

NOTICE
Decision filed 10/27/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140120-U

NO. 5-14-0120

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

AMY CIBOROWSKI, as Administrator of the)	Appeal from the
Estate of Keven T. Ciborowski, Deceased,)	Circuit Court of
)	St. Clair County.
Plaintiff,)	
)	
v.)	No. 11-L-674
)	
WEDEKEMPER'S INC.,)	
)	
Defendant-Appellee,)	
)	
and)	
)	
RITCHIE BROS. AUCTIONEERS)	
(AMERICA) INC.,)	
)	
Defendant-Appellant/Third-Party Plaintiff,)	
)	
v.)	
AMERICAN ASPHALT & GRADING COMPANY)	
and WEDEKEMPER'S CONSTRUCTION, INC.,)	Honorable
)	Vincent J. Lopinot,
Third-Party Defendants.)	Judge, presiding.

PRESIDING JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in dismissing defendant's claim for contractual indemnity on the pleadings.

¶ 2 The plaintiff, Amy Ciborowski, as administrator of the estate of Keven T. Ciborowski, deceased, filed a wrongful death action against defendant-appellee, Wedekemper's Inc., and defendant-appellant/third-party plaintiff, Ritchie Bros. Auctioneers Inc., and alleged that the decedent suffered fatal injuries as a result of the defective condition of a boom truck which Wedekemper's had purchased at auction from Ritchie Bros. Ritchie Bros. filed a counterclaim against Wedekemper's for contractual indemnity. The indemnity claim was dismissed pursuant to Wedekemper's motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). This appeal followed. On appeal, Ritchie Bros. contends that the trial court erred in dismissing its indemnity claim at the pleading stage where the indemnity provisions in the auction-sales documents plainly state that Wedekemper's will indemnify Ritchie Bros. for any and all actions and losses arising from the use of the boom truck, whenever and wherever they may occur. For reasons that follow, we reverse and remand.

¶ 3 On September 21, 2011, the decedent, Keven T. Ciborowski, suffered fatal injuries while he and his coworkers were constructing a metal tower for a grain elevator in Pinckneyville, Illinois. One of the decedent's coworkers was using a boom truck to hoist a section of a metal tower when safety guards on the boom and crane assembly failed, causing the load to fall onto the decedent and fatally injure him. The boom truck, a 2005 Ford F650 Mechanics Truck, was on loan to the decedent's employer from Wedekemper's. Wedekemper's had purchased the truck, in an "as-is" condition, from Ritchie Bros., a commercial auctioneer of vehicles and equipment, for the sum of

\$47,500, at an auction in Las Vegas, Nevada, on November 6, 2009. Ritchie Bros. had acquired the truck from American Asphalt & Grading Company one month prior to the auction.

¶ 4 In December 2011, the plaintiff filed a wrongful death action against Wedekemper's and Ritchie Bros. based on theories of strict product liability, negligence, and willful and wanton misconduct. Following a period for discovery, Ritchie Bros. filed claims against Wedekemper's for contribution and contractual indemnity. The contribution claim was dismissed after the trial court found that a settlement agreement between Wedekemper's and the plaintiff was entered in good faith and approved it. The remaining claim for contractual indemnity was based on provisions in two auction documents, the "Bidder's Registration Agreement" and the "Listing Catalog."

¶ 5 In the claim for contractual indemnity, Ritchie Bros. alleged that it was a commercial auctioneer of vehicles and equipment; that it was not in the business of performing construction work; that the subject boom truck was sold to Wedekemper's at an auction in 2009; that Ritchie Bros. did not possess or retain any ownership interest in the truck after the sale to Wedekemper's; and that Wedekemper's has been the sole owner of the truck since the sale. Ritchie Bros. further alleged that Pam Wedekemper, the authorized agent for Wedekemper's, received and reviewed copies of the Bidder's Registration Agreement and the Listing Catalog on the day before the auction; that the Bidder's Registration Agreement and the Listing Catalog contain an express indemnity provision; and that in accordance with the express indemnity provision, Ritchie Bros. was

entitled to full indemnity from Wedekemper's for any and all actions and damages arising from use of the boom truck.

