[Cite as *D.I.C.E., Inc. v. State Farm Ins. Co.*, 2012-Ohio-1563.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

D.I.C.E., Inc.

Appellant

v.

State Farm Insurance Company

Appellee

Court of Appeals No. L-11-1006

Trial Court No. CI0200405806
CI0200602001

DECISION AND JUDGMENT

Decided: April 6, 2012

* * * * *

Scott E. Spencer, for Appellant.

David L. Lester, for Appellee.

* * * * *

YARBROUGH, J.

I. INTRODUCTION

{¶1} Appellants, Brian and Tara Camper ("The Campers"), appeal the decision of the Lucas County Court of Common Pleas granting summary judgment in favor of appellee, State Farm Insurance Company, and the decision denying appellants' motion for reconsideration. For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶2} On September 13, 2001, Brian Camper sustained serious injuries when his foot was crushed while operating a "high speed packout machine" owned by his employer, MINTEQ, Inc. ("MINTEQ"). The high speed packout machine is a dry product filling station utilizing a fill hopper, a hydraulic lift platform, and a roller conveyor system.

{¶3} D.I.C.E. was incorporated in 1986, and has since been located in the home of its owner and sole employee, Dean Diehl ("Diehl"). In his deposition testimony, Diehl averred that he holds a degree in industrial engineering and that he "[d]esigns[s] and engineer[s] conveying equipment; design[s] and build[s] conveying equipment normally bulk handling conveyors." In 1989, D.I.C.E. sold the roller conveyer system to Quigley Company, Inc. ("Quigley"), now MINTEQ. The record reflects that Diehl did nothing more than locate a roller conveyer system already manufactured and used elsewhere and deliver it to Quigley. Thereafter, in 1990, Diehl was again contacted by Quigley and asked to produce a hydraulic lift system so that Quigley could fill 2000 pound bags using the roller conveyer system. At the time, Quigley was filling 4000 pound bags and needed a way to lift the smaller bags for filling. John Connors, the owner of Quigley, contacted Diehl and gave him a rough sketch of a hydraulic lift system that he envisioned would help fill the smaller bags. A purchase order for the hydraulic lift mechanism was executed by Quigley on March 20, 1990. As indicated in this order, D.I.C.E. was to deliver to Quigley a hydraulic lift mechanism consisting of: (1) A multi-tined fork with

neck that fits between the existing conveyor rolls in the neutral mode; the fork would raise to a maximum height of 24" above roll-top, (2) A four-wheeled cart riding in a vertical set of tracks similar to a fork truck, (3) A self-contained hydraulic power unit with pump, reservoir, valving, and filter, (4) A starter in NEMA-12 enclosure, and (5) The unit would be shop-assembled, clearance-checked, and painted.

{¶4} According to the depositions, Diehl completed drawings of the hydraulic lift then subcontracted the manufacturing of the various components. In June 1990, Diehl delivered the completed hydraulic lift to Quigley to be used in conjunction with the roller conveyor system.

{¶5} On September 13, 2001, Camper was standing on the roller conveyor system adjacent to the hydraulic lift mechanism when the forks of the hydraulic lift platform descended and crushed his feet between the conveyor system and the forks of the hydraulic lift. Camper sustained severe injuries to his feet necessitating a partial amputation of his left foot including all of his toes. Diehl testified that he did not envision employees standing on the roller conveyor system. Photographs of the machine taken following Camper's accident reveal that metal slats were added between the rolls on the conveyor for employees to stand on while attaching bags to the fill hopper located above the hydraulic lift. Testimony from Don Britton, MINTEQ's plant manager at the time of the incident, reveals that prior to the date of Camper's injury, employees were permitted to stand on the rollers adjacent to the forks on the lift.

{¶6} Camper subsequently filed suit against D.I.C.E. on November 14, 2002. That case was dismissed but re-filed on November 9, 2004, under case No. CI04-5806. Camper's claims were asserted pursuant to former R.C. 2307.75,[1] effective July 6, 2001, for a defect in the hydraulic lift mechanism arising out of D.I.C.E.'s alleged failure to design, formulate and supply a guarding mechanism between the roller conveyor system and the forks of the hydraulic lift. The Campers also brought a claim pursuant to R.C. 2307.76 for D.I.C.E.'s alleged failure to provide adequate warnings and instructions. Camper's wife, Tara, also claimed a loss of consortium.

{¶7} State Farm defended D.I.C.E. in that action, but did so under a reservation of rights based upon the "professional services exclusion" in D.I.C.E.'s policy. Thereafter, D.I.C.E. filed a separate complaint for declaratory judgment against State Farm, seeking coverage under its policy for the Campers' claims. This latter case was captioned as case No. CI06-2001. Both cases were eventually consolidated on May 22, 2006.

{¶8} As to the insurance policy at issue, D.I.C.E. purchased a business insurance policy from State Farm. It is undisputed that this policy was in effect at the time of

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[1] Former R.C. 2307.75 provides: "(A) Subject to divisions (D), (E), and (F) of this section, a product is defective in design or formulation if either of the following applies:

"(1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation as determined pursuant to division (B) of this section exceeded the benefits associated with that design or formulation as determined pursuant to division (C) of this section;

"(2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."

Camper's accident. As stated on the declarations page of the policy, the coverage provided to D.I.C.E., under Section II of the policy, included Coverage L, for business liability with a $1,000,000 limit, and Coverage M, for medical payments with a $5,000 limit. Coverage L also lists several business liability exclusions where the insurance does not apply, including the following for "professional services":

> 10. to bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments. This includes but is not limited to:
>
> a. legal, accounting or advertising services;
>
> b. engineering, drafting, surveying, or architectural services, including preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, change orders, designs or specifications;
>
> * * *.

{¶9} Furthermore, under Section II, Limits of Insurance, the policy states:

> 2. The most we will pay for all damages because of bodily injury, property damage, personal injury, advertising injury and medical expenses arising out of any one occurrence is the Coverage L – Business Liability limit shown in the declarations. But the most we will pay for all medical expenses because of bodily injury sustained by one person is the Coverage M – Medical Payments limit shown in the Declarations.

3. The most we will pay for:

a. injury or damage under the products-completed operations hazard arising from all occurrences during the policy period is the Products-Completed Operations (PCO) Aggregate limit shown in the Declarations;

* * *.

{¶10} The declarations page reflects that D.I.C.E. has an aggregate limit of $2,000,000 for products-completed operations ("PCO").

Section II of the policy contains the following definition:

13. products-completed operations hazard:

a. includes all bodily injury and property damage arising out of your product or your work except products that are still in your physical possession or work that has not yet been completed or abandoned. The bodily injury or property damage must occur away from the premises you own or rent unless your business includes the selling, handling or distribution of your product for consumption on premises you own or rent.

{¶11} On November 11, 2006, after both State Farm and D.I.C.E. filed motions for summary judgment, the trial court determined that there was no coverage available to D.I.C.E. under the State Farm policy for the Campers' claims. Accordingly, State Farm's motion for summary judgment on the declaratory judgment was granted and D.I.C.E.'s was denied. In awarding summary judgment to State Farm, the trial court determined

that the professional services exclusion contained in Coverage L excluded the Campers' claims, which were based upon the theory of defective design. In so holding, the trial court determined that there was no separate coverage for damages arising from PCO, and therefore the professional services exclusion applied to any claims arising from the same. Specifically, the trial court stated,

> Reading the State Farm policy in the present case in its entirety, there is no ambiguity with respect to "products-completed operations hazard." "Products-completed operations hazard" is under business liability coverage in Section II of the policy. There is no separate coverage for "products-completed operations hazard." The State Farm policy plainly sets forth that the [professional services] exclusion applies to business liability coverage and "products-completed operations hazard" is under business liability coverage, "products-completed operations hazard" is therefore subject to the exclusion. (Internal citations omitted.)

{¶12} Thereafter, D.I.C.E. appealed, but this court dismissed the appeal on the basis that Campers' claims against D.I.C.E. were still pending and therefore the decision was not final and appealable.

{¶13} On February 13, 2010, a written arbitration award was rendered in the Campers' suit against D.I.C.E. In that decision, D.I.C.E. was found liable for Camper's

injuries pursuant to R.C. 2307.75(A)(1)-(2).[2] Brian Camper was awarded $400,000 for his injury claim, and Tara Camper was awarded $25,000 for her loss of consortium claim. As part of the arbitration agreement, D.I.C.E. assigned all of its rights against State Farm under the State Farm policy to the Campers with respect to the Campers' claims.

