

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

DARNELL WATKINS : CIVIL ACTION
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 v. :
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 KMART CORPORATION :
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 KMART CORPORATION :
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 v. :
 :
 DIGBY TRUCK LINE, INC. : NO. 96-4566

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL JUDGMENT**

HUTTON, J.

June 26, 1998

This litigation began when Darnell Watkins, a former employee of Digby Truck Line, Inc. ("Digby"), sued Kmart Corporation ("Kmart") for personal injuries he allegedly suffered at a Kmart loading dock in the scope of his employment with Digby. After Digby refused to defend and indemnify Kmart pursuant to the shipping contract between them, Kmart impleaded Digby as a Third-Party Defendant. Watkins bowed out, however, when Kmart and Digby began to develop evidence that his claim may be fraudulent.

After providing the impetus for over thirty thousand dollars in legal expenses, Watkins failed to appear at the March 7, 1997 arbitration hearing in this matter, and the arbitration panel entered judgment against him. The dispute thus reduced to whether the costs of Watkins' litigation--now \$32,760.50--should fall on Kmart or Digby. The arbitration panel found Digby liable to indemnify Kmart under the terms of their contract, but awarded Kmart nothing because it failed to prove its expenses. Both

parties then sought a trial de novo, and the Court held a bench trial. In accordance with Federal Rule of Civil Procedure 52(a), the Court now enters the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. The Transportation Agreement

1. On August 10, 1992 the parties entered into a Transportation Agreement that set out the terms under which Digby would deliver freight for Kmart. The Agreement was still in effect on June 27, 1994, the date of Watkins' alleged accident.

2. Paragraph 10, section (A), of the Transportation Agreement provides:

Carrier [Digby] hereby agrees to reimburse, indemnify, defend and hold Shipper [Kmart] harmless from any loss (excluding lost profit), damage or expense, including reasonable attorneys fees, which shipper may suffer, sustain or incur as a result of any violation or breach hereof or default hereunder by Carrier, or as a result of any injury or death to persons or damages to property in the performance by Carrier hereunder, or in the performance of any other carrier as a result of Carrier's brokering and or trip leasing any good of Shipper.

Third-Party Plaintiff's Exhibit 1 ¶ 10(A).

3. Paragraph 15 of the Agreement provides:

THIS AGREEMENT SHALL BE DEEMED TO HAVE BEEN EXECUTED AND DELIVERED IN TROY, MICHIGAN AND SHALL BE CONSTRUED, INTERPRETED AND ENFORCED UNDER AND IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF MICHIGAN. CARRIER [DIGBY] AGREES TO EXERCISE ANY RIGHT OR REMEDY IN CONNECTION WITH THIS AGREEMENT EXCLUSIVELY IN, AND HEREBY SUBMITS TO THE JURISDICTION OF, THE STATE OF MICHIGAN COURTS OF OAKLAND COUNTY, MICHIGAN OR THE UNITED STATES DISTRICT COURT IN DETROIT, MICHIGAN.

Third-Party Plaintiff's Exhibit 1 ¶ 15.

4. The Agreement identifies Kmart as a Michigan Corporation with its principal place of business in Troy, Michigan, and Digby as a Tennessee Corporation with its principal place of business in Lavergne, Tennessee.

5. The Agreement was signed, at least in part, in Oakland County, Michigan and was to be performed throughout the United States.

B. The Underlying Litigation

6. As noted before, Watkins, a citizen of Ohio, sued Kmart for personal injuries he allegedly incurred in a slip and fall incident on Kmart property while under the employ of Digby. Watkins claimed medical specials, lost wages and loss of future earnings in excess of \$582,190.80.

7. Both Kmart and Digby suspected that Watkins' claims were fraudulent, and Kmart instructed its counsel to defend the matter vigorously. But neither Kmart nor Digby actually charged Watkins with fraud, and it has never actually been established that Watkins' claims were fraudulent. There is no evidence in the record that any of Kmart's fees, costs or expenses were spent pursuing an action against Watkins for fraud.