¶ 6 The indemnity provision at issue in this case is set forth in paragraph 4 of the Bidder's Registration Agreement and states as follows:

"4. Bidder, whether acting as principal, agent, officer or director of a company or otherwise, in any capacity whatsoever, and the company he represents, both jointly and severally agree:

(a) to indemnify and save harmless Auctioneers and its consignors ('Consignors') from any and all actions, causes of action, suits, damages, costs and losses of any nature, arising from the purchase or use of any items, or the attendance or participation of Bidder, his agents or employees, at the auction sale and/or on the auction site whether before, during or after the auction sale[.]"

¶ 7 Paragraph 5 of the Bidder's Registration Agreement provides that "[t]he terms of the agreement shall be governed by and interpreted under the laws of, and any action hereunder against Auctioneers shall be commenced in, the State and County in which the auction occurs."

¶ 8 Terms of bidding and sale were also printed on the inside cover of the Listing Catalog. An indemnity provision identical to the one in the Bidder's Registration Agreement is set forth in paragraph 4 of the Listing Catalog. Specific warranty disclaimers by the seller and certain obligations of a successful bidder are set forth in paragraph 7, and provide as follows:

"7. There shall be no guarantees or warranties, expressed or implied, statutory or otherwise of any nature whatsoever in respect of the Lots offered at the auction. Each and every Lot will be sold 'as is, where is'[,] Specifically, but without limitation, Auctioneers make no representation or warranty that any of the Lots:

(a) conform to any standard in respect of safety, pollution or hazardous material or to any standard or requirement of any applicable authority, law or regulation, or

(b) are fit for any particular purpose, or

(c) are merchantable or financeable, or

(d) are of any particular age, year of manufacture, model, make or condition.

Bidder agrees he has satisfied himself and is not relying on Auctioneers, nor are Auctioneers liable, for any matter in respect of the above. Bidder further agrees to repair, at his cost, any lot purchased at the auction to a safe operating condition and, without limitation, to a condition which meets any standard or requirement of any applicable authority, law or regulation including those concerning any use to which the lot may be put."

¶ 9 Paragraph 8 admonishes the bidder that the auction site is a potentially dangerous place, and that the bidders are present at their own risk with notice of the conditions of the premises and the activities performed there. "No person shall have any claim against Auctioneers, their agents, employees, or principals for any injuries sustained, nor for damages to or loss of property which may occur from any cause whatsoever."

¶ 10 Four bullet points, printed in bold-faced type and capital letters, are listed below paragraph 9 in the Listing Catalog:

-EVERY ITEM SOLD "AS IS – WHERE IS".

-NO GUARANTEES OR WARRANTIES WHATSOEVER.

-PLEASE INSPECT THE EQUIPMENT BEFORE BIDDING.

-ALL SALES ARE FINAL.

¶ 11 Wedekemper's filed a section 2-619 motion for involuntary dismissal of the indemnity claim and asserted that the indemnity provision at issue only applied to incidents that occurred at the auction sale or the auction site; that any ambiguities in the indemnity provision must be construed against Ritchie Bros.; and that the indemnity provision is unenforceable because it does not expressly state that Ritchie Bros. would be indemnified for its own negligence. Following a hearing, the trial court granted Wedekemper's motion to dismiss, but did not state the basis for the ruling. Ritchie Bros. filed a motion asking the court to reconsider its ruling, and alternatively, to identify the basis for dismissal of the indemnity claim. The motion to reconsider was denied. Thereafter, Ritchie Bros. and the plaintiff agreed to settle the strict liability count, and the plaintiff agreed to voluntarily dismiss all other counts against Ritchie Bros. Ritchie Bros. then appealed.

