IN THE COURT OF APPEALS OF IOWA

No. 6-404 / 95-1508

000263

REGENT INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

ESTES COMPANY, a corporation,

Defendant-Appellant.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Regent Insurance Company filed a petition for declaratory judgment. The trial court sustained its motion for summary judgment finding that an indemnification provision was not triggered. **AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.**

Martha L. Shaff and Jean Dickson Feeney of Betty, Neuman & McMahon, L.L.P., Davenport, for appellant.

John P. Harris and Jeffrey C. Kull of Bozeman, Neighbour, Patton & Noe, Moline, Illinois, for appellee.

Heard by Sackett, P.J., and Habhab, C.J., and Vogel, J.

HABHAB, C.J.

Estes Company (Estes) subcontracted with Crawford Heating (Crawford) to install a ventilation system for the Friendly House project in Davenport. The subcontract was drafted by Estes and required Crawford to obtain insurance naming Estes as an additional insured on a primary basis. The subcontract also contained an indemnification clause. Crawford obtained a policy, as required by the subcontract, through Regent Insurance Company (Regent).

While installing the ventilation system, a Crawford employee, Robert Martin, was injured when trusses installed by Estes collapsed and he fell thirty-five feet. Martin sued Estes for, among other things, negligently installing the trusses.

Estes tendered its defense to Regent, asserting Estes was a named additional insured under Crawford's policy. Regent declined, contending its policy on Crawford did not provide Estes with liability coverage for bodily injury caused by Estes' own negligence. At trial, Estes admitted negligence and the jury awarded damages of approximately $430,000 to Martin.

In October 1994, Regent filed a petition for declaratory judgment requesting the court to construe its rights and duties under the insurance contract. Estes answered and then filed an application for adjudication of law points or motion for summary judgment. Regent filed its resistance and its own cross-motion for summary judgment.

Following a hearing, the district court granted Regent's cross-motion for summary judgment. The district court analyzed the indemnity clause in the subcontract between Estes and Crawford, as well as other sections of the agreement, and concluded that because Estes was solely at fault, the indemnification clause was not triggered and coverage under the policy was not extended to Estes.

Estes appeals. First, Estes argues Regent's policy coverage extended to Estes for the Martin lawsuit by virtue of the insurance policy language regardless of the subcontract provisions. Estes asserts the policy lists it as an additional insured with primary coverage and the policy covers claims made by an employee of an insured. Second, Estes contends the subcontract states that the owner, Estes, is to be indemnified regardless of whether or not the claim is caused in part by the party seeking to be indemnified. Estes asserts this language clearly reflects the intent to relieve an indemnitee of its own negligence. Thus, Estes claims the indemnification was triggered and the district court erred in holding otherwise.

Regent argues, among other things, that Estes has failed to preserve error on its argument concerning the insurance policy language. Also, Regent asserts that as Estes admitted in the Martin lawsuit its own insurance carriers provide coverage for Martin's injuries, it is estopped from now claiming Regent should provide coverage.

We review a district court's ruling granting summary judgment for errors at law. Iowa R. App. P. 4.

I. Coverage Under the Regent Policy. Estes maintains the language within the Regent policy clearly establishes it is covered for the injuries sustained by Martin. Estes contends the terms of the insurance policy are clear and unambiguous and nothing in the policy states coverage is extended only if Crawford has a duty to indemnify Estes.

Regent, on the one hand, alleges Estes has not preserved this issue for appeal. Nonetheless, it invites us to rule in its favor on this issue. We decline the invitation.

"Ordinarily, issues must be raised and decided by the trial court before they may be raised and decided on appeal." *Peters v. Burlington Northern R. Co.*, 492 N.W.2d 399, 401 (Iowa 1992). Although Regent, not Estes, raised this issue in its summary judgment motion, the trial court did not address the issue in its ruling.[1]

> The law requires a party to file a motion requesting the trial court to enlarge or amend its findings in order to preserve an issue for appeal only when the court fails to resolve an issue, claim, defense, or legal theory the parties have properly submitted to it for adjudication.

Lawrence v. Grinde, 534 N.W.2d 414, 418 (Iowa 1995) (citations omitted). No motion to enlarge or amend the findings of the trial court was made by either party. As such, we do not consider this issue as it has not been properly preserved for appeal.

