STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1504

Sno Pac Foods, Inc.,
Respondent,

vs.

Nelson Construction Co. of Caledonia,
Respondent,

Food Industry Maintenance Services, Inc.,
Appellant.

Filed July 28, 2009
Affirmed in part, reversed in part, and remanded
Shumaker, Judge

Houston County District Court
File No. 28-CV-05-111

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Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

In this appeal from final judgment, appellant challenges the denial of its motion for a new trial, arguing that the district court erred in ruling that a waiver-of-subrogation clause did not apply to appellant and that the district court abused its discretion in admitting certain expert testimony. Without having filed a notice of review, respondent challenges an adverse decision regarding insurance coverage. We reverse as to the interpretation of the waiver-of-subrogation clause and remand for further proceedings; we affirm as to the evidentiary ruling; and we do not reach respondent's challenge because it failed to file a notice of review.

FACTS

In 2003, respondent Sno Pac Foods, Inc. decided to expand its facility by constructing an addition that would contain an insulated freezer enclosure. Sno Pac and Nelson Construction Co. of Caledonia entered into a written contract, using a standard contract form for construction projects, under which Nelson would construct the addition for $279,906. In this contract, the freezer enclosure was designated as the responsibility of unnamed others, but it is undisputed that Sno Pac hired appellant Food Industry Maintenance Services., Inc. (FIMS) to complete and install the freezer enclosure under an oral contract.

After some work on both projects was performed, rain fell and pooled on the freezer ceiling that FIMS had installed, causing it to collapse and to result in damages of $34,257.04. Sno Pac submitted a claim to its all-risk insurer, Continental Western Group,

which paid the damages less the $1,000 deductible. Sno Pac then sued Nelson and FIMS for negligence.[1] The district court dismissed Nelson on summary judgment, applying a waiver-of-subrogation clause in the written contract between Sno Pac and Nelson, but ruled that there were factual issues as to the application of the waiver clause to FIMS, and set the matter on for trial. The jury found Sno Pac 15% negligent, Nelson 15% negligent, and FIMS 70% negligent, with damages of $34,457.04. The district court denied the posttrial motions by FIMS, ruling that FIMS was not entitled to the benefit of the waiver-of-subrogation clause and upholding an evidentiary ruling made during trial.

FIMS filed a notice of appeal. Nelson filed a notice of review, which it later dismissed, and it settled with Sno Pac. Sno Pac did not file a notice of review.

D E C I S I O N

I

"The construction and effect of a contract is . . . a question of law unless the contract is ambiguous." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). "[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). When interpreting a contract, the reviewing court "must look at the contract as a whole because the cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in

[1] According to FIMS, this is a subrogation action, but is brought in the insured's name because the insured, Sno Pac, was not completely compensated for its damages due to the $1,000 deductible.

drafting the whole contract." *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998) (quotation omitted).

The first issue is whether FIMS, which was not a party to the written contract between Sno Pac and Nelson, is, as a matter of law, covered by the waiver-of-subrogation clause in that contract. The contract is an American Institute of Architects (AIA) owner-contractor agreement used for construction projects of limited scope, AIA Document A107-1987, a printed form in which the parties to the contract fill in relevant blanks. In A.C.C.T., the supreme court has reviewed the identical waiver clause at issue here, although it addressed a different issue. *Id.* at 491-92 (holding that the owner's insurer is prohibited from bringing a subrogation claim for damages to both "work" and "nonwork" property by the waiver clause, when the owner relies on existing all-risk property-insurance coverage that is broader in scope than the coverage required by the contract). Using the same approach as the supreme court did, however, we review the plain language of the contract as well as caselaw from other jurisdictions addressing the same or similar contract provisions to resolve the issue. *See id.* at 493-94 (noting that the supreme court's interpretation is consistent with the majority of jurisdictions that have ruled on the issue).

Paragraph 17.6 of the contract contains the waiver clause and provides in relevant part that:

> *The Owner [Sno Pac] and Contractor [Nelson] waive all rights against* each other and the Architect, Architect's consultants, *separate contractors described in Article 12*, if any, and any of their subcontractors, sub-subcontrators, agents and employees, *for damages* caused by fire or other

> perils *to the extent covered by property insurance obtained pursuant to this Article 17 or any other property insurance applicable to the Work . . . .*

(Emphasis added.) Under paragraph 17.3, the owner, Sno Pac, was required to obtain "property insurance upon the entire Work at the site to the full insurable value thereof. The insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work . . . ." Paragraph 12.1, addressing construction by the owner or by separate contractors, states:

> The Owner reserves the right *to perform construction or operations related to the Project* with the Owner's own forces, and to award *separate contracts* in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation.

(Emphasis added.) FIMS was responsible for the construction of the freezer enclosure under a separate contract, which indisputably was "construction or operations related to the Project." At issue here is whether FIMS, as a separate contractor, was one to whom the waiver provisions apply as a matter of law.

Sno Pac argues that the district court properly concluded that the waiver did not apply because FIMS was not a party to the contract between Sno Pac and Nelson, that the work of installing the freezer was excluded from the contract, and that the contract explicitly states that it does not create a contractual relationship between anyone except Sno Pac and Nelson. But under the plain language of paragraph 17.6, the waiver applies not only to the parties to the contract but also broadly applies to various nonparties, including separate contractors. And paragraph 12.1 expressly allows the owner to award

separate contracts for other parts of the project, which is exactly what the owner did here. Thus, we take the plain language of the contract to mean that the waiver clause broadly applies to nonparties such as FIMS.