{¶14} On September 30, 2010, the Campers and D.I.C.E. submitted a joint application to the trial court for an order to confirm the arbitration award. The application included the settlement agreement between the two parties, a copy of a letter sent to State Farm notifying it of the arbitration, and a copy of a reply letter from State Farm indicating that it declined to participate in the arbitration.

{¶15} Based upon the arbitration award, the Campers filed a motion for reconsideration of the trial court's November 20, 2006 award of summary judgment in favor of State Farm. The basis of the motion was that the Campers' claims were not excluded by the State Farm policy issued to D.I.C.E. because the arbitrator assessed liability against D.I.C.E. based upon Ohio's products liability statute for a defective product and not upon any professional services rendered by D.I.C.E. In their motion, the Campers contended that Quigley purchased a completed product and not a service from D.I.C.E., and therefore the PCO coverage provides coverage for their claims. In response, State Farm argued that the Campers' claims are based upon the defective

[2] D.I.C.E. was found not liable for failure to warn pursuant to R.C. 2307.76.

design of a piece of machinery, which involves engineering principles, which it argues is a professional service as contemplated in the exclusion.

{¶16} On December 9, 2010, the trial court denied the Campers' motion for reconsideration and entered its final judgment and notice of the arbitration award. In denying the Campers' motion for reconsideration, the trial court determined,

> The exclusion makes no mention of the theory of liability [professional negligence or strict liability] that an injured party pursues to recover damages or the theory under which an arbitrator finds liability against a manufacturer. Because the Campers' allegations relate to D.I.C.E.'s defective design of the machine due to the failure to include proper guarding and an emergency stopping mechanism, the claim clearly falls within the professional services exclusion.

{¶17} The trial court concluded that "the professional services exclusion applies notwithstanding the arbitrator's finding that D.I.C.E. was liable under Ohio's products liability statute for a defective product."

{¶18} The Campers, as assignees of D.I.C.E.'s claims against State Farm, now appeal.

B. Assignments of Error

{¶19} The Campers assert the following three assignments of error for our review:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S–APPELLANT'S MOTION FOR RECONSIDERATION OF THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE AND DENYING SUMMARY JUDGMENT TO PLAINTIFF-APPELLEE [sic], BECAUSE THE PROFESSIONAL SERVICES EXCLUSION TO THE SUBJECT PRODUCTS LIABILITY INSURANCE POLICY DOES NOT APPLY TO A STATUTORY PRODUCTS LIABILITY CLAIM THAT IS NOT BASED UPON THE RENDERING OF OR THE FAILURE TO RENDER A PROFESSIONAL SERVICE, BUT, RATHER, IS BASED UPON THE DEFECTIVE CONDITION OF THE COMPLETED PRODUCT.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED IN GRANTING [sic][3] PLAINTIFF'S-APPELLANT'S MOTION FOR RECONSIDERATION OF

[3] Contrary to appellants' assignments of error, we note that appellants' motion for reconsideration was actually denied in the trial court. Nevertheless, in the body of appellants' brief, they state,

> This is an appeal from two (2) opinions and judgment entries of the Lucas County Common Pleas Court. The first, journalized November 22, 2006, (1) denied D.I.C.E., Inc.'s * * * motion for summary judgment against State Farm Insurance Company * * * and (2) granted State Farm's cross-motion for summary judgment against DICE. The second, journalized December 10, 2010, denied DICE's assignees' motion for

THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE AND DENYING SUMMARY JUDGMENT TO PLAINTIFF-APPELLANT, BECAUSE THE PLEADINGS COULD BE CONSTRUED TO ALLEGE AND AN ARBITRATOR FOUND APPELLANT'S PRODUCT TO BE DEFECTIVE IN DESIGN OR FORMULATION PURSUANT TO O.R.C. § 2307.75(A)(1) BECAUSE THE RISKS OF THE PRODUCT OUTWEIGHED ITS BENEFITS, NOT BECAUSE OF A PROFESSIONAL SERVICE THAT APPELLANT RENDERED OR FAILED TO RENDER.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT ERRED IN GRANTING [sic] PLAINTIFF'S–APPELLANT'S MOTION FOR RECONSIDERATION OF THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO DEFEDANT-APPELLEE AND DENYING SUMMARY JUDGMENT TO PLAINTIFF-APPELLANT, BECAUSE THE PLEADINGS COULD BE CONSTRUED TO ALLEGE AND AN

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reconsideration of the trial court's November 22, 2006 opinion and judgment entry.

