IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2138

ROBERT LEE HAMILTON, ET AL.,

Plaintiffs,

versus

AMOCO PIPELINE COMPANY,

Defendant-Third Party Plaintiff-Appellant,

versus

WOODSON CONSTRUCTION COMPANY,

Third Party Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Texas
(CA H 87 4158)

(February 22, 1994)

Before HIGGINBOTHAM and DUHé, Circuit Judges, and STAGG[*], District Judge.

PER CURIAM:[**]

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[*]District Judge of the Western District of Louisiana, sitting by designation.

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court refused to enforce an indemnity agreement between Woodson Construction Company and Amoco Pipeline Company. Applying Texas law, we REVERSE and REMAND.

I.

Three Woodson employees, including Robert Hamilton, sustained burns while replacing an Amoco pipeline. The workers did not sue Woodson because it had immunity under the Texas workers compensation scheme. Instead, they sued Amoco. The lawsuits alleged control of the job site and negligent failure to maintain a safe work environment. Amoco settled the cases for $6,025,000.00.

Woodson intervened in the Hamilton litigation and claimed damage to its equipment. Amoco filed a cross-claim against Woodson to recoup some of the cost of settling with the injured workers. The cross-claim alleged that Woodson should reimburse Amoco according to its proportion of the fault.

Woodson moved for summary judgment because the Texas Worker's Compensation Act immunizes a subscribing employer from indemnity or contribution claims. Woodson also stated that the express negligence test, enunciated in Ethyl v. Daniel, 725 S.W.2d 705 (Tex. 1987), provides that a negligent indemnitee can be indemnified only if the contract expressly provides for it. Woodson alleged that the contract did not expressly state that Amoco would be indemnified for its own negligence.

Amoco did not respond that the contract passed the express negligence test, but argued that it sought indemnity for Woodson's

negligence, not for its own share of the fault. The trial court denied summary judgment not because Amoco's negligence remained a fact issue under the express negligence test, but because Woodson's negligence remained in question. Amoco assumed that the court had held that the express negligence test did not apply to the case.

Woodson and Amoco then stipulated that the money Amoco paid to settle the underlying case was necessary and reasonable. They also stipulated that the underlying accident was caused 50% by Woodson's negligence, and 50% by Amoco's negligence. Amoco dismissed a separate lawsuit against Woodson, in which it had argued that Woodson breached a contract with Amoco by failing to have Amoco named as an additional insured on Woodson's insurance policies.

After agreeing on the stipulations, Amoco moved for a judgment awarding it 50% of the amount it had spent settling the underlying claims. Woodson moved for a take-nothing judgment because Amoco was a negligent indemnitee that could not recover without an express negligence provision in its contract.

This time, the court ruled for Woodson, and, to Amoco's surprise, applied the express negligence test. The court stated that Amoco had stipulated that it was negligent, and that Amoco, as a negligent indemnitee, could not receive indemnification without an express negligence provision. The court found that the contract did not contain the magic words.

Amoco moved for a new trial, arguing that the contract not only contained an indemnity covenant, but also a reimbursement covenant, which is not subject to the express negligence test. In

Getty v. Insurance Co. of North America, 845 S.W.2d 705, 708 (Tex. 1987), the Texas Supreme Court had held that a promise to name a party as an additional insured is not subject to the express negligence test.

Amoco also wanted to withdraw its stipulations because the court's second ruling applying the express negligence test conflicted with its first decision that Woodson's negligence remained an unresolved issue, something that would be irrelevant under the express negligence test. Amoco argued that it had relied on the first ruling when it stipulated to partial negligence, and now that the court has changed its mind, the court should allow it to withdraw the stipulation. The court denied the motion. Amoco appealed.

II.

Amoco is not seeking indemnification for its own negligence. Rather, Amoco here seeks to recover for the cost attributable to the negligence of Woodson, stipulated to be 50%. We see nothing in Texas law to defeat enforceability of this agreement. Assuming, without deciding, that under Ethyl Corp. v. Daniel, 725 S.W.2d 705 (Tex. 1987), Amoco must meet the express negligence test even though it seeks recovery only for Woodson's negligence (indemnification of comparative fault), we find the contract to be enforceable. The Texas Supreme Court in Page Petroleum, Inc. v. Dresser Industries, Inc., 36 Tex. S. Ct. J. 737 (Tex. 1993), concluded that the requirements of conspicuity and expressed negligence are "not applicable when the indemnitee establishes that

the indemnitor possessed actual notice or knowledge of the indemnity agreement." Id. at 308 n.2. Louis Woodson testified that he understood that Woodson Construction Company would be liable for its own negligence. This was sufficient because Amoco sought no more.

We need not reach the other issues in this case. The judgment of the district court is REVERSED, and the case is REMANDED for entry of an appropriate judgment.