8. Pursuant to ¶ 10(A) of the Transportation Agreement, Kmart tendered its defense to Digby and its insurance carrier on several occasions, as far back as August 13, 1996, and Digby refused to undertake Kmart's defense.

C. Kmart's Litigation Expenses

9. The parties have stipulated that the billing records Kmart submitted to evidence its costs, expenses and attorneys' fees are authentic.

10. These materials indicate that Kmart's attorneys' fees, expenses and costs from the beginning of this action through the filing of proposed findings of facts and conclusions of law amount to \$32,760.50.

11. To demonstrate that these fees and costs were reasonable, Kmart presented Peter Turro of IHDS, a claim administration service hired by Kmart for a per-file fee to evaluate and negotiate liability claims against Kmart.

12. As the claims administrator, Turro was personally involved in overseeing and approving Kmart's legal expenses in this matter. Turro testified that under the guidelines established by Kmart and IHDS, Kmart would routinely pay this amount of expenses in defending similar litigation, and that Kmart's expenses in defending this matter were reasonable.

13. Kmart seeks hourly fees for its attorneys in the amount of: \$120.00 per hour for I. Steven Levy, a partner at the law firm of White and Williams; \$90.00 per hour for Dylan J. Walker, an associate at the law firm of White and Williams; and \$45.00 per hour for James Mulcahy, a paralegal at the law firm of White and Williams. Digby presented no evidence that these billing rates are unreasonable.

14. Kmart offered into evidence detailed bills of White and Williams' legal work specific enough to allow this Court to

determine that the hours are reasonable for the work performed. Digby did not challenge these bills, and presented no evidence that they were inauthentic, inaccurate, or excessive in any way. Instead, Digby relied on its general argument that it is not liable to indemnify Kmart under the terms of the Transportation Agreement.

II. CONCLUSIONS OF LAW

A. Conflicts of Law Standard

15. Although the amount now in controversy is less than \$75,000, the Court has diversity jurisdiction based on Watkins' original claim against Kmart for over \$500,000.

16. When jurisdiction is based on diversity of citizenship, the district court generally applies the conflict of law rules of the state in which it sits. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

B. Choice of Law Analysis

17. Pennsylvania courts have traditionally held that a choice of law provision in a contract will be upheld as long as the transaction bears a "reasonable relationship to the state whose law is governing." Cottman Transmission Systems, Inc. v. Melody, 869 F.Supp. 1180, 1184 (E.D.Pa. 1994). See Novus Franchising Inc. v. Taylor, 795 F.Supp. 122, 126 (M.D.Pa.1992) (citing Churchill Corp. v. Third Century, Inc., 578 A.2d 532, 537 (1990), app. denied, 592 A.2d 1296 (1991)).

18. Under Pennsylvania law the parties' choice of law will govern unless: (a) the chosen state has no substantial

relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue, and which would be the state of the applicable law in the absence of an effective choice of law by the parties. See Cottman, 869 F.Supp. at 1184 (citing Restatement (Second) of Torts § 187(2)).

19. Pennsylvania courts will honor contractual choice of law provisions where the parties have sufficient contacts with the chosen state. See id. at 1184; Jaskey Fin. and Leasing v. Display Data Corp., 564 F.Supp. 160 (E.D.Pa. 1983).

20. The parties' choice of Michigan law to govern the Transportation Agreement is reasonable. The Agreement was signed, at least in part, in Michigan, and one of the parties to the contract--Kmart--is a Michigan Corporation with its principal place of business in Michigan.

21. The evidence of record does not indicate that either Ohio or Pennsylvania, the states whose law Digby suggests should apply, has an equal or greater number of significant contacts with the contract at issue, or a "materially greater interest" in the outcome of the litigation.

22. Since neither Ohio nor Pennsylvania has a "materially greater interest" in the litigation than Michigan, the Court need not conduct an analysis of whether the contract's choice of law provision contravenes the public policy of a state with

equal or greater interest in having its law applied. See Cottman, 869 F. Supp. at 1184.