Thus, despite the mistakes contained in appellants' second and third assignments of error, it is clear that appellants argue that the trial court committed reversible error by granting summary judgment in favor of State Farm.

ARBITRATOR FOUND APPELLANT'S PRODUCT TO BE DEFECTIVE IN DESIGN OR FORMULATION PURSUANT TO O.R.C. § 2307.75(A)(2) BECAUSE IT WAS MORE DANGEROUS THAN AN ORDINARY CONSUMER WOULD EXPECT, NOT BECAUSE OF A PROFESSIONAL SERVICE THAT APPELLANT RENDERED OR FAILED TO RENDER.

II. ANALYSIS

A. Standard of Review

{¶20} Our review of the decision granting summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). A trial court shall grant summary judgment only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co*., 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46 (1978). Here, the trial court ruled that State Farm had no duty to indemnify D.I.C.E. for the Campers' claims under the terms of the policy as a matter of law.

B. State Farm is Entitled to Summary Judgment

{¶21} In their second and third assignments of error, appellants argue that the State Farm policy issued to D.I.C.E. provides coverage for appellants' claims.

Appellants assert that the policy includes coverage for both business liability, Coverage L, and separately for products-completed operations. Because their claims sound in strict tort liability for the defective finished product, appellants argue that their claims are not excluded by the professional services exclusion contained in Coverage L. Thus, we must interpret the comprehensive business liability insurance policy at issue.

{¶22} Identical standards of interpretation will be applied to insurance contracts as will be applied to other written contracts. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992). As a contract, an insurance policy must be construed in its entirety in order to ascertain the intent of the parties. *Burris v. Grange Mut. Cos.*, 46 Ohio St.3d 84, 89, 545 N.E.2d 83 (1989), overruled on other grounds, *Savoie v. Grange Mut. Ins. Co.*, 67 Ohio St.3d 500, 620 N.E.2d 809 (1993). The language in an insurance policy must be given its plain and ordinary meaning, and only where a contract of insurance is ambiguous and susceptible of more than one interpretation must the policy language be liberally construed in favor of the insured or claimant seeking coverage. *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 99, 313 N.E.2d 844 (1974). The general rule of liberal construction of policies in favor of the insured will not be applied so as to provide an unreasonable interpretation of the words of the policy. *Morfoot v. Stake*, 174 Ohio St. 506, 190 N.E.2d 573 (1963), paragraph one of the syllabus. Interpretation of a clear and unambiguous insurance contract is a matter of

law, subject to de novo review. *Nationwide Mut. Fire. Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

{¶23} Furthermore, policy provisions containing exclusions, exceptions, or limitations must be given effect if expressed in plain, specific, or unambiguous terms, and if not inconsistent with other clauses or provisions of the contract. *See Trimble v. Western & Southern Life Ins. Co.*, 83 Ohio App. 102, 106-107, 82 N.E.2d 548 (1st Dist.1948). "[A]n exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded." (Emphasis deleted.) *Hybud Equip. Corp.* at 665.

{¶24} With the foregoing principles in mind, we turn to the language of the State Farm insurance policy issued to D.I.C.E. Both parties agree that but for the professional services exclusion, the Campers' claims would be covered by the State Farm policy. Thus, we must determine whether D.I.C.E.'s actions fall within the professional services exclusion thereby barring coverage.

1. D.I.C.E. performed a professional service as defined by the policy

{¶25} According to Diehl's deposition testimony, he made drawings for the hydraulic lift then subcontracted the manufacturing process before delivering the completed product to Quigley. The policy states that the "professional services" exclusion applies

to bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments. This includes but is not limited to:

a. legal, accounting or advertising services;

b. engineering, drafting, surveying or architectural services, including preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs, or specifications; * * *.