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[1] The entire thrust of Estes' summary judgment motion relates to indemnification. In its summary judgment motion, Estes prayed, "[D]efendant, Estes Company, requests that the court adjudicate the law point to find that Estes Company is entitled to indemnity or grant summary judgment in favor of Estes Company on the issue of indemnity."

Nor do we consider on appeal what appears to be an estoppel issue raised by Regent. This question, like the previous, was not addressed by the trial court. Those two issues will have to await further action by the trial court and, as noted hereafter, we remand for that purpose.

II. Indemnification Clause of the Subcontract. The subcontract entered into by Estes and Crawford contained the following indemnification provisions:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Architect, Contractor, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . *but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor*, 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 is caused *in part* by a party indemnified hereunder.

(Emphasis added.)

Estes maintains that the language, "regardless of whether or not such claim, damages, loss or expense is caused in part by a party indemnified hereunder," establishes that Estes is entitled to indemnity regardless of the fact Martin's injuries were the result of its *sole* negligence. Estes argues the contract's intent in this regard is clearly imported by this language. Estes contends that although the contract fails to specifically address situations in which Estes is solely at fault, this failure is not

fatal to its claim for indemnification.[2] We disagree.

The terms of the indemnification provisions in the subcontract provide that Crawford is required to indemnify Estes only to the extent Crawford was "in whole or in part" negligent for the injuries sustained by Martin. This language is clear and unequivocal. The language relied upon by Estes, unlike this language, merely provides for indemnification where Estes is "in part" negligent, not when they are "wholly" negligent.

> In examining an insurance policy, however, we will not "write a new contract of insurance between the parties" where there is no ambiguity. We avoid straining the words and phrases of the policy "to impose liability that was not intended and was not purchased."

Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 834 (Iowa 1987) (citations omitted).

We find the language of the subcontract clearly reflects the intent of the parties. "Ambiguity is not present merely because the provisions 'could have been

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[2] In support of its contention, Estes cites *Payne Plumbing v. Bob McKiness Excavating*, 382 N.W.2d 156 (Iowa 1986). We find the subcontract at issue here is unlike that in *Payne* as the language of the subcontract does not clearly establish that indemnity is required where Estes is solely negligent. However, in *Daugherty v. Ankeny Const. Co.*, 433 N.W 2d 742 (Iowa 1988), our supreme court considered whether an indemnification clause was triggered in a subcontract which contains substantially the same provisions as the subcontract here, and where, as here, there was no negligence on the part of the subcontractor. The supreme court did not find the indemnification provisions of the subcontract were triggered in *Daugherty* due to an inadequate record. *Id.* at 745-746. The court did note, however, the provisions of the subcontract at issue in that case were distinguishable from those in *Payne*, as "[U]nlike *Payne*, where indemnification was triggered by the subcontractor's negligence, the subcontractor was not negligent here." *Daugherty*, 433 N W 2d at 745.

worded more clearly or precisely than it in fact was.'" *Id.* (citation omitted). "The general rule is that an indemnifying agreement will not be construed to relieve the indemnitee from the effect of its own negligence, unless the agreement provides for it in 'clear and unequivocal' language." *Payne Plumbing v. Bob McKiness Excavating*, 382 N.W.2d 156, 160 (Iowa 1986) (citations omitted).

We look with some disfavor on an agreement which relieves an indemnitee from its own negligence. *Employers Mut. Cas. v. Chicago & No. West.*, 521 N.W.2d 692, 694 (Iowa 1994). "Broad and general language will not suffice to shift the burden of liability, particularly when the damage is caused by the indemnitee's sole negligence." *Herter v. Rigland-Johnson-Crowley Co.*, 492 N.W.2d 672, 674 (Iowa 1992). However, it was not necessary for the subcontract to expressly relieve Estes of its own negligence if terms of the contract had clearly imported that intent. *See id.*

We find the imported intent of the subcontract was not to relieve Estes of responsibility for its sole negligence. We affirm the trial court's summary judgment decision and find the indemnification provisions of the subcontract have not been triggered as Estes' sole negligence caused Martin's injuries.

We have addressed only the indemnification issue. The two issues referred to under division I of this opinion, along with the remaining issues under the declaratory judgment action, will have to await further action by the trial court and we remand for that purpose.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.