[Cite as *Dayton Power & Light Co. v. Enerfab, Inc.*, 2007-Ohio-432.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

THE DAYTON POWER AND LIGHT COMPANY	:	
Plaintiff-Appellant	:	C.A. CASE NO. 21512
v.	:	T.C. NO. 2003 CV 9372
ENERFAB, INC., et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 2nd day of February, 2007.

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WALTERS, J. (By assignment)

{¶ 1} Dayton Power & Light Company ("DP&L") appeals from judgments of the

Montgomery County Court of Common Pleas, overruling DP&L's motion for partial summary judgment and sustaining motions for summary judgment filed by defendants Enerfab, Inc. and Continental Casualty Company ("Continental"). DP&L argues that it should have been covered under Enerfab's liability insurance contract.[1] Because DP&L did not actively participate in Enerfab's work, because the jury in the underlying case found DP&L solely negligent, and because R.C. 2305.31 prohibits indemnity agreements in construction related contracts, we affirm the trial court's judgment.

{¶ 2} The facts giving rise to the dispute among the parties are as follows.

{¶ 3} In 1995, Alan Evans worked as a pipefitter for Enerfab, which had been hired by DP&L to perform maintenance work at a DP&L plant as an independent contractor. The job entailed working with a crew of pipefitters to replace twenty air preheater coils, each of which weighed about 3,200 pounds. The coils were long and narrow, and they were inserted into the building at an angle. Once the coils were inserted, the pipefitters fastened them in a temporary fashion because the gaskets that were required for permanent attachment of the coils had not yet been provided by DP&L, as required by its contract with Enerfab. Evans suffered serious injuries when one of the coils slid out of position and knocked him off of a catwalk. *Evans v. Dayton Power and Light Co.*, Adams App. No. 03CA763, 2004-Ohio-2183.

{¶ 4} Evans sued DP&L in the Adams County Court of Common Pleas, alleging that it was negligent in failing to supply the gaskets in a timely fashion, which

[1]In its brief, DP&L also argues, in a second assignment of error, that Enerfab breached its contract by failing to include DP&L on the insurance policy. At oral argument, the parties indicated that a settlement had been reached between Enerfab and DP&L, and that the second assignment of error was withdrawn.

would have permitted permanent attachment of the coils when they were installed. As a general rule, an owner of premises has no legal duty, and therefore cannot be liable in negligence, to the employees of an independent contractor working on the premises. *Pusey v. Bater*, 94 Ohio St.3d 275, 279, 2002-Ohio-795, 762 N.E.2d 968; *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 438, 628 N.E.2d 46; *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St.103, 113 N.E.2d 629. Exceptions to this rule exist, however, where the owner actively participates in the project or controls a critical variable in the work environment. *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 642-643, 1998-Ohio-341, 693 N.E.2d 233; *Michaels v. Ford Motor Co.*, 72 Ohio St.3d 475, 1995-Ohio-142, 650 N.E.2d 1352; *Hirschback v. Cincinnati Gas & Elec. Co.* (1983), 6 Ohio St.3d 206, 452 N.E.2d 326, syllabus. Thus, the key issue in *Evans* was whether DP&L had been negligent in actively participating or controlling a critical variable in the coil installation project. In rendering its verdict, the jury concluded that DP&L had owed a duty to Evans, even though he was the employee of an independent contractor, because DP&L had controlled a critical variable in the work environment, the availability of the gaskets. Evans obtained a judgment against DP&L in the amount of $806,077.27. This judgment was affirmed, in pertinent part, on appeal. *Evans*, 2004-Ohio-2183, ¶42, 52.

{¶ 5} DP&L subsequently filed this suit against Enerfab in the Montgomery County Court of Common Pleas for breach of contract and indemnification. It also sought a declaratory judgment on the issue of insurance coverage against Continental, Enerfab's insurer, as DP&L was contractually required to have been added as an "additional insured" on Enerfab's liability policies. The trial court granted summary judgment in favor of Enerfab and Continental and denied DP&L's motion for partial summary judgment.

{¶ 6} DP&L filed the instant appeal, setting forth one assignment of error for our review: "The trial court erred in denying DP&L's summary judgment motion against Continental and granting Continental's cross-motion."

{¶ 7} Enerfab was insured by Continental. DP&L's contract with Enerfab required Enerfab to maintain comprehensive general liability insurance coverage with a minimum limit of $1 million and to name DP&L as an additional insured on the policy. In keeping with this contract, Enerfab's contract with Continental included a "Blanket Additional Insured Endorsement," which provided:

{¶ 8} "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under:

{¶ 9} "1. A written contract or agreement[.]"

{¶ 10} ***

{¶ 11} "The insurance provided to the additional insured is limited as follows:

{¶ 12} "1. That person or organization is only an additional insured with respect to liability arising out of:

{¶ 13} "a. Premises you own, rent, lease, or occupy; or

{¶ 14} "b. 'Your work' for that additional insured by or for you."

{¶ 15} "Your work" is not defined in the policy.

{¶ 16} DP&L asserts that the trial court erred in denying its motion for summary judgment against Continental and in granting Continental's motion for summary judgment on the issue of insurance coverage for Evans' injuries. DP&L claims that it was covered because DP&L's liability grew out of Enerfab's operations. Continental responds that the

trial court properly denied coverage because the contract did not cover DP&L's *own* negligence, only DP&L's liability for Enerfab's negligence. Thus, we turn to whether Enerfab's policy covered DP&L under the circumstances presented.

{¶ 17} DP&L contends that our 2002 holding *Danis Bldg. Constr. Co. v. Employers Fire Ins. Co.*, Montgomery App. No. 19264, 2002-Ohio-6374 supports its conclusion that it was covered by Enerfab's insurance contract. We disagree.

{¶ 18} In *Danis*, Danis was the general contractor on a project, and it subcontracted with Mitre Masonry for masonry work. Mitre's contract with Danis required Mitre to name Danis as an additional insured on its comprehensive business and umbrella insurance policies. The primary policy limited Danis's coverage to liability arising out of work performed for Danis by Mitre. Id. at ¶8, 26. DP&L concedes that the additional insured endorsements here and in *Danis* are essentially identical.

{¶ 19} The masonry work that Mitre was hired to perform required the use of a crane to lift mortar pans to the height of Mitre's scaffolding, but Mitre did not have a crane or a crane operator at the site. Danis did have a crane and a crane operator, Dave King. Thus, Mitre used King and Danis's crane to lift mortar pans at the direction of Mitre's employees. King was still employed by Danis. In the course of King's work for Mitre, a Mitre employee suffered serious injuries when he was knocked from the scaffolding by a mortar pan that was being hoisted by the crane. The injured employee sued Danis and King, but not Mitre. Danis impleaded Mitre on an intentional workplace tort theory. Id. at ¶24-25.

{¶ 20} In *Danis*, we discussed the difference between an indemnity clause and an additional insured clause. "A distinction must be drawn between contractual provisions which seek to exempt a party from liability to persons who have been injured or whose

property has been damaged (i.e., an indemnity clause) and contractual provisions *** which in effect simply require one of the parties to the contract to provide insurance for all the parties (i.e., an additional insured clause)." Id. at ¶32 (citations omitted). See, also, *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.* (1997), 121 Ohio App.3d 147, 151, 699 N.E.2d 127. We observed that, under an additional insured clause, "coverage would be available only with respect to liability arising out of the subcontractor's work." In adopting this reasoning, we implicitly found that additional insured provisions in a contract do not violate R.C. 2305.31, which prohibits indemnity agreements on public policy grounds. *Danis,* supra at 32. Turning to the circumstances then before us, we held that Danis and King were entitled to coverage under the additional insured provision in Mitre's insurance contract, because Danis assisted Mitre in performing Mitre's subcontract, at Mitre's request. Id. at ¶31.

{¶ 21} Comparing the facts in *Danis* to those in the case before us, we note that the work performed by Danis and Mitre was inextricably intertwined. It appears that Mitre did not have the means to complete its portion of the project without the assistance of Danis's crane operator and the use of its crane. Importantly, however, the crane was operated at the direction of Mitre's employees. This level of involvement differs significantly from DP&L's involvement with Enerfab's work, which was limited to the provision of parts. Under the terms of the contract between Enerfab and DP&L, "DP&L was to supply all the materials for the coil replacement project and Enerfab was to provide the necessary tools and manpower." *Evans,* supra at ¶81. Indeed, *Evans* expressly held that DP&L's general supervisory role, that of ensuring workplace safety and compliance with the job specifications, was insufficient to establish "active participation" in Enerfab's work. Id. at

¶38. In other words, neither Evans nor DP&L established that DP&L had actively participated in Enerfab's work. Instead, Evans prevailed in his action against DP&L on the theory that DP&L's failure to provide the gaskets, and thus its control over a critical variable in the job, caused his injuries. Therefore, *Danis* is distinguishable on its facts.

{¶ 22} DP&L further contends that the insurance contract provision that provided coverage to an additional insured for liability "arising out of" Enerfab's work affords broad coverage. DP&L asserts that it should be covered by the policy because DP&L's liability "was causally related to Enerfab's failure to secure the coil," and an expansive reading of the contract language "requires a causal relationship, but not one of proximate cause." The problem with DP&L's argument is that Enerfab has never been found to have been negligent. Evans did not even allege that Enerfab had been negligent. Rather, Evans' case focused on whether DP&L had retained control over a critical element of the work process, i.e., the provision of the gaskets required to permanently attach the coils, such that DP&L was liable for the injury. In other words, Evans' theory of the case was that DP&L had incurred a duty of care to the employees of the independent contractor by retaining control over a critical variable in the work environment. See *Sopkovich*, 81 Ohio St.3d 628; *Michaels*, 72 Ohio St.3d 475; *Hirschback*, 6 Ohio St.3d 206. DP&L did not file a third-party action against Enerfab. The jury found in favor of Evans, concluding that DP&L had controlled a critical variable in the workplace that caused the injury. Although DP&L still disputes this finding, it is settled for purposes of determining insurance coverage. Because the jury concluded that DP&L was negligent for its own actions, DP&L's liability did not fall within the additional insured provision of Enerfab's policy. Coverage was properly denied.

{¶ 23} Moreover, in light of the jury's finding that DP&L was negligent, the interpretation of the insurance contract proposed by DP&L would violate R.C. 2305.31. R.C. 2305.31 "prohibits indemnity agreements, in the construction-related contracts described therein, whereby the promisor agrees to indemnify the promisee for damages caused by or resulting from the negligence of the promisee." *Kendall v. U.S. Dismantling Co.* (1985), 20 Ohio St.3d 61, 485 N.E.2d 1047, paragraph one of the syllabus. As discussed above and in *Danis*, an additional insured provision can provide coverage "only with respect to liability arising out of the subcontractor's work." DP&L was found liable, but the subcontractor, Enerfab, was not. To find coverage in such a situation would go beyond the scope of an additional insured provision and approve an indemnity provision. Such an interpretation is prohibited by R.C. 2305.31.

{¶ 24} The assignment of error is overruled.

{¶ 25} The judgment of the trial court is hereby affirmed.

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BROGAN, J. and FAIN, J., concur.

(Hon. Sumner E. Walters, retired from the Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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