[Cite as *Hehman v. Maxim Crane Works*, 2010-Ohio-3562.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

JAMES HEHMAN, et al.,	:	
Plaintiffs,	:	CASE NO. CA2010-01-009
	:	O P I N I O N
- vs -		8/2/2010
	:	
MAXIM CRANE WORKS, et al.,	:	
Third-Party Plaintiff/Appellant,	:	
	:	
- vs -		
	:	
EVERS WELDING CO.,	:	
Third-Party Defendant/Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-12-5227

Kohnen & Patton, LLP, Peggy Murphy Barker and Rebecca L. Cull, PNC Center, 201 East Fifth Street, Suite 800, Cincinnati, Ohio 45202, for third-party plaintiff/appellant

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YOUNG, P.J.

{¶1} Third-party plaintiff/appellant, Maxim Crane Works, appeals from an

order of the Butler County Court of Common Pleas granting summary judgment in favor of third-party defendant/appellee, Evers Welding Company, as to Maxim's indemnification claim against Evers for the attorney fees and costs Maxim incurs in defending a personal injury action brought against it by one of Evers' employees.[1]

{¶2} In 2006, Evers entered into an agreement with Maxim whereby Maxim leased a crane and crane operator to Evers to allow Evers to perform construction work at one of its jobsites. One of Evers' employees, James Hehman, was subsequently injured while working at the jobsite. In 2008, Hehman and his wife brought a complaint against Maxim, alleging that Hehman was injured as a result of Maxim's crane operator's negligence in lifting and moving a heavy panel at the jobsite. In response, Maxim filed an amended third-party complaint against Evers, alleging that under the indemnity provision in their agreement, Evers was liable for any damages awarded against Maxim, as well as for the attorney fees and costs Maxim incurs in defending Hehman's action. Evers subsequently moved for summary judgment on Maxim's amended third-party complaint and the trial court granted it, finding that Evers was entitled to immunity from Maxim's indemnification claim under R.C. 4123.74 of Ohio's workers' compensation law.[2]

{¶3} Maxim now appeals, and in its sole assignment of error, argues:

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶5} Maxim argues the trial court erred in granting summary judgment to

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

2. In the first part of its decision, the trial court found that R.C. 2305.31, which prohibits indemnity agreements in the types of construction-related contracts listed therein, did not apply in this case because the parties' contract was not governed by Ohio law, but by Pennsylvania law, which permits such indemnification provisions. This finding has not been appealed.

Evers on Maxim's indemnification claim for its attorney fees and costs in defending Hehman's action because the term "damages" as used in R.C. 4123.74 does not encompass attorney fees and costs, and therefore Maxim is entitled to indemnification for those expenses pursuant to the indemnity provision in the parties' contract. We disagree.

{¶6} "Summary judgment is a procedural device used to terminate litigation and avoid a formal trial when there are no issues in a case to try." *Clifton v. Blanchester,* Clinton App. No. CA2009-07-009, 2010-Ohio-2309, ¶36. "A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party." Id. at ¶37. An appellate court must review the trial court's decision to grant summary judgment "de novo" meaning the appellate court must review the trial court's decision independently, using the same standard the trial court should have used, and without giving any deference to the trial court's decision. Id.

{¶7} R.C. 4123.74 provides, in pertinent part, that an employer who complies with its duties under Ohio's workers' compensation law "shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment[.]" See, also, Section 35, Article II of the Ohio Constitution (allowing laws to be passed that compensate workers "for death, injuries or occupational disease occasioned in the course of [their] employment[,]" and providing that "[s]uch compensation shall be in lieu of all other rights to compensation, or

damages, for such death, injuries, or occupational disease").

{¶8} The indemnity provision in the parties' contract states:

{¶9} "Customer [Evers] shall defend, indemnify, and hold harmless Maxim and its officers, directors, shareholders, partners, members, managers, employees, affiliates, representatives and agents (the 'indemnitees [sic]') from any and all actions, causes of action, claims, suits, demands, investigations, obligations, judgments, losses, costs, liabilities, damages, fines, penalties and expenses, including attorney's fees, which are incurred by, accrued, asserted, or made against, or recoverable from any of the indemnitees [sic] arising from or relating to, directly or indirectly, customer's acceptance, possession, transport, use, operation, or control of the equipment, whether or not the same arises from damage to property (real or personal), injury or death to persons (including but not limited to customer's employees, agents and representatives), failure to comply with applicable laws, regulations and ordinances, equipment condition, loss of use or seizure of equipment, or otherwise, even if the same are caused in part by the indemnitees' [sic] own negligence. Customer's obligation to indemnify the indemnities [sic] shall survive the termination of this service agreement."