¶ 12 On appeal, Ritchie Bros. contends that the trial court erred in dismissing its indemnity claim at the pleading stage where the indemnity provisions in the auction-sales documents plainly state that Wedekemper's will indemnify Ritchie Bros. for any and all

actions and losses arising from the use of the boom truck, whenever and wherever they may occur.

¶ 13 Initially, we note that the parties have engaged in some discussion in the trial court and on appeal about whether the indemnity issue should be decided under the substantive law of Nevada or Illinois. During the oral arguments before this court, however, both parties seemed to agree that the substantive law of Nevada is applicable to the issues in this appeal. A conflict of law exists when there is an actual conflict in the law of two states such that the application of one state's law over the other's will make a difference in the outcome of the case. *Bridgeview Health Care Center, Ltd. v. State Farm Fire & Casualty Co.*, 2014 IL 116389, ¶ 14, 10 N.E.3d 902. If the laws of the jurisdictions in question are essentially the same on a disputed issue, there is no need to apply a choice-of-law analysis. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 59, 879 N.E.2d 910, 918 (2007). After reviewing the case law of Illinois and Nevada, we find that there appear to be some meaningful differences in how the respective jurisdictions construe contract provisions purporting to indemnify a party against its own negligence. Compare *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co.*, 255 P.3d 268, 274 (Nev. 2011), and *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 309, 882 N.E.2d 525, 529 (2008). In this case the Bidder's Registration Agreement specifically provides that the agreement will be governed by and interpreted under the laws of Nevada, and so we will construe the indemnity provision under Nevada law. That said, Illinois is the forum state and so its laws govern matters of procedure. *Morris B.*

Chapman & Associates, Ltd. v. Kitzman, 193 Ill. 2d 560, 656, 739 N.E.2d 1263, 1267 (2000).

¶ 14 In this case, Wedekemper's moved for the involuntary dismissal of Ritchie Bros.' indemnity claim under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)). A motion to dismiss under section 2-619(a)(9) admits the legal sufficiency of the pleading, but asserts that the claim is barred by other affirmative matters that avoid the legal effect of or defeat the claim. 735 ILCS 5/2-619(a)(9) (West 2010). When ruling on a section 2-619 motion, the trial court will construe all pleadings and supporting documents in a light most favorable to the nonmoving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d at 343, 352, 882 N.E.2d 583, 588 (2008). A trial court's decision to grant a section 2-619 motion is reviewed *de novo*. *Porter*, 227 Ill. 2d at 352, 882 N.E.2d at 588.

¶ 15 Turning now to the law governing the substantive issues presented, Nevada courts have held that contractual indemnity is "where, pursuant to a contractual provision, two parties agree that one party will reimburse the other party for liability resulting from the former's work." (Internal quotation marks omitted.) *Reyburn*, 255 P.3d at 274; *George L. Brown Insurance Agency, Inc. v. Star Insurance Co.*, 237 P.3d 92, 96 (Nev. 2010). The scope of a contractual indemnity provision is determined by the contract and is generally interpreted like any other contract in order to discern and give effect to the intent of the contracting parties. *United Rentals Highway Technologies, Inc. v. Wells Cargo, Inc.*, 289 P.3d 221 (Nev. 2012). In reviewing a contract, courts look to the plain meaning of contract terms and apply meaning to all the contract's provisions. *Canfora v.*

Coast Hotels & Casinos, Inc., 121 P.3d 599, 603 (Nev. 2005). When the duty to indemnify arises from contract language, it generally is not subject to equitable considerations, but is enforced in accordance with the parties' contractual agreement. *Reyburn*, 255 P.3d at 274.

¶ 16 Under Nevada law, a contract purporting to indemnify a party against its own negligence will be strictly construed and will only be enforced if the contract clearly expresses such an intent. *George L. Brown Insurance*, 237 P.3d at 97. The indemnity provision must contain an express or explicit reference that the indemnitor is indemnifying the indemnitee against the indemnitee's negligence, and in absence of such language, the indemnitee may be indemnified only for damages associated with the indemnitor's negligence. *George L. Brown Insurance*, 237 P.3d at 97. The interpretation of an indemnity clause within a contract is a question of law that is reviewed *de novo*. *Reyburn*, 255 P.3d at 274.