{¶26} From the record, it is clear that Quigley went to Diehl with an idea for filling smaller bags. By his own admission, Diehl designed the hydraulic lift so that Quigley could fill these smaller bags. Diehl then completed drawings so that the hydraulic lift could be fabricated by subcontractors. Thus, Diehl performed professional services as defined by the policy.

2. Professional services exclusion bars the Campers' defective design claims

{¶27} We must now determine whether the "professional services" exclusion operates to exclude coverage for the Campers' claims.

{¶28} The Campers claimed that Brian Camper was injured when the roller conveyor system and the hydraulic lift collapsed. The Campers' claims were in strict liability alleging that the hydraulic lift mechanism was defectively designed as described by R.C. 2307.75(A)(1) and (2), and that Diehl was strictly liable for his failure to warn as

described by R.C. 2307.76. Even though the Campers asserted that D.I.C.E. manufactured the hydraulic lift platform, there was no claim that the hydraulic lift was defectively manufactured.

{¶29} The entire basis for appellants' argument is that the professional services exclusion operates to exclude coverage for professional negligence claims and not claims brought in strict products liability for defective design. In support of this argument, appellants cite *McFarland v. Bruno Machinery Corp.*, 68 Ohio St.3d 305, 309, 626 N.E.2d 659 (1994), in which the Supreme Court of Ohio stated,

> In Ohio, the contrast between negligence and strict liability in products liability cases is distinct. In a products case based on strict liability, the focus is solely on the defective condition of the product and not, as in an action premised on negligence, on what the defendant knew or should have known of the defect which caused the injury. One court, contrasting strict liability with negligence, has correctly emphasized that 'under the evolved doctrine of strict products liability, the scienter that is so vital to the negligence suit need not be shown. The shift so wrought is from fault to defect * * *.'

{¶30} While the Campers' recitation of *McFarland* is accurate, their reliance on this case is misplaced. The Campers argue that a claim brought under the theory of strict products liability will be afforded coverage by the policy while a claim brought under the

theory of professional negligence will be excluded. However, the State Farm policy makes no distinction between claims brought under the theory of either professional negligence or strict liability. Rather, it operates to exclude all claims for "bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments[.]" Therefore, it is possible for D.I.C.E. to be strictly liable for the defective design of its machine, but not have insurance coverage under the policy for the claim because the act of designing the machine is considered a professional service and is plainly excluded by the policy.

{¶31} In a further attempt to illustrate their argument, the Campers strenuously argue that the only case on point is *Leverence v. United States Fid. & Guar.*, 158 Wis.2d 64, 462 N.W.2d 218 (Wis.App.1990), review denied, 464 N.W.2d 423 (1990), overruled on other grounds, *Wenke v. Gehl Co.*, 274 Wis.2d 220, 682 N.W.2d 405 (2004). The *Leverence* court concluded that a professional service exclusion in a commercial general liability insurance policy was not applicable to a products liability claim brought under the theory of defective design against a manufacturer of prefabricated homes. In interpreting the exclusion, the *Leverence* court concluded that "the professional service exclusion does not bar the occupants' claims because the claims arise out of the manufacture of an allegedly defective product and not malpractice in rendering of a professional service." *Leverence* at 83.

{¶32} The *Leverence* court determined that the occupants sought the final product, and not merely the design of a home, and that the proper focus of the coverage should be on the "end-product," and not each step in the process that leads to the end-product. *Id.* at 84. The reasoning behind the court's interpretation was that,

> Most, if not all, human activity involves some intellectual component. However, to break down [the manufacturer's] activities into separate components, and then bar claims arising out of its manufactured product because intellectual skills were employed would go beyond the normal rules of contract interpretation. *Id.*

{¶33} The *Leverence* court was careful, however, to distinguish the case from others where the primary objective of the insured's activity does not result in a product or a commodity. *Id.*, 158 Wis.2d at 84, 462 N.W.2d 218. The *Leverence* court determined that "'professional services' has a broad meaning, as evidenced in the cited cases, to accept a definition that includes the manufacture of a prefabricated home obliterates its meaning entirely." *Id.* at 85. However, the *Leverence* court also noted that "our conclusion is not that nothing constitutes a professional service if it results at some point in the production of a commodity. For example, an architectural design may ultimately result in the production of a building, but when one employs an architect, one is purchasing a professional service, not a building." *Id.* The *Leverence* court concluded,