{¶10} In support of its determination that Evers was entitled to immunity under R.C. 4123.74 from Maxim's indemnification claim for its attorney fees and expenses in defending Hehman's action, the trial court relied on *Best v. Energized Substation Service* (1994), Lorrain App. No. 93CA005737. The *Best* court, in turn, relied on *Kendall v. U.S. Dismantling Co.* (1985), 20 Ohio St.3d 61.

{¶11} In *Kendall,* the American Cyanamid Company hired the U.S. Dismantling Company to dismantle Cyanamid's sulfuric acid plant. One of U.S.

Dismantling's employees, Samuel Kendall, was subsequently injured while disassembling certain pipelines at the plant. Kendall and his wife brought an action against U.S. Dismantling and Cyanamid for injuries and damages allegedly caused by the intentional misconduct and/or negligence of one or both companies. Cyanamid filed a cross-claim for indemnification against U.S. Dismantling based upon the indemnity provision in their agreement, which stated in pertinent part:

{¶12} "Subject to the terms and conditions of this contract, CONTRACTOR [U.S. Dismantling] shall be liable for and protect, defend, indemnify, and save CYANAMID, its officers, directors, and employees harmless against any and all claims, losses, demands, causes of action, and any and all related costs and expenses, of every kind and character (including reasonable attorneys fees) suffered by the parties hereto, their employees and/or any other person or corporation, on account of personal injuries or death, or damages to property occurring, growing out of, incident to, or resulting directly or indirectly from the performance by Contractor hereunder[.]" Id. at 63.

{¶13} U.S. Dismantling moved for summary judgment on Cyanamid's cross-claim for indemnification and the trial court granted it, and the court of appeals upheld the trial court's decision. Cyanamid then appealed to the Ohio Supreme Court, which upheld the grant of summary judgment to U.S. Dismantling, finding that the "express general indemnity agreement" between U.S. Dismantling and Cyanamid was "insufficiently specific" to constitute an effective waiver of U.S. Dismantling's "statutory and constitutional immunity as an employer in compliance with Ohio workers' compensation law." Id. at 64–65. The *Kendall* court provided the following rationale for its decision:

{¶14} "The statutory and constitutional immunity granted to complying employers is crucial to workers' compensation law. The legislature granted this immunity to complying employers in exchange for their relinquishment of all their common-law defenses to claims of work-related injury. See *Goodman v. Beall* (1936), 130 Ohio St. 427-429. This agreement is the backbone of the Ohio Workers' Compensation Act. We believe that before this immunity may be considered to have been waived, the waiver must be express, and must refer specifically to this particular immunity. Although express indemnity agreements worded in general terms may suffice for other purposes, we are not inclined to construe them as effective waivers of this immunity absent a clear evocation of the parties' intent to that effect. See *Davis v. Consolidated Rail Corp.* (1981), 2 Ohio App.3d 475.

{¶15} "Further, our holding today is consistent with the well-established rule that '[c]ontracts of indemnity purporting to relieve one from the results of his negligence must be construed strictly.' *Kay v. Pennsylvania RR. Co.* (1952), 156 Ohio St. 503, paragraph one of the syllabus.

{¶16} "Accordingly, we hold that an employer in compliance with the workers' compensation laws of this state does not surrender its statutory and constitutional immunity from suits arising out of employment absent an express and specific waiver of that immunity. A general agreement of indemnity with a third party which does not specifically express the employer's intent to waive this particular immunity is ineffective for that purpose." *Kendall* at 65.

