IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20129
Summary Calendar

ROSA HERNANDEZ,

Plaintiff-Appellant,

versus

DALE ALLEN PEDERSEN, ET AL.,

Defendants,

NEW YORK UNDERWRITERS INSURANCE CO.,
HARTFORD UNDERWRITERS INSURANCE CO. and
HARTFORD CASUALTY INSURANCE CO.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
(CA-H-92-395)

(November 4, 1994)

Before, SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per curiam:[1]

Rosa Hernandez ("Hernandez") appeals the summary judgment rendered against her by the district court, which found that New York Underwriters Insurance Company, Hartford Underwriters Insurance Company and Hartford Casualty Insurance Company

[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(hereinafter referred to collectively as "Hartford") were not liable to Hernandez on any of her claims. We affirm.

FACTS

In September 1984, Idela Construction Company ("Idela") signed a contract with the City of San Antonio ("City") for the construction of the Leon Creek Outfall, a sanitary sewer project. This contract required Idela to secure performance and payment bonds for the project, to maintain liability insurance coverage, and to have certificates of insurance issue to the City. The contract further required Idela to "include the Owner, Project Manager, and Engineer and their agents and employees as additional insureds."

Idela's insurance broker, the Conway, Dooley & Martin Agency ("Conway agency"), an independent insurance agency, assisted in securing the necessary coverage. Hartford issued to Idela a comprehensive general liability policy, a comprehensive automobile liability policy and an umbrella policy. Idela, the City, the project manager, and the engineer were listed as named insureds under those policies. The Conway agency then issued to the City the requisite certificate in which Idela's liability policies were identified.

Idela then entered into a subcontract with Sabine Consolidated, Inc. ("Sabine") for a portion of the construction work of the Leon Creek project. In accordance with that subcontract, Sabine was to maintain its own liability insurance coverage. Sabine's liability coverage was confirmed by a

certificate of insurance that was issued by Essary, Hart & MacWilliam, Inc.

In December 1984, Sabine, in turn, entered into a subcontract with R&F Construction ("R&F"), which required R&F to maintain its own liability insurance coverage. A certificate of insurance demonstrating R&F's liability coverage was provided to Sabine by the JWJ Insurance Agency.

In April 1985, Appellant's five year old son, Andres Hernandez, was struck and killed by an automobile that was driven by Gabriel Chavez ("Chavez"), an employee of R&F. The accident occurred in the parking lot of a San Antonio restaurant at a time when Chavez, an hourly worker was not "on the clock." The vehicle was owned by one of R&F's partners, and there is a fact dispute about whether Chavez was in the course of his employment at the time of the accident. The vehicle was covered by a Texas personal automobile policy, which paid its $15,500 limit of bodily injury coverage to Hernandez.

PROCEDURAL BACKGROUND

Appellant brought a wrongful death suit against Chavez, R&F, and R&F's owners, in May 1985. *Rosa L. H. Miranda v. Chavez, et al.*, Cause No. 85-30668, 129th Judicial District, Harris County, Texas. Idela and Sabine were not parties to this action. In response to Appellant's claims, Chavez and the R&F partner who owned the automobile were tendered a defense by the insurer providing coverage for the vehicle. Discovery in that lawsuit revealed that R&F did not have automobile liability insurance,

despite the fact that a certificate showing such coverage had allegedly been issued by JWJ Insurance. R&F, therefore, had to fund individual defenses.

In June 1988, R&F demanded that the Hartford companies defend them pursuant to the policies that had been issued to Idela for the construction project. The Hartford companies declined, taking the position that those policies did not extend coverage for R&F.

In August 1988, a consent judgment in favor of Hernandez was entered in the state court action. In return for Appellant's agreement not to pursue collection against Chavez, R&F, and R&F's owners, a $25,000,000 judgment was entered against the tort defendants. The defendants, in turn, assigned their rights to Hernandez.

Based on the assignments from the tort defendants, Hernandez next sought recovery from Idela and from R&F's insurance agency, JWJ Insurance. Hernandez's claims against Idela ended in a non-suit, with prejudice, in November 1991. *Miranda v. Idela Construction Co., et al.*, Cause No. 85-30668-B, 129th Judicial District, Harris County, Texas. In her suit against JWJ Insurance, Hernandez argued that R&F was contractually bound by its contract with Sabine to purchase and maintain its own insurance coverage, and JWJ Insurance failed to secure automobile liability coverage for F&R as required. That suit was successful, and Hernandez was paid $90,000 on behalf of JWJ Insurance in September 1992.

The present case was filed in state court, and removed to federal court on the basis of diversity of citizenship in February

1992. Hernandez sought a direct recovery from Hartford, Idela's insurer, on the grounds that the previous tort defendants, whose rights were assigned to Hernandez, should have been afforded coverage for the wrongful death claim under the Idela policies. The parties both filed motions for summary judgment. The district court granted Hartford's motion for summary judgment, denied Hernandez's motion for summary judgment, and entered a final judgment, dismissing the action with prejudice. Hernandez appeals.

STANDARD OF REVIEW AND CHOICE OF LAW

This Court reviews an order granting summary judgment *de novo*. *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 618 (5th Cir. 1993), *cert. denied, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994)*. Summary judgment is appropriate only if "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Like the district court, we are obligated to resolve all factual inferences in favor of the nonmovant. *Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir. 1989).

In determining which facts are material, we must examine the substantive law applicable to the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). This action, removed by Hartford from a Texas state court to federal court pursuant to diversity jurisdiction, 28 U.S.C. § 1332(a)(1), has the most significant ties with Texas, and there is no dispute that Texas law applies to all substantive issues. See *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 241

(5th Cir. 1993).

WHAT INSURANCE DID THE CONTRACT REQUIRE?

Appellant maintains that the contract[2] between the City and Idela required Idela to maintain liability insurance for itself and all those working under Idela on the Leon Creek project, including subcontractors. Paragraph 53 of the contract states that Idela will purchase insurance to protect against liability resulting from acts committed "by the Contractor [Idela], by any Subcontractor, by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable." Appellant contends that the final "any of them" in this clause should be read to require protection against liability incurred by Idela or any of the subcontractors.

The court below rejected this reading, finding that the clause merely required Idela to protect itself, the City and other named

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[2]The relevant language from paragraph 53 of the contract is:

> The Contractor [Idela] shall purchase and maintain comprehensive general liability and other insurance as will provide protection from claims set forth below or required by law which may arise out of or result from Contractor's performance of the Work and Contractor's other obligations under the Contract Documents, whether such performance of the Work is by the Contractor, by any Subcontractor, by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:
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> f. Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

insureds from liability that the named insureds might incur as a result of the contractor's or subcontractor's work. We agree with the district court.

Texas law requires that a contract should be construed as a whole and in light of the circumstances surrounding its execution. *Smart v. Tower Land and Investment Co.*, 597 S.W.2d 333, 337 (Tex. 1980). The terms of the entire contract and the conduct of the City, Idela and the subcontractors all establish that each contractor was to maintain its own coverage in amounts no less than that set forth in the prime contract. R&F and Idela each furnished a certificate evidencing its own independent insurance coverage prior to the time the Contract was executed. The fact that the contract was subsequently executed and Idela was given authorization to proceed with the project indicates that the parties intended no obligation on Idela to provide automobile insurance to R&F's employees and lends further support to our reading of paragraph 53.

Appellant contends alternatively that Idela is liable for errors made by the Conway agency in failing to solicit or transmit the proper insurance policies in this case. The argument is premised on the contract requiring Idela to provide automobile insurance coverage to R&F. Because the contract does not require that coverage, the insurance agency made no error that could constitute the basis for Idela's liability.

Appellant's final issue is an attack on appellees' judicial estoppel defense, which we find unnecessary to reach.

CONCLUSION

The district court's order dismissing Appellant's case with prejudice is AFFIRMED.