> The undisputed facts established that the claims here arose primarily out of the constructed homes, and the occupants' use of the homes. Although the homes' design allegedly contributed to the claimed injuries, the primary objective of [the manufacturer's] operations was the production of a prefabricated home, not a design of a home. *Id.*

{¶34} State Farm points out that *Leverence* involved a claim against a manufacturer and seller of a standard model prefabricated home, not a custom-designed and engineered piece of industrial machinery, as in the instant appeal. State Farm further notes that the *Leverence* court deemed the case to involve the sale of a standard commodity and the manufacture of an allegedly defective product.

{¶35} We agree that the facts set forth in *Leverence* are dissimilar to those now before this court. First, Diehl, the owner and sole employee of D.I.C.E., is an engineer. Deposition testimony reveals that Quigley specifically employed Diehl to fabricate a custom piece of machinery to accommodate filling smaller bag sizes. Diehl admittedly made drawings, and then subcontracted the fabrication of the hydraulic lift. Thus, the custom designed hydraulic lift is dissimilar from a prefabricated home, which is a commodity. In *Leverence*, the customers did not specifically hire an architect for the design of their homes. The *Leverence* court noted that if those customers had, then the architect would have performed a "professional service."

{¶36} Furthermore, the *Leverence* court looked at the "primary objective" of the insured's activity. There, the primary objective of the home manufacturer was to create a product. If this were the case, then the primary objective of Diehl's work would have been for the completed hydraulic lift as evidenced by the purchase order. There was no indication that Quigley desired drawings or designs for a hydraulic lift, rather it desired a finished product. Nevertheless, our analysis of Ohio law on this issue leads us to the conclusion that in interpreting a policy exclusion, the focus should be on the actual cause of the defect which caused the occurrence for which the claim is based.

{¶37} The Eighth District has previously analyzed this issue. In *Havens & Emerson, Inc. v. Aetna Cas. & Sur. Co.*, 8th Dist. No. 65507, 1994 WL 189147, *1 (May 12, 1994), an engineering firm was hired to supervise a construction project at the Waste Treatment Plant in the city of Elyria. A problem arose with the lime feeder, which was supplied by a subcontractor, and an employee of the city was injured when he was readying the lime feeder equipment for repair. *Id*. The injured employee sued the engineering firm, the general contractor, and the subcontractor. The *Havens* court, in analyzing the engineering firm's coverage under its insurance policy for the worker's claim, determined that

> [T]he proper focal point is the nature of the services rendered by the [engineering firm] to the City of Elyria. The [engineering firm] specifies in its complaint both that it is an environmental engineering consultant, and

> provides design and other services relevant to pollution abatement projects; and that it does not engage in the manufacturing or production of an actual product. The [engineering firm] does not contend that any of the services provided to the City of Elyria were other than professional in nature. *Id.* at 4.

{¶38} The *Havens* court found that the injured worker's claim fell squarely within the professional services exclusion, and therefore, Aetna, the engineering firm's insurer, was not obligated to indemnify the firm for the worker's claim. However, this case is not entirely persuasive because the *Havens* court also noted that the complaint failed to allege that the insured engaged in the manufacturing or production of an actual product. Here, the Campers did allege that D.I.C.E. manufactured the hydraulic lift.

{¶39} Therefore, our analysis continues by examining *Erie Ins. Exchange v. Colony Development Corp.*, 136 Ohio App.3d 406, 736 N.E.2d 941 (10th Dist.1999), in which the Tenth District interpreted a professional services exclusion nearly identical to the one at issue. The *Erie Ins*. court stated,

> Again, while this exclusion may apply to several of the Association's allegations (*i.e.*, those related to Colony's alleged negligent design of the condominium complex), the exclusion does not apply to those damages resulting from Colony's construction activities, including those performed on its behalf by subcontractors. Construction activities are not professional services. Therefore, the 'professional services exclusion,' alone or in

connection with the 'work performed exclusion,' does not exclude all of the Association's claims from coverage under the policy. (Citations omitted).

Id. at 417.

{¶40} While the *Havens* court looked to the nature of services rendered, the *Erie Ins.* court looked to the actual activity giving rise to the claims in order to determine liability.

{¶41} Likewise, in *Gen. Acc. Ins. Co. v. Insurance Co. of N. Am.*, 69 Ohio App.3d 52, 590 N.E.2d 33 (8th Dist.1990), the Eighth District analyzed a professional services exclusion similar to the one at issue in a strict products liability case based upon the theory of defective design. In *Gen. Acc. Ins*., an architect's and engineer's professional liability insurer brought an action against a comprehensive general liability insurer for a declaratory judgment and compensatory damages alleging that the comprehensive general liability insurer breached its duty to defend. The claim arose over a defective coke oven battery. Specifically, the complaint from the purchaser of the coke oven battery stated,

25. McKee-Otto's [sic] has failed to engineer, design, fabricate, and construct Sparrow's Point Battery 'A' in a substantial and workmanlike manner, and the performance of its work and the materials supplied under the contract are not 'first class throughout' but are defective and deficient and are not in accordance with the contract, plans, and specifications. * * *

* * *

43. * * * McKee-Otto's failure to engineer, design, and/or construct for Bethlehem a coke oven battery free from such defects and deficiencies has rendered it unreasonably dangerous for its intended use * * *. *Id*. at 55.

{¶42} McKee-Otto and the other named plaintiffs were insured under a comprehensive general liability policy issued by the Insurance Company of North America ("INA"), which included "Endorsement 2," a professional services exclusion almost identical to the one in the instant State Farm policy.

{¶43} The *Gen. Acc. Ins*. court affirmed the trial court's conclusion that the professional services exclusion applied to any claim for the design of a coke oven battery, and therefore, INA had no duty to defend. The court, in also determining that an exclusion barred coverage for the insured's actual product, concluded, "In addition, Endorsement 2 clearly bars coverage as it excludes coverage for property damages arising out of the rendering of professional services including plans, designs and specifications. Thus, we hold that the trial court properly concluded that INA had no duty to defend." *Id.*, 69 Ohio App.3d at 60, 590 N.E.2d 33. The court concluded that INA had no duty to defend despite the fact that Bethlehem claimed that McKee-Otto acted negligently and incurred strict liability in designing the coke oven battery.

{¶44} We also find the case sub judice factually similar to *Transportes Ferreos De Venezuela II CA v. NKK Corp*., 239 F.3d 555 (3d Cir.2001). In that case, litigation arose

after the collapse of a boom on an ore tanker named the Rio Caroni. The cause of the accident was due to the failure of a rod-eye in the boom cylinder.

{¶45} In 1992, TVF, the owner of the Rio Caroni, entered into a contract with the NKK Corporation ("NKK") to convert the Rio Caroni from a bulk carrier to a self-unloading shuttle vessel. As part of the conversion, NKK was required to build a materials handling system consisting of a series of conveyor belts and a boom that would be placed on the Rio Caroni to facilitate the movement of iron ore onto the vessel and its discharge from the vessel. NKK subcontracted the design and furnishing of the materials handling system to EDC, Inc. ("EDC"), which was to provide NKK with engineering expertise, drawings, and parts. NKK was to assemble the provided parts to complete the conversion of the Rio Caroni. The boom was designed and manufactured by the same supplier, EDC. However, because EDC was unable to build the boom cylinder, it subcontracted the manufacture of this part to the Sheffer Corporation ("Sheffer"). The purchase order indicated that EDC provided at least some special parameters to which the boom cylinder was to comply. The resultant boom cylinder was a modified Sheffer cylinder, custom built to EDC's specifications. After the conversion of the Rio Caroni was completed, the boom eventually collapsed while the vessel was unloading iron ore onto another vessel. It was determined that the cause of the collapse was due to a sudden fracture of the steel rod-eye, a component of the boom cylinder that had been built for

EDC by Sheffer. An investigator gave ten possible reasons for the rod-eye failure, including possible design and manufacturing defects. *Id*. at 558.

