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In Nevada, an Indemnity Provision Will Only be Enforced to Find One Party Owes for the Other's Sole

By Wendy L. Wilcox, Esq.

On June 2, 2011, the Nevada Supreme Court in *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc.* held that parties are free to contractually agree to indemnify each other for one's own negligence but the contract will only be enforced if the parties clearly express such an intent in the contract.

Here, the indemnification provision did not explicitly or expressly state that the subcontractor, Reyburn Lawn and Landscape designers ("Reyburn"), would have to indemnify the developer and general contractor, Plaster Development Co. ("Plaster") for Plaster's own negligence. Rather, the provision links Reyburn's defense and indemnification duties to defects caused or allegedly caused by Reyburn only. The Court found that any obligation by Reyburn to Plaster under the contract would be limited to Reyburn's potential negligence, i.e., any award of attorneys' fees to Plaster is limited to those fees incurred by Plaster defending against the claims concerning Reyburn's scope of work.

There was a long history on this construction defect case. A group of homeowners brought suit against Plaster because the perimeter retaining wall and sidewalks were allegedly defective. Plaster sued Reyburn regarding Reyburn's allegedly defective finish grading work under the indemnification provision wherein Plaster claimed Reyburn owed defense and indemnity obligations to it.

During trial, Plaster was granted judgment as a matter of law against Reyburn after Reyburn's owner's testimony was considered a judicial admission of liability, thus proving Reyburn's negligence. The court then precluded Reyburn from submitting jury instructions, limited the scope of Reyburn's closing argument and did not allow the jury to determine Reyburn's liability for the constructional defects. The jury found Plaster 99% at fault (plaintiffs were held 1% liable) and Reyburn was held liable for the judgment.

Following trial, Plaster moved for a determination of damages against Reyburn on its indemnity and breach of contract claims. The district court entered judgment for Plaster and awarded Plaster attorneys' fees and costs against Reyburn in the sum of \$952,813.26 based on Reyburn's failure to defend Plaster.

Reyburn appealed, arguing 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 attorneys' fees and costs.

The Nevada Supreme Court agreed, finding that under NRCP 50(a)(1) a district court may grant judgment as a matter of law if a party has failed to prove a sufficient issue for the jury. If there is conflicting evidence on a material issue or if a reasonable person could draw different inferences from the facts, the question is for the jury. Here, the district court justified judgment as a matter of law based on a purported judicial admission by Reyburn's owner. Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within the party's knowledge. However, the Supreme Court did not view Reyburn's testimony as a judicial admission. Reyburn's testimony was responsive to hypothetical conditions.

In addition, there was conflicting evidence regarding Reyburn's negligence. A reasonable jury could have drawn different inferences from the evidence presented, and the district court should not have granted Plaster's motion of judgment as a matter of law on Plaster's contractual indemnity and breach of contract causes of action against Reyburn directly attributed to the indemnitor's scope of work. Here, there was enough conflicting evidence as to whether Reyburn's work was implicated in the allegedly defective walls. Therefore, it is unclear if Reyburn even breached its contractual duties to defend Plaster. The attorneys' fees should have been limited to fees and damages incurred defending against claims concerning Reyburn's scope of work and not the entire amount of damages and fees incurred by Plaster.

There is currently extensive litigation in Nevada and California regarding indemnity provisions between general contractors and subcontractors. The general contractor typically sues the subcontractors who worked on the project for the subcontractors to pay the defense and the indemnity of the general contractor. And in so many cases they appear to end up being more form over substance, i.e., the general contractor (as in this case) is so concerned about what could or should be paid to it from the subcontractors than what has been alleged by the plaintiff, i.e., the reason all of the parties are in the case in the first place. This decision at least clearly states that if the general contractor expects the subcontractor to pay for the general contractor's own negligence, it must be laid out clearly and explicitly in the contract and show this was the intent by the parties.

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