eight years later Rauch v. Senecal, supra, was decided. This opinion was written by the author of the *Turner* opinion. In *Rauch,* Senecal, one of three defendants who had been found not liable to the plaintiff in a boiler explosion case, thereafter sought to recover his costs of defense including

attorney fees from American Radiator Corporation, one of the defendants who had been held liable to the plaintiff. Procedurally this case was raised by a cross-petition filed in the originanl action seeking indemnity or contribution from American in the event Senecal was held liable on plaintiff's claims. Hearing on the cross-petition was deferred until after the trial of plaintiff's claims. Senecal having prevailed as to those claims, the only issue remaining was his right to recover costs and attorney fees which was denied by the trial court. The Supreme Court affirmed. In the opinion, specific reference was made to the *Turner* case but the court qualified the *Turner* holding by stating (253 Iowa at 491, 112 N.W.2d at 888):

> "But if A is defending, in whole or in part, his own *alleged* tort, he may not recover indemnity from another who may also have been claimed, or adjudged, to have also been guilty of tortious conduct." (Emphasis supplied.)

Later in the same opinion, the court further stated (253 Iowa at 492, 112 N.W.2d at 889):

> "We are not concerned with the question of whether this was a good allegation of negligence, or whether it was ultimately submitted to the jury. The question of importance is, was this a direct *allegation* of his own negligence which the defendant Senecal was defending? Clearly it was; and that he may have defended it successfully is not material." (Emphasis supplied.)

The court concluded that plaintiff's allegations of negligence against Senecal which asserted that Senecal failed to warn the plaintiff of dangers in the water heater and failed to inspect the water heater were "a direct *charge* of primary negligence against Senecal." After so concluding, the court stated (253 Iowa at 493, 112 N.W.2d at 889):

> "Our holding is confined to the proposition that a defendant who successfully defends his own primary negligence, in part at least, may not recover his expenses as indemnity against a co-defendant who was found liable for negligence. This is so even though some charges of negligence were made, and defended, as to which the liability of the first defendant was secondary only to that of the second defendant."

The holding in *Rauch* clearly forecloses Forsyth's efforts to recoup his defense costs and attorney fees from Cass County in the present case. Conrad's allegations of negligence against Forsyth involve at least six different specifications of negligence which, it is averred, involved Forsyth's own act and would not involve Cass County in any way. The *Rauch* holding clearly turns on the allegations of the claim against the party defending it, not the ultimate result of the litigation.

The contention of the majority that *Rauch* is limited to situations involving "independent primary acts of negligence" by indemnitor and indemnitee is without support in *Rauch* itself where identical allegations of negligence were leveled against Senecal and American jointly. The related contention of the majority that here, unlike *Rauch*, it is "alleged that the indemnitee's alleged negligent acts were, in fact, the indemnitor's" is also not persuasive. I assume this means that here the claim is "I didn't do it but he did". If so, this is really no different from the claim which Senecal was seeking to advance in the *Rauch* case but which the court held insufficient to permit recovery. In *Rauch*, American had, in fact, supplied the defective chattel to Senecal upon which Rauch's claims against Senecal were based. There is no such clearly defined relationship between Forsyth and Cass County in the present case. As between the two cases the facts in *Rauch* present a stronger case for recoupment of fees than the instant case.

The decision in Peters v. Lyons, 168 N.W.2d 759 (Iowa 1969) does not alter the holding in *Rauch* as applied to the present case. The court in *Peters* discusses *Rauch* and initially limits the holding of the case to those instances where the party seeking indemnity has successfully defended against his own primary negligence. In *Peters* the party seeking indemnity had not successfully defended the claims against him but rather had settled such claims with the injured plaintiff. Next, the court in *Peters* distinguished *Rauch* from *Turner* stating (168 N.W.2d at 769):

> "In *Turner v. Zip Motors, Inc., supra,* ... the indemnitee not only successfully defended herself against charges of negligence but no part of those charges involved primary negligence in the sense the term was used in *Rauch v. Senecal, supra.*"

Then the court completely reaffirmed those principles of *Rauch* which apply to the instant appeal, stating (168 N.W.2d at 770):

> "It is clear from Rauch that where an indemnitee is defending himself from a charge of wrongdoing which is not secondary to the indemnitor's wrongdoing, no attorney fees are recoverable. This result is patent as the indemnitor is not responsible for such charges. He had nothing to do with them -- was independent of them. Rauch also holds if the charges against the indemnitor [*sic*] involved charges of primary negligence *and* charges of negligence secondary to the indemnitor's wrongdoing, recovery for attorney fees will be denied. The reason for such holding is not given but the difficulties of allocating costs are apparent. In any event we adhere to the rule."

Any subsequent comment in Peters v. Lyons, supra, about whether the recoverability of attorney fees is to be based upon "the charges made by the injured party or on the facts as found by the court or jury" has application to the situation where the parties seeking indemnity has not successfully defended the claim of the injured party but has incurred liability or settled

the case based upon grounds of liability secondary to the indemnitor's. This is apparent from the context in which these remarks are made. They are in response to a dictum in a federal decision cited elsewhere in the *Peters* decision that a person may be able to recover common indemnity because adjudged liable on theories of secondary negligence but still not recoup attorney fees because primary negligence was also alleged. The *Peters* decision rejects this contention in instances where the indemnitee has been held liable but is otherwise entitled to indemnity from the indemnitor. There is no attempt to alter the application of *Rauch* to the situation where the indemnitee has successfully defended himself against either (a) claims based entirely upon allegations of his primary negligence; or (b) claims based upon allegations of negligence some of which are primary and some of which are secondary. In fact, the holding of *Rauch* was specifically reaffirmed as to both of these situations in the portion of the *Peters* decision quoted at length earlier in this dissenting opinion. To attribute to the subsequent remarks in *Peters* the implications which the majority now draws from them, one must conclude that the *Peters* court changed its mind in the space of two paragraphs.

In conclusion it should be noted that if, as the majority suggests, there is an anomaly in denying recoupment of attorney fees by a party who has successfully defended himself against false charges of primary negligence while permitting such recoupment by a party who has been held liable for secondary acts of negligence, this was nonetheless the considered holding of *Rauch*. That case has not been overruled. But I submit that there is no anomaly if it is recognized that indemnity is not ordinarily based upon comparitive culpability on an absolute

scale, but rather upon special relationships and duties between the indemnitor and indemnitee, or on comparity culpability to a third person towards whom indemnitor and indemnitee are both liable. See, *e.g.*, Iowa Power & Light Co. v. Abild Construction Co., 259 Iowa 314, 144 N.W.2d 303 (1966). I would affirm the trial court.