23. Therefore, the choice of law provision in the Transportation Agreement is valid and enforceable and the present dispute is governed by Michigan law.

C. Application of Michigan Law

24. Under Michigan law, even though the Workmen's Compensation Act precludes contribution of an employer for injuries suffered by its employee during the course and scope of his employment, indemnification is permissible under either a properly drawn contractual agreement or at common law. See McLough Steel Corp. v. A.E. Anderson Constr. Co., 210 N.W.2d 448, 451 (1973) (citing Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., 350 US 124 (1956)).

25. Michigan Courts have held that where a clear expression of an intent to indemnify is contained in a written agreement, an employer may be joined as a third-party defendant on an indemnity theory without disturbing the exclusivity clause of the Workers' Disability Compensation Act. See Giguere v. Detroit Edison Co., 319 N.W. 2d 334, 337 (1982).

26. The Michigan Courts have consistently held that clear indemnity language is a valid waiver of an employer's immunity under the Workmen's Compensation Act. See id. at 336; McClough, 210 N.W.2d at 448.

27. Digby concedes that if Michigan law applies to this case, the indemnity language in the subject contract would act to waive Digby's immunity.

28. Paragraph 10(A) of the Transportation agreement clearly states that Digby will indemnify Kmart for any loss or expense, including reasonable attorneys fees, that Kmart incurs "as a result of any injury or death to persons or damages to property in the performance by [Digby]." The Court finds this language sufficiently clear to support an indemnity claim against Digby despite the effect of Michigan's Disability Compensation Act, or any other workers compensation law.

D. Scope of the Indemnity Clause

29. Digby argues that even if it has a general duty under the Transportation Agreement to defend and indemnify Kmart, the present case does not fall within the terms of the Agreement because it is a fraudulent claim, and did not in fact involve any "personal injuries."

30. This reasoning is rejected for two reasons. First, although the parties have speculated that Watkins' claims were fraudulent, fraud was never proven. Second, it is clear from the Transportation Agreement that the parties meant for Digby to defend Kmart against claims of personal injury. It is irrelevant that those claims are eventually retracted, or even dismissed.

31. Accordingly, the Court rejects Digby's contention that Watkins' claim was fraudulent and, therefore, outside the

scope of the indemnification clause in the Transportation Agreement.

E. Kmart's Attorneys' Fees, Expenses and Costs

32. The Court finds that pursuant to the indemnification clause in the Transportation Agreement, Kmart is entitled to be reimbursed for all reasonable attorneys' fees, expenses and costs associated with defending itself against the allegations made by Watkins, as well as the attorneys' fees, costs and expenses incurred prosecuting its case against Digby.

33. A party seeking compensation for attorneys fees and costs must (1) demonstrate the reasonable market rate for the type and complexity of the legal services rendered, see Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996) (explaining lodestar method of fee calculation), and (2) document the hours for which payment is sought "with sufficient specificity." Id. at 1037.

34. Records of legal work need only be specific enough to show whether the hours claimed are reasonable for the work performed. See id.

35. Detailed billing summaries of time spent by each attorney and paralegal rise to the level of specificity required for the Court to determine reasonableness. See Keenan v. City of Philadelphia, 983 F.2d 459, 473 (3d Cir. 1992).

36. Turro testified that he had reviewed the attorneys' fees, costs and expenses submitted by White and Williams and was

satisfied that Kmart would pay them in the ordinary course of its business.

37. After itself reviewing the computerized billing statements submitted by White and Williams, the Court finds them sufficiently specific to support a finding that the hours claimed are reasonable for the work performed. Furthermore, the Court finds that the costs and fees claimed are reasonable.

38. Once the party seeking an award of fees and costs has carried its burden, the opposing party must respond with appropriate record evidence. See Washington, 89 F.3d at 1036.

39. Digby attempted to present Gabriel Cieri of a firm called Legalgard as an expert on legal fees.

40. Federal Rule of Evidence 702 requires that an expert witness must possess scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. See Fed. R. Evid. 702.

41. After an expert witness colloquy, the Court found that based on his educational background and lack of any published documentation in the field of attorneys fees, and the fact that he had not been recognized as an expert in any court of record, Mr. Cieri was not qualified to opine as an expert under Federal Rule of Evidence 702.

42. There is no testimony or evidence in the record that Mr. Cieri personally reviewed any of Kmart's attorneys' bills or litigation costs.

43. There is no testimony or evidence in the record that Mr. Cieri had any knowledge of Kmart's billing rates and guidelines

for litigation costs. Nor is there any evidence or testimony in the record that Mr. Cieri had any knowledge of Digby's billing guidelines for attorneys' fees. Further, there is no evidence that Mr. Cieri ever reviewed any file in this case or spoke with any of the attorneys or support staff that handled this matter for Kmart to discuss the appropriateness of the costs and expenses incurred.

44. Consequently, the Court found that Mr. Cieri was not qualified to offer an opinion as to the reasonableness of White and Williams' attorneys fees, costs and expenses under Federal Rules of Evidence 702 and 703.

45. Digby did not offer any other evidence to contest the reasonableness of Kmart's attorney's fees or costs. Therefore, there is no evidence in the record that Kmart's attorneys' fees, expense or costs are unreasonable.

46. In the absence of such record evidence, Kmart must be awarded attorneys' fees and costs at the requested rate in the requested amount. See Washington, 89 F.3d at 1036; Cunningham v. City of Mckeesport, 807 F.2d 49, 52-53 (3d Cir. 1986).

47. In view of Mr. Turro's testimony that the bills submitted by White and Williams are reasonable and in conformity with IHDS and Kmart Billing Guidelines, and the lack of any record evidence to the contrary, the Court finds that the expenses, costs and attorneys' fees incurred by Kmart in defending against Watkins' claims and pursuing Kmart's third-party claim against Digby are reasonable and that Kmart is entitled to recover the \$32,760.50 requested.

F. Fees Incurred Before Joinder of Digby and After Arbitration

48. Finally, Digby argues that even if it has a duty to defend and indemnify Kmart, it does not owe Kmart for attorneys' fees, costs or expenses incurred before its joinder into this action. Digby also argues that it does not owe Kmart for Kmart's post-arbitration attorneys' fees or expenses, because Kmart incurred these additional expenses as a result of its failure to present evidence of expenses at arbitration.

49. The Court disagrees with Digby on both of these points. First, testimony revealed that Kmart tendered its defense to Digby many times from the beginning of this litigation, and joined Digby as a party only after first trying to convince it to accept its contractual responsibility without court intervention. If the Court found Digby not liable for fees or costs until the time it was joined, it would, in essence, reward Digby for refusing to honor its legitimate, bargained-for obligation to Kmart at the time Kmart originally tendered its defense.

50. As to Digby's second argument, the Court finds that all of the litigation expenses Kmart incurred after Watkins failed to appear at arbitration are attributable to Digby's continued refusal to meet its contractual obligations. At any time Digby could have agreed to indemnify Kmart and stop the continued accumulation of legal fees.

III. CONCLUSION

51. The Court finds, under the terms of the Transportation Agreement, that Digby must indemnify Kmart for all

of its expenses in defending the personal injury claim brought against it by Darnell Watkins, as well as in obtaining this fee award. Accordingly, the Court finds in favor of Kmart and against Digby in the amount of \$32,760.50.

This Court's Final Judgment follows.

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

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 K-MART CORPORATION, et al. : 96-4566

FINAL JUDGMENT

AND NOW, this 26th day of June, 1998, as required by Fed. R. Civ. P. 52, IT IS HEREBY ORDERED that this Court enter the attached Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that **JUDGMENT** is entered **IN FAVOR OF** Third-Party Plaintiff Kmart Corporation and **AGAINST** Third-Party Defendant Digby Truck Line, Inc. in the amount of Thirty-two Thousand, Seven Hundred and Sixty Dollars, and Fifty Cents (\$32,760.50).

BY THE COURT:

HERBERT J. HUTTON, J.