¶ 17 In this case, Wedekemper's has made three main arguments in support of its motion to dismiss the indemnity claim under section 2-619(a)(9) of the Code. Wedekemper's initially claims that a plain reading of the indemnity provision shows that Ritchie Bros. is only entitled to indemnity for actions and losses that arose from the use of the boom truck at the auction sale and/or the auction site, and that indemnity does not extend to claims, such as that accident here, which arose away from the auction site and several years after the auction. Wedekemper's also claims that if this court finds some ambiguity regarding the indemnity provision, then the ambiguity must be construed against Ritchie Bros. as drafter of the provision. Finally, Wedekemper's claims that the

indemnity provision is unenforceable because it does not explicitly state that Ritchie Bros. will be indemnified for its own negligent conduct.

¶ 18 The threshold question is whether the decedent's accident is covered within the scope of the indemnity provision. The indemnity provision at issue is printed in the Bidder's Registration Agreement and the Listing Catalog. It is set forth along with other terms and conditions of bidding and sale, the seller's warranty disclaimers, and specific requirements of a successful bidder to inspect and repair any machinery purchased so that it is in a safe operation condition before use. Reading the indemnity provision as written, and considering it within the context of the Bidder's Registration Agreement and Listing Catalog, we find that the provision clearly states that a bidder will agree to indemnify Ritchie Bros. in two types of situations. The first is where an action or loss results from the purchase or use of the item purchased. The second is where the action or loss results from the attendance of and participation by the bidder at the auction site before, during, or after the auction sale. Wedekemper's contention that the indemnity provision limits Ritchie Bros. to indemnity for actions and losses that arose from the use of the boom truck at the auction sale or the auction site constitutes a very constricted interpretation that would not give effect to the parties' intent. After reviewing the auction-sales documents, we find that the decedent's accident fits within the scope of the indemnity provision at issue and that there is no ambiguity regarding the scope of the provision.

¶ 19 Wedekemper's also argues that the indemnity claim was properly dismissed because the indemnity provision does not contain an explicit reference to indemnity for Ritchie Bros.' own negligent conduct as required under Nevada law, and is therefore

unenforceable. Ritchie Bros. counters that the argument is without merit because it is not seeking indemnity for damages that result from its own negligence or fault. Ritchie Bros. states it is seeking to be indemnified for damages awarded because of Wedekemper's negligence or misconduct in failing to inspect and repair the boom truck before allowing it to be used. Ritchie Bros. contends that the dismissal of its indemnity claim on the pleadings was prejudicial error which deprived it of the opportunity to show that the plaintiff's damages resulted not from any negligence or malfeasance on its part, but from the negligence or malfeasance of Wedekemper's, and that it was entitled to contractual indemnity.

¶ 21 We have reviewed the indemnity provision at issue and find that it does not expressly state that Ritchie Bros. will be indemnified for damages that result from its own negligence or culpable conduct. As construed under Nevada law, this provision does not afford Ritchie Bros. indemnity for its own negligence or culpable conduct. But this finding does not preclude Ritchie Bros. from pursuing indemnity for damages associated with Wedekemper's negligence or culpable conduct. See *Reyburn*, 255 P.3d at 279-80; *Brown Insurance*, 237 P.3d at 97-98. After reviewing the record, we find that Wedekemper's failed to establish the existence of affirmative matters that avoid the legal effect of or defeat Ritchie Bros.' claim for contractual indemnity, and that the trial court erred in granting Wedekemper's section 2-619 motion for involuntary dismissal of that claim.

¶ 22 Accordingly, the judgment of the circuit court is reversed and the cause is remanded for further proceedings.

¶ 23 Reversed and remanded.