{¶46} TVF, the owner of the vessel, filed suit against NKK, EDC, and Sheffer. Through litigation, it was determined that EDC was covered by a comprehensive general liability and business liability policy through the Hartford Fire Insurance Company ("Hartford"), which provided a $2 million aggregate limit for business liability claims. EDC brought a third party complaint against Hartford, which eventually agreed to defend EDC under a reservation of rights as to coverage of the claim. Nevertheless, EDC settled its claim and assigned its rights against Hartford to TFV. Summary judgment was thereafter awarded to Hartford. *Id*. at 559.

{¶47} On appeal, the Third Circuit analyzed whether coverage existed under the Hartford policy for TVF's claims, as an assignee for EDC. *NKK Corp*., 239 F.3d at 563. The Hartford policy contained a "professional services" exclusion identical to the exclusion in the instant State Farm policy. The *TVF* court determined that the professional services exclusion precluded coverage only if the damage or occurrence was caused by faulty design, as opposed to faulty manufacture. *Id*. at 564. In so deciding this, the court found that the policy provided coverage only if the accident or occurrence was not attributable to a defect in EDC's or Sheffer's design of the rod-eye. *Id*. Because the record was incomplete in regards to the cause of the actual defect, the Third Circuit

remanded the case for the trial court to determine the cause of the rod-eye's failure. *Id*. at 565.

{¶48} Like Ohio courts, the *TVF* court looked at the cause of the defect which caused the occurrence for which the plaintiff's claims were based. TVF sought damages for property damage caused by the collapsed boom. The *TVF* court determined if the actual cause of the defective boom was from Sheffer's defective design, the professional services exclusion would operate to bar coverage. On the other hand, if the rod-eye defect was due to defective manufacturing, the professional services exclusion would not bar coverage.

{¶49} At the time of Camper's accident, a plaintiff could bring a products liability claim under three separate theories: (1) defective manufacture pursuant to R.C. 2307.74, (2) defective design pursuant to former R.C. 2307.75, and (3) failure to warn pursuant to R.C. 2307.76. The Campers only brought forth a claim under the two latter theories.

{¶50} Here, unlike the case in *TVF*, the cause of the hydraulic lift platform's defect has already been determined. Pursuant to the binding arbitration agreement, D.I.C.E. was found liable for the defective design of the hydraulic lift machine pursuant to R.C. 2307.74(A)(1) and (2). Therefore, because the professional services exclusion operates to exclude claims for "bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments," State Farm has no obligation to indemnify D.I.C.E. for the Campers' defective design claims.

{¶51} Accordingly, we find the Campers' second and third assignments of error not well-taken.

C. Motion to Reconsider Properly Denied

{¶52} Appellants' first assignment of error is that "[t]he trial court erred in denying plaintiff's-appellant's motion for reconsideration of the trial court's order granting summary judgment to defendant-appellee * * *." Appellants do not set forth any additional arguments as to why the trial court's denial of their motion for reconsideration was reversible error.

{¶53} On September 30, 2010, the Campers, as assignees of the claim of D.I.C.E., filed a motion for reconsideration of the trial court's award of summary judgment to State Farm. A trial court may reconsider any decision rendered in a case if no final appealable order has been entered. Civ.R. 54(B). Because the trial court had not entered a final judgment recognizing the arbitrator's award, the trial court's decision granting summary judgment to State Farm was not yet final and appealable. Therefore, the trial court was well within its discretion to reconsider its decision.

{¶54} In their motion, the Campers argued that because the arbitrator found D.I.C.E. liable under Ohio's product liability statute for a defective product, the professional services exclusion does not apply.

{¶55} In regard to the Campers' motion for reconsideration of the grant of summary judgment, we apply a de novo standard of review. *Dunn v. N. Star Resources,*

Inc., 8th Dist. No. 79455, 2002-Ohio-4570, at ¶ 10. Thus, we "afford no deference to the trial court's decision and independently review the record in the light most favorable to the non-movant to determine whether summary judgment is appropriate." *Id. See also Thayer v. Diver*, 6th Dist. No. L-07-1415, 2009-Ohio-2053, ¶ 26. In light of our analysis above, we find that the trial court did not err when it denied appellants' motion for reconsideration.

{¶56} Accordingly, we find the Campers' first assignment of error not well-taken.

III. Conclusion

{¶57} Wherefore, we find that substantial justice was done. The decisions of the trial court are affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

D.I.C.E., Inc.
v. State Farm Insurance Company
L-11-1006

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE