

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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GULF INTERSTATE FIELD	:	
SERVICES, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 98-651
	:	
HENKELS & MCCOY, INC.,	:	
	:	
Defendant.	:	

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**MEMORANDUM**

ROBERT F. KELLY, J.

APRIL 17, 1998

This is a diversity action in which the Plaintiff seeks a declaratory judgment requiring the Defendant to defend and indemnify the Plaintiff in a personal injury suit. Presently before this Court is the Defendant's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. For the reasons that follow, the Defendant's motion will be granted.

**Background**

This case arose out of a personal injury case brought in Montgomery County, Pennsylvania. During August of 1994, the Plaintiff and Defendant were involved with a gas pipeline project. Both parties were subcontractors to Texas Eastern Transmission Corporation ("Texas Eastern"). On August 25, Andrew Allen, an employee of the Defendant, was injured at the project.

Allen subsequently filed a personal injury lawsuit

against Texas Eastern and the Plaintiff. The Plaintiff filed this action, claiming that an indemnification clause in the contract between the Defendant and Texas Eastern requires the Defendant now to defend and indemnify the Plaintiff for the injuries sustained by Allen.

### **Standard**

A motion for judgment on the pleadings is subject to the same standard as a Rule 12(b)(6) motion to dismiss. Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993). Therefore, this Court will accept as true all well-pleaded allegations in the complaint and draw all inferences in favor of the non-moving party. Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n, 90 F.3d 797, 799-800 (3d Cir. 1996). Judgment will not be granted unless the movant clearly establishes that there is no material issue of fact to be resolved and that he is entitled to judgment as a matter of law. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 290 (3d Cir. 1988).

### **Discussion**

The contract between Defendant and Texas Eastern contains a section titled "Indemnification," which provides in part:

Contractor [Defendant] agrees to protect, indemnify and save Indemnified Parties harmless from and against all expenses, costs, attorney fees, court costs, losses, damages, and from claims, demands and causes of action

of every kind and character, including those arising from any injury of or death to persons, damage to or destruction of property, contamination of the environment or injury to natural resources, whether contractual, in tort, or a matter of strict liability imposed by statute, regulations or ordinances, arising in favor of Contractor, its employees, agents or invitees, Company [Texas Eastern], its employees, agents or invitees, or third parties, on account of, incident to, in connection with, or arising out of the Work.

(Def.'s Mot. for J. on the Pleadings Ex. A.) The agreement defines "Indemnified Parties" as Texas Eastern, "its directors, officers, employees, agents, representatives, insurers, contractors (excluding [Defendant]), subcontractors (excluding [Defendant]), and parent, subsidiary and affiliate companies." (Id.) The Plaintiff contends that, based upon these provisions, the Defendant agreed to defend and indemnify the Plaintiff for a claim such as the one brought by Allen. The Defendant argues that provisions such as this are insufficient to waive its immunity from suits by its own employees under the Pennsylvania Workmen's Compensation Act. See 77 P.S. § 481.

The Pennsylvania Workmen's Compensation Act provides:

In the event injury or death to an employe is caused by a third party, then such employe . . . may bring [his] action at law against such third party, but the employer, his insurance carrier, their servants and agents, employes, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.

77 P.S. § 481(b). Under this section, a third party may not seek contribution or indemnity from an injured party's employer absent an express provision for indemnity in a written contract. Bester v. Essex Crane Rental Corp., 619 A.2d 304, 306-7 (Pa. Super. 1993), appeal denied, 651 A.2d 530 (Pa. 1994).

The Pennsylvania Supreme Court has not yet examined the degree of specificity required in an indemnification agreement in order for an employer to waive immunity under 77 P.S. § 481(b). Decisions of the Pennsylvania Superior Court, though not binding on this Court, are given significant weight in determining how the supreme court might rule. Wisniewski v. John-Mansville Corp., 759 F.2d 271, 274 (3d Cir. 1985); Groff v. Continental Ins. Co., 741 F. Supp. 541, 546 (E.D. Pa. 1990).

The Pennsylvania Superior Court has held that for an employer to waive Workmen's Compensation immunity, "[t]he parties must specifically utilize language which indicates that the employer/alleged indemnitor intends to indemnify the third party against claims by employees of the alleged indemnitor; this must clearly appear from the terms of the agreement." Snare v. Ebensburg Power Co., 637 A.2d 296, 299 (Pa. Super. 1993), appeal denied, 646 A.2d 1181 (Pa. 1994). While the employer need not expressly waive Workmen's Compensation immunity, the intent to indemnify against claims by employees of the alleged indemnitor must clearly appear from the terms of the agreement. Bester, 619

A.2d at 307.<sup>1</sup> General indemnity language is insufficient. Id.

In Snare, an employee of a subcontractor brought suit against the general contractor and the project owner for injuries he sustained while working on the project. The general contractor filed a third party complaint against the subcontractor seeking indemnification based on provisions in the subcontract. Snare, 637 A.2d at 297. The relevant provision provided that the subcontractor "Agrees to indemnify and hold harmless" the project owner and general contractor "from and against any and all claims, demands, suits, actions, losses, liens, damages, or expenses and attorneys' fees, however caused, resulting from, arising out of or in any way connected with the Contract." Id. at 299. The Superior Court found this language insufficient to waive the subcontractor's protection under the Workmen's Compensation Act. Id.

The language at issue here is general indemnity language. It does not specifically state that the Defendant would indemnify against injury claims by its own employees. The language in this contract is similar to the language used in Snare that was found to be insufficient to waive Workmen's

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<sup>1</sup>In Bester, the superior court, en banc, explicitly disagreed with the earlier analysis of Szymanski-Gallagher v. Chestnut Realty, 597 A.2d 1225 (Pa. Super. 1991), in which a panel held that an agreement need not specifically state that the indemnification applies to claims brought by employees. Bester, 619 A.2d at 308.

Compensation immunity. While the contract provides that the Defendant will defend and indemnify against "claims, demands and causes of action of every kind and character," this broad language does not have the degree of specificity required for an employer to waive its immunity under 77 P.S. § 481(b).<sup>2</sup>

Based upon the decisions of the courts of Pennsylvania, the indemnity clause at issue here does not expressly provide for claims by injured employees of the Defendant. Therefore, the Defendant did not waive its protection under Pennsylvania's Workmen's Compensation Act and is immune from liability. The Defendant cannot be required to defend and indemnify the Plaintiff in the underlying personal injury action.

An appropriate Order follows.

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<sup>2</sup>For examples of language that courts have held to be sufficient to waive immunity under 77 P.S. § 481(b), see Kiewit Eastern Co. v. L & R Constr. Co., 44 F.3d 1194, 1198-99 (3d Cir. 1995) and Hackman v. Moyer Packing, 621 A.2d 166, 168 (Pa. Super. 1993).

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ORDER

AND NOW, this 17th day of April, 1998, upon consideration of Defendant's Motion for Judgment on the Pleadings, and all responses thereto, it is hereby ORDERED that:

1. Defendant's Motion is GRANTED;
2. the Clerk of Court is directed to list this case as CLOSED.

BY THE COURT:

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Robert F. Kelly, J.