As the supreme court did in *A.C.C.T.*, 580 N.W.2d at 493-94, we next consider relevant cases from foreign jurisdictions on this issue. It is true that in discussions of the waiver clause there may be a general reference to the parties to the contract. "A waiver of subrogation is a provision by which parties to a contract relieve each other of liability to the extent each is covered by insurance, thereby shifting the risk of loss to an insurer." *Reliance Nat'l Indem. v. Knowles Indus. Servs. Corp.*, 868 A.2d 220, 225 (Me. 2005). But, when that contract contains a waiver clause of broad scope explicitly applicable to "separate contractors" and "all other contractors," the waiver is not limited to those who are parties to the contract. *Id.* at 228-29 & n.7 (holding that the waiver applied, regardless of whether the manufacturers and suppliers were considered "separate contractors" or "all other subcontractors").

In another case addressing the waiver issue, a building designer sought protection of a similar waiver clause. *Anderson Hay & Grain Co. v. United Dominion Indus., Inc.*, 76 P.3d 1205, 1207-09 (Wash. Ct. App. 2003), *review denied*, 88 P.3d 964 (Wash. 2004). The court there held that regardless of whether the building designer, who was not a party to the contract, was considered the builder's agent or employee or an independent separate contractor to either the builder or the owner, it was protected under the expansive waiver-of-subrogation clause. *Id.* at 1208-09. Sno Pac, however, contends that case is distinguishable because the designs, drawing, and specifications were

required to be part of the contract at issue, which is not present here. *Id.* at 1208. Here, there is no doubt that FIMS is a separate contractor as the term is referred to under the contract, and we do not find the difference Sno Pac cites to be significant.

In light of the plain-language applicability of the waiver to separate contractors, it is not relevant that FIMS was not a party to the contract, that there was a factual question as to whether FIMS was a subcontractor, or that there may or may not be third-party beneficiaries. Under a plain reading of the contract language, FIMS was a "separate contractor" to whom the waiver provision applied. The district court's ruling as to this issue is reversed, and the matter is remanded for further proceedings.

II

Sno Pac next argues that the freezer enclosure was not "work" to which the waiver of subrogation applies. The district court ruled against Sno Pac on this issue, and Sno Pac did not file a notice of review. "A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with the clerk of the appellate courts." Minn. R. Civ. App. P. 106. "Even if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the district court's ruling on a particular issue." *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). If the notice of review is not filed, "the issue is not preserved for appeal and a reviewing court cannot address it." *Id.* Consequently, we do not reach this issue.

III

Finally, FIMS asserts that the district court should have granted its motion for a new trial because it abused its discretion in admitting testimony by one of Sno Pac's experts that had allegedly not been disclosed to FIMS prior to trial.

A district court's decision on whether to grant a new trial "is addressed to the sound discretion of the trial court . . . , and its decision will not be disturbed on appeal except upon a showing of a clear abuse of discretion." *Schiro v. Raymond*, 237 Minn. 271, 277, 54 N.W.2d 329, 333 (1952). A party may move for a new trial based on "[a]ccident or surprise which could not have been prevented by ordinary prudence." Minn. R. Civ. P. 59.01(c). Such a motion should be granted only when there is a strong probability that a new trial would have a different result. *Sward v. Nash*, 230 Minn. 100, 109, 40 N.W.2d 828, 833 (1950).

FIMS asserts that the district court overruled FIMS' objection to testimony by one of Sno Pac's experts regarding the spacing of the brackets used for the ceiling of the freezer enclosure which later collapsed, asserting lack of notice of this testimony. The court noted that FIMS did not specifically object to the testimony as to the spacing of the clamps; instead, FIMS objected to testimony regarding the method of attachment. Nonetheless, the court ruled that it would address the merits.

If requested through interrogatories, a party must disclose "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Minn. R. Civ. P. 26.02(e)(1)(A). While "[i]nadequate answers may warrant sanctions[,] . . . suppression of expert testimony is a serious

sanction and should be imposed only in the most compelling circumstances and then only after careful consideration of" relevant factors. *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986).

The district court gave several reasons for overruling FIMS' objection to this testimony in its order denying the motion for the new trial. First, the district court ruled that Sno Pac's disclosures gave FIMS sufficient notice to suggest that it was the experts' opinion that the method of attachment of the ceiling was improper. Our review shows that this is correct.

Next, the district court noted that FIMS failed to ask for any remedy at the time of its objections and declined to ask its own expert about the spacing issue. Failure to request a continuance when claiming surprise is not determinative, but it may support a denial of a new trial based on all the circumstances. *See Fifer v. Nelson*, 295 Minn. 313, 317, 204 N.W.2d 422, 424 (1973) (basing decision also on fact that the appellant raised the issue of surprise for the first time in the motion for a new trial).

Finally, the district court found that any error was at most harmless error that did not affect the result. Even if error in the admission or exclusion of evidence occurs, the court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Minn. R. Civ. P. 61. An appellate court will not presume error, and the party seeking reversal has the burden of showing error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). FIMS has not demonstrated prejudice from the alleged improperly admitted testimony. The

district court's denial of the motion for a new trial based on the claimed error in admitting the expert testimony in dispute was not an abuse of discretion, and the ruling is affirmed.

Affirmed in part, reversed in part, and remanded.