{¶17} In *Best v. Energized Substation Service,* Lorain App. No. 93CA005737, p. 4-6, the Ninth District Court of Appeals addressed the same issue that Maxim raises in this case, namely, whether the immunity granted to a complying employer

by R.C. 4123.74 extends to attorney fees and costs arising from damages for which the complying employer is immune from liability. The *Best* court found that it did, reasoning as follows:

{¶18} "[In *Kendall,* the Ohio Supreme Court] held that th[e] indemnity agreement [in that case], worded in general terms, did not include an express and specific waiver of the contractor's immunity. Absent such a waiver, the court concluded that the contractor's immunity relieved it from any liability to the property owner under the agreement. [*Kendall*, 20 Ohio St.3d] at 65. By its plain terms, the indemnity agreement in *Kendall* provided that the contractor had a duty to indemnify the property owner for legal fees and costs related to claims arising from performance under the contract. In concluding that the contractor was not liable under the broad scope of the *Kendall* indemnity agreement, we find the Supreme Court implicitly recognized that an indemnity agreement for legal fees and costs resulting from work-related injuries is subject to the immunity granted a complying employer in R.C. 4123.74." *Best* at p. 5.

{¶19} In *Moore v. Dayton Power and Light Co.* (1994), 99 Ohio App.3d 138, 141, the Second District Court of Appeals was confronted with the same parties and the same issue presented in *Best.* However, the *Moore* court found that ESS *was* contractually obligated to reimburse Dayton Power for its legal fees and costs, reasoning as follows:

{¶20} "[W]e part from the Ninth District Court of Appeals in its interpretation of the language of the 'hold harmless clause' contained in the purchase order agreement entered into between ESS and [Dayton Power]. That clause provides as follows:

{¶21} "ESS shall indemnify and save harmless [Dayton Power] from any and all costs and expenses, including but not restricted to attorney's fees and court costs, arising from, caused by or incident or related to injuries or damages to property * * * or persons, * * * including, but not restricted to employees and agents of [ESS] in the performance of their duties or otherwise which may arise or be incident or related in any way to any of the work * * * to be performed or provided hereunder.

{¶22} "As we understand it, the language of the 'hold harmless' provision does not purport to indemnify [Dayton Power] against liability for damages arising out of bodily injury to persons, or damage to property, and the provision is therefore beyond the scope of R.C. 2305.31. Furthermore, the specific reference to legal fees and costs, as contained in the "hold harmless" provision of the purchase agreement, is beyond the scope of the immunity granted to employers under R.C. 4123.74. Likewise, the provision is unrelated to the constitutional immunity afforded to complying employers under the provisions of Section 35, Article II of the Ohio Constitution.

{¶23} "In holding that ESS was not required to indemnify [Dayton Power] for legal fees and costs in the *Best* case, the Ninth District Court of Appeals relied heavily upon *Kendall,* which merely held at paragraph two of the syllabus that "[a]n employer in compliance with the workers' compensation laws of this state does not surrender its statutory and constitutional immunity from suits arising out of employment absent an express and specific waiver of that immunity." However, even the broad brush applied in the *Kendall* case does not cover a separate indemnity agreement which solely relates to costs and expenses.

{¶24} "Here, the separate 'hold harmless' provision does not extend to

indemnification for *damages arising out of injuries* as contemplated by R.C. 2305.31 and 4123.74, but is limited to indemnification for all costs and expenses, including attorney fees, which are an incident of or relate to any such possible damages. Manifestly, the two areas of indemnification are severable and different, as graphically illustrated by the facts of this case, and the Supreme Court of Ohio has held that an agreement to indemnify for legal fees and costs is enforceable. See *Allen v. Std. Oil Co.* (1982), 2 Ohio St.3d 122; *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St.3d 238.

{¶25} "Accordingly, * * * we conclude that the Court of Common Pleas of Montgomery County did not err in granting judgment to [Dayton Power] for the amount of the fees and costs incurred in the defense and prosecution of the action." *Moore*, 99 Ohio App.3d at 141-142.

{¶26} Maxim requests that we follow *Moore* and find that the trial court erred in granting Evers summary judgment on Maxim's claim for indemnification for its attorney fees and court costs in defending against Hehman's action. However, the indemnity provision in this case is clearly distinguishable from the "hold harmless" provision in the parties' contract in *Best* and *Moore*, because the indemnity provision in Maxim and Evers' contract *does* extend to indemnification for damages arising out of injuries as contemplated by R.C. 2305.31 and 4123.74, and is *not* limited to indemnification for all costs and expenses, including attorney fees, which are an incident of or relate to any such possible damages. Cf. *Moore* at 141-142.

{¶27} The indemnity provision in this case is similar to the one at issue in *Kendall,* which provided that U.S. Dismantling had a duty to indemnify American Cyanamid "against any and all claims, * * * causes of action, and any and all related

costs and expenses, of every kind and character (including reasonable attorney fees) suffered by the parties hereto, * * * resulting directly or indirectly" from U.S. Dismantling's performance under the contract. *Kendall*, 20 Ohio St.3d at 63. The *Kendall* court concluded that U.S. Dismantling was entitled to the immunity granted complying employers under R.C. 4123.74, and therefore was not liable to American Cyanamid under the indemnity provision in the parties' contract. Id. at 65.

{¶28} There is nothing in *Kendall* to suggest that the portion of the indemnity provision regarding attorney fees and costs could still be enforced against the complying employer on the basis that such fees and costs do not qualify as "damages" under R.C. 4123.74. The *Kendall* court, at least implicitly, found that the immunity granted to complying employers under R.C. 4123.74 extended to attorney fees and costs, and given the similarity between the indemnity provisions in that case and this one, we conclude that we are obligated to do the same. Cf. *Moore*, 99 Ohio App.3d at 141-142.

{¶29} Lastly, Maxim argues this court should apply the "severability" clause in the last sentence of the parties' contract and sever or excise the term "damages" from the contract's indemnity provision so that Evers would be required to indemnify Maxim only for its attorney fees, expenses and court costs. We decline to do so.

{¶30} Initially, the trial court did not rule on the severability issue, apparently, because Maxim only raised it in a footnote to its memorandum in opposition to Evers' motion for summary judgment. However, even if Maxim had failed to raise the issue altogether, Maxim still could not be deemed to have waived it, since the interpretation of a contract is a matter of law that an appellate court is obligated to review de novo. *Ignazio v. Clear Channel Broadcasting, Inc.,* 113 Ohio St.3d 276, 2007-Ohio-1947,

¶19.

{¶31} The last sentence of Maxim's and Evers' agreement states, "If any provision of this agreement is held to be invalid or illegal by a court of competent jurisdiction, the invalid or illegal term will be deemed excluded from this agreement and will not invalidate the remaining terms of this agreement."

{¶32} "Whether a part of a contract may be severed from the remainder 'depends generally upon the intention of the parties, and this must be ascertained by the ordinary rules of construction.'" *Ignazio* at ¶11, citing *Huntington & Finke Co. v. Lake Erie Lumber & Supply Co*. (1924), 109 Ohio St. 488, syllabus. A court must determine whether the part of the contract sought to be excised "is fundamental to the overall meaning of the agreement, or whether it may be severed so that the remainder of the agreement may be given effect." *Ignazio*.

{¶33} In this case, we find that severing the word "damages" from the indemnification agreement would "alter [its] fundamental nature[,]" id. at ¶16, by transforming the indemnification provision from one that indemnifies against "any and all actions, causes of action, claims, suits, demands, investigations, obligations, judgments, losses, costs, liabilities, damages, fines, penalties and expenses, including attorney's fees," *Kendall* at 63, into one that "is limited to indemnification for all costs and expenses, including attorney fees." *Moore*, 99 Ohio App.3d at 141-142. The term "damages" in the indemnity provision of the parties' contract is also fundamental to the overall meaning of the indemnity agreement because, by using an indemnity provision in their contract similar to the one in *Kendall* rather than the "hold harmless" clause in *Best* and *Moore*, it is clear that the parties intended for attorney fees, costs and expenses to be treated the same as damages, and did *not* intend for

the indemnity provision to relate solely to attorney fees, costs and expenses. Therefore, severing or excising the word "damages" from the parties' indemnity agreement would impermissibly alter the fundamental nature of that agreement. Cf. *Ignazio* at ¶11-17.

{¶34} We conclude that the immunity granted to a complying employer by R.C. 4123.74 extends to attorney fees and costs arising from damages for which the complying employer is immune from liability, and therefore Evers was entitled to immunity from Maxim's indemnification claim for its attorney fees and costs in defending against Hehman's action. Consequently, the trial court did not err in granting Evers summary judgment on Maxim's indemnification claim.

{¶35} Maxim's sole assignment of error is overruled.

{¶36} Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.