IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

STEVEN E. HAINES, JULIETTE M. HAINES
and WILLIAM B. HAINES by his guardian
ad litem ATTORNEY MICHAEL A. SCHUMACHER,

Plaintiffs,

ORDER
06-C-095-S

and

BURNETT COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES
and GROUP HEALTH COOPERATIVE OF EAU CLAIRE,

Nominal Plaintiffs,

v.

NELSON TREE SERVICE, INC.,
SCHMIDY'S MACHINERY COMPANY,
AUTO-OWNERS INSURANCE COMPANY and
LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendants.

Plaintiff Steven E. Haines ("plaintiff") commenced this personal injury action alleging that defendants Nelson Tree Service, Inc. and Schmidy's Machinery Company are liable in negligence and strict liability for injuries he sustained when the boom on a lift truck failed. Nelson cross-claimed against Schmidy's for indemnification based on the terms of a bill of sale between the defendants. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332. All defendants have settled with the plaintiffs. The matter is presently before the Court on cross motions for summary judgment on the sole remaining issue whether

Nelson is entitled to indemnification from Schmidy's. The following facts are undisputed for purposes of the pending motion.

FACTS

Defendant Nelson, an Ohio Corporation in the tree trimming business, maintains a fleet of tree trimming trucks including bucket trucks. As part of an effort to maintain a newer fleet of trucks, Nelson periodically sells used equipment. Defendant Schmidy's is an Illinois corporation in the business of selling used bucket trucks and other equipment. Plaintiff is a Wisconsin resident and sole proprietor of a tree trimming business, Haines Tree Service.

Since 2002, Nelson has sold Schmidy's 370 used bucket trucks. Nelson's standard practice is to sell equipment to Schmidy's in packages which combine several pieces of equipment into a single purchase transaction. Nelson cuts the boom cables prior to sale of bucket trucks. Schmidy's sometimes picks up the equipment prior to making full payment and makes subsequent installment payments on the package. Nelson does not provide the titles or bills of sale for the equipment to Schmidy's until full payment is made on the entire equipment package. Once final payment is made Nelson delivers the title and bill of sale. Schmidy's repairs, cleans and resells the equipment. It sometimes resells equipment prior to making final payment to and receiving title from Nelson. Nelson is aware of and approves this practice.

In 1991 Nelson purchased a new 1992 International 4600 truck ("the truck"), installed on it a Sky Rider SR-51 boom and bucket and began using the truck in its fleet. On May 21, 2004, Schmidy's acquired the truck as part of a package of used equipment from Nelson. On May 22, 2004 plaintiff purchased the truck from Schmidy's for use in his tree trimming business.

On June 4, 2004 Nelson executed a bill of sale for the truck to Schmidy's which included the following language:

> Further, the BUYER .. agrees to hold harmless and indemnify SELLER ... from all liability, causes of action, and expenses, including attorney's fees, which may be related to the ownership, use, operation, possession or resale of all or any part of the equipment sold to the BUYER....

Schmidy's executed the bill of sale on June 14, 2004.

On June 14, 2004 plaintiff was injured when the boom on the truck failed while he was working in the bucket. Plaintiff obtained expert opinion that the boom failure was the result of a fatigue crack in the boom which could have been detected by an inspection and that the crack existed while the truck was in Nelson's possession. Both defendants settled with the plaintiff.

MEMORANDUM

The sole remaining issue is whether the indemnification language in the bill of sale entitles Nelson to be indemnified by Schmidy. Defendant contends that the broad language of the

provision encompasses the negligence and strict liability claims. Plaintiff argues that absent express language such provisions are construed not to require indemnification for the negligence of the selling party. The parties do not dispute the application of Illinois law to the contract issue.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. The parties agree that there are no genuine factual disputes and that the matter is appropriately resolved as a matter of law.

The applicable legal standard is as follows:

> It is quite generally held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract, or such intention is expressed in unequivocal terms.

Tatar v. Maxon Const. Co., 54 Ill. 2d 64, 294 N.E.2d 272, 273 (1973). (quoting Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp., 70 N.E.2d 604, 607 (Ill. 1946). The rule applies equally to claims for strict liability. See Sorrentino v. Waco Scaffolding & Shoring Co., Inc., 44 Ill. App. 3d 1055, 358

N.E.2d 1244, 1246 (1976). Considering the application of this rule by Illinois courts, the indemnification language of the Bill of sale in insufficient to satisfy the "clear and explicit" standard.

Tatar addressed contractual language at least as expansive as the language at issue here. In Tatar a subcontractor agreed in indemnify its general contractor

> against all claims, expenses, suits or judgments of every kind whatsoever, by or on behalf of any person, firm or corporation, by reason of, arising out of, or, connected with, accidents, injuries, or damages, which may occur on or about the Subcontractor's work.

294 N.E.2d at 273. An employee of the subcontractor, injured in a job site accident, sued the general contract in negligence. Notwithstanding that the literal language of the indemnification agreement clearly encompassed the claim, the court rejected its application to a claim based on the General contractor's negligence: "...we conclude that when measured against the standards set forth in Westinghouse, it does not, under the circumstances alleged in the pleadings, provide indemnity against claims arising out of [the general contractor's] own negligence."

Not surprisingly, the only case cited by Nelson in support of its claim for indemnification, Burlington Northern Railroad Co. v. Pawnee Motor Service, Inc., 525 N.E.2d 910 (Ill. Ct. App. 1988), involved an indemnification clause which expressly indemnified for liability on account of injuries whether "contributed to by the sole or partial negligence of the Railway..." In distinguishing

the facts from the numerous other contrary cases the Court noted: "By contrast, in the present case, the indemnity provision clearly and unequivocably states that Burlington was to be indemnified for its own negligence." Id. at 915.

The present indemnity provision makes no express reference to indemnification against Nelson's own negligence and therefore falls within the rule against extending indemnification to such claims. From a practical perspective the principal alleged negligent conduct ascribed to Nelson was painting over and thereby disguising the stress crack in the boom. It seems reasonable to presume that Schmidy's would not have obligated itself to indemnify Nelson for conduct which by its very nature could have been anticipated by Schmidy's because it involved concealing the defect.

ORDER

IT IS ORDERED that Defendant Nelson's motion for summary judgement declaring that it is entitled to indemnification from Defendant Schmidy's is DENIED.

IT IS FURTHER ORDERED that judgment be entered dismissing defendant Nelson's cross claim against Defendant Schmidy's with prejudice and costs.

Entered this 6th day of September, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge