

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

EDWARD F. GREISZ
SANDRA FRIZZEL GREISZ

v.

CROWN AMERICAN ASSOCIATES,
OWENS-CORNING CORPORATION,
STERLING PLUMBING GROUP, INC.,

CIVIL ACTION

NO. 97-5839

M E M O R A N D U M

Broderick, J.

May 13, 1999

In this action, Plaintiff Edward Griesz sought damages for personal injuries he sustained while he was using a bathtub in a guestroom of the Comfort Inn in Pottstown, Pennsylvania. Plaintiffs asserted products liability, negligence, and breach of warranty claims against Defendant Owens Corning Corporation ("Owens Corning") and Defendant Sterling Plumbing Group, Inc., ("Sterling") based upon the allegation that the injuries were caused by a defect in the bathtub unit. Owens Corning was the original manufacturer of the type of fiberglass reinforced bathtub units at issue in this case. In 1987, Sterling purchased the assets of Owens Corning's FRP Component Division, the division which had previously manufactured fiberglass reinforced bathing tubs.

On the eve of trial, Owens Corning filed a motion seeking summary judgment on its cross-claim for indemnification against its co-defendant Sterling. The Court denied Owens Corning's

motion without prejudice, reserving judgment on the issue of indemnification until the completion of trial.

The case thereafter proceeded to trial on a bifurcated basis, with the Plaintiffs' claims against Owens Corning limited to strict liability pursuant to section 402A of the Restatement (Second) of Torts and vicarious liability under section 400 of the Restatement (Second) of Torts. The evidence presented at trial unequivocally established that Owens Corning did not manufacture or sell the bathtub unit at issue, and this Court accordingly granted Owens Corning's Rule 50 motion on Plaintiffs' strict liability claims. In addition, the Court held that Owens Corning was not liable under Section 400 of the Restatement (Second) of Torts, and therefore entered judgment in favor of Owens Corning and against Plaintiffs. A jury subsequently found Sterling liable to Plaintiffs, and returned a compensatory verdict in the total amount of \$175,000.

Presently before the Court is Owens Corning's motion to alter or amend the judgment. Owens Corning requests that the Court grant judgment in its favor with respect to its cross-claim for indemnity against Sterling based on an indemnity agreement between Owens Corning and Sterling. Owens Corning seeks costs and reasonable attorneys' fees incurred in the defense of this action and in the prosecution of its cross-claim. Defendant Sterling Plumbing Group has filed responses objecting to the applicability of the indemnity agreement to Owens Corning's

defense of this action and to its prosecution of its cross-claim against Sterling.

Owens Corning has provided the Court with the affidavit of Catherine Jasons, Esq., detailing the costs and legal fees accrued through December 31, 1998, in the amount of \$119,779.27. For the reasons stated below, this Court will grant Owens Corning's motion to alter or amend the judgment, and will enter judgment on Owens-Corning's cross-claim for indemnification in favor of Owens-Corning and against Sterling in the amount of \$119,779.27.

The basis of Owens Corning's cross-claim for indemnity from Sterling is provided in a Purchase Agreement dated January 13, 1987, by which Sterling purchased all of the assets and contractual rights relating to the business of manufacturing and selling fiberglass-reinforced plastic bathing and plumbing fixtures, including any existing inventory as of the date of sale. Sterling expressly agreed to indemnify and hold Owens Corning harmless from any claims, including costs and attorneys fees, "arising out of or resulting from the operation of the [fiberglass bathtub manufacturing] Division." The scope of this indemnity provision is defined in Schedule 16 of the Agreement which provides, in pertinent part:

Purchaser agrees that Seller assumes no liability of any sort relative to Purchaser's use of Seller's name or registered logo, or as a result of any claim related to the manufacture, sale, distribution or use of Purchaser's products, and Purchaser further agrees to hold Seller harmless, indemnify and pay on behalf of Seller all claims

of any sort arising from or relating to the manufacture, sale, distribution or use of Purchaser's products.

The Purchase Agreement provides that its terms "shall be governed by and construed in accordance with the laws of the State of Illinois," and it is uncontested that Illinois law is applicable in interpreting the Purchase Agreement. Under Illinois law, in the construction of indemnity provisions, Illinois courts seek to determine the intention of the parties by reference to the contract as a whole. Tatar v. Maxon Construction Co., 54 Ill. 2d 64, 294 N.E.2d 272 (1973). Where the parties' intentions are clearly ascertainable from the language used, and no ambiguity exists, the plain meaning of the language controls. Id., 294 N.E.2d at 273-74.

Sterling's agreement to indemnify and hold harmless Owens Corning for "all claims of any sort arising from or relating to the manufacture, sale, distribution or use of" Sterling's products is unambiguous and susceptible of only one meaning. This Court has determined that the evidence presented during the trial of this case made it clear that the Plaintiffs' action was based upon a defect "arising from or relating to the manufacture, sale, distribution or use of" Sterling's product.

Sterling argues that the indemnity agreement does not control in this case because one of the Plaintiffs' claims against Owens Corning was a negligent design claim, and there is no dispute that Owens Corning was the original designer of the product. However, as heretofore discussed, the Plaintiffs in the trial of the instant action proceeded solely on the basis of

strict liability pursuant to § 402A of the Restatement, and abandoned its negligent design claim. Furthermore, the evidence presented at trial referred in no way to negligent design. The evidence presented at trial showed that the basis of the Plaintiffs' claims was a manufacturing defect in the tub which was found to have been manufactured by Sterling.

In Freislinger v. Emro Propane Co., 99 F.3d 1412 (7th Cir. 1996), the Seventh Circuit interpreted an indemnity provision which required the lessee of a propane tank to indemnify the lessor for "any and all claims ... connected with or arising out of the use of [the] storage tank or with the use of the propane gas." Id. at 1420. The Seventh Circuit noted that "Illinois law does not require indemnity contracts to contain an express provision providing for the coverage of the indemnitee's own negligence in order for them to be enforceable." Id. The Seventh Circuit found no ambiguity in the indemnity provision, and held that it was "broad enough to encompass both negligence and strict liability claims" arising from an explosion of the propane tank. Id.

In the instant action, this Court finds no ambiguity in the indemnity agreement, and there can be no question that Sterling's agreement to indemnify Owens Corning is applicable in this action.

Sterling also contends that Owens Corning cannot recover attorneys fees incurred in prosecuting its cross-claim for indemnification. Sterling cites no law in support of this

proposition. This Court points out, however, that Sterling specifically agreed to indemnify Owens Corning "against any out-of-pocket liability, obligation, loss, cost, damage and expenses (including reasonable attorneys' fees)."

In connection with this motion, Sterling does not question the reasonableness of Owens Corning's legal fees. Therefore, for the reasons stated above, Owens Corning's motion to alter or amend the judgment will be granted, and the Court will enter judgment on Owens-Corning's cross-claim for indemnification in favor of Owens-Corning and against Sterling in the amount of \$119,779.27.

An appropriate Order follows.

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CIVIL JUDGMENT

Before the Honorable Raymond J. Broderick

AND NOW, this 13th day of May, 1999; Defendant Owens Corning Corporation having filed a motion to alter or amend the judgment; ; Defendant Sterling having opposed this motion; for the reasons stated in the Court's accompanying Memorandum of this date;

IT IS ORDERED: Owens Corning's motion to alter or amend the judgment is **GRANTED**;

IT IS FURTHER ORDERED: Judgment be and the same is hereby entered in favor of Defendant Owens Corning and against Defendant Sterling Plumbing Group in the amount of \$119,779.27;

**RAYMOND J.
BRODERICK, J.**