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REPLY

I.A. The indemnification clauses do not clearly and unequivocally entitle the indemnitees to indemnification for their own negligence.

Dunn and Starlight make no attempt to explain how the AIA clause at issue can meet the clear and unequivocal standard in Missouri while it has been found to fall short of this exact same standard in numerous other jurisdictions. This begs the question: "in a country with English as the national language, how can the meaning of the standard AIA clause be different in Missouri than it is in Kansas, Minnesota, New Jersey and Indiana?" There is no issue here about whether Missouri follows some majority or minority position on some controlling legal principle. The issue here is whether specific contract language means the same thing in Missouri is it does in all other states that have interpreted the same language.

Dunn and Starlight both acknowledge that the standard annunciated in *Parks v. Union Carbide Corp.,* 602 S.W.2d 188, 190 (Mo. *banc* 1980) requires clear and unequivocal language before an indemnitee will be entitled to indemnification for its own negligent acts. Yet both summarily dismiss the cases cited by PC because they did not apply Missouri law. This court, in *Dillard v.*

Shaughnessy, Fickel et al., 884 S.W.2d 722 (Mo.App. W.D. 1994) applied Kansas law, which arguably employs a lesser standard than Missouri.

> "Pursuant to Kansas law, an indemnification agreement is construed in accordance with the rules for the construction of contracts, . . . and does not indemnify for damages caused by the indemnitee's own negligence unless the agreement specifically states, . . . or the indemnification agreement necessarily indicates it.") *Id.* at pp. 723 – 24 (cites omitted)

Even without the Missouri requirement of clear and unequivocal expression of intent, this court found the clause lacked a specific statement that the indemnitee was entitled to indemnification for its own negligence. This court's opinion gives no hint that it was somehow employing the English language differently for Kansas law than it would have under Missouri law.

The other cases cited by PC applied the same standard required in Missouri and those courts found no clear and unequivocal intent that the indemnitor indemnify the indemnitee for its own negligent acts. See *Braegelmann v. Horizon Development Co.,* 371 N.W.2d 644, 646 (Minn.App. 1985) ("Agreements . . . are not construed in favor of indemnification unless such intention is expressed in clear and unequivocal terms . . ."); *Mautz v. J.P. Patti Co.,* 298 N.J.Super. 13, 19, 688 A.2d 1088, 1091 (1997) ("[A] contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms."); *Hagerman Const. Corp. v. Long Electric Co.,* 741 N.E.2d 390, 393 (Ind.Ct.App. 2000) ("Next, we must determine

whether the indemnification clause also expressly states, in clear and unequivocal terms, that it applies to indemnify Hagerman for its own negligence.").

Dunn and Starlight suggest that *Buchanan v. Rentenbach Constructors, Inc.*, 922 S.W.2d 467 (Mo.App. E.D. 1996) controls the interpretation of the indemnification clause at issue here. While both now rely exclusively on that case, neither cited the case in their motions to the trial court. *Buchanan* dealt solely with whether the trial court had erred in dismissing the indemnitee's third-party claim for indemnification. To the extent *Buchanan* states that the indemnification clause requires indemnification for the indemnitee's own negligence, that statement is *obiter dictum* and has no precedential value on that issue. *Boyle v. Vista Eyewear, Inc.* 700 S.W.2d 859, 866 (Mo.App. W.D. 1985); *Baker v. Goodman*, 364 Mo. 1202, 1212, 274 S.W.2d 293, 297 (*banc* 1955) ("There is no doctrine better settled than that the language of judicial decisions must be construed with reference to the facts and issues of the particular case, and that the authority of the decision as a precedent is limited to those points of law which were raised by the record, considered by the court, and necessary to a decision.")

In *Buchanan*, plaintiff was an employee of subcontractor K & K who alleged that Rentenbach, the general contractor, negligently allowed K & K to use three-wheeled platforms on the project, which led to plaintiff's injuries. *Id.* at p. 470. Rentenbach then filed a third-party action against K & K alleging that

plaintiff's claim arose out of K & K's negligent performance of work. *Id.* The court concluded: "These assertions sufficiently support Rentenbach's claim for indemnification under the agreement." The court then considered K & K's assertion that the agreement did not require K & K to indemnify Rentenbach for Rentenbach's own negligence.

The court noted the portion of the clause that allowed for indemnification "regardless of whether it is caused in part by a party indemnified" and held the language "sufficiently clear to survive a motion to dismiss." *Id.* Without further clarification, the court then stated: "We disagree, however, with K & K's argument that the agreement between it and Rentenbach did not contain clear and unequivocal language requiring it to indemnify Rentenbach for its own negligent acts." *Id.* The analysis in the opinion suggests that the court may have been rejecting a claim that Rentenbach could not maintain a claim for indemnification because there were direct claims of negligence against it. However, the court in *Buchanan* did not have to reach the ultimate decision of whether or not Rentenbach was entitled to be indemnified for its own negligence because it was clearly entitled to be indemnified to the extent of K & K's alleged negligence. While the issue of indemnification for the indemnitee's own negligence was raised in the record and considered by the court, the decision of whether the clause provided for complete versus partial indemnification was not addressed and it was

not necessary to the decision. Therefore, under *Boyle* and *Baker*, *Buchanan* has no precedential value on this issue.

Another problem with *Buchanan* is that the indemnification clauses are not the same. Paraphrasing the indemnification clause in *Buchanan*, the indemnitor (subcontractor) agreed to indemnify the indemnitee (general contractor) for claims "to the extent caused or alleged to be caused in whole or in part by" the subcontractor. *Buchanan* had additional language requiring the subcontractor to indemnify not only for claims caused by the subcontractor's work, but also for claims *alleged* to have been caused by the subcontractor's work. This was particularly important since the plaintiff had specifically alleged negligence in allowing the subcontractor to use three-wheeled carts. Missing from the clause in *Buchanan* are the additional limiting words at issue here, i.e., that PC agreed to indemnify Dunn for claims "*but only* to the extent in whole or in part by" the negligence of PC. This same limiting language was discussed in *Hagerman* at pp. 393 –94: . . ."[T]he phrase 'but only to the extent' clearly limits Long's obligation to indemnify Hagerman only to the extent that Long, its sub-subcontractors, employees, and anyone for whom it may be liable are negligent." The inclusion of the words "but only" in the indemnification clause serves to further reinforce the intent that the indemnitor was only required to indemnify for its own negligence and not for the negligence of the indemnitee.

Dunn and Starlight convinced the trial court to interpret or rewrite the indemnification clause to state:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, ~~but only to the extent~~ caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Subsubcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6.

If the parties had stricken the words "but only to the extent" then Dunn and Starlight's interpretation might be correct. Dunn and PC did strike other parts of the AIA form that did not express their intent and agreement. The subcontract between Dunn and PC has portions stricken on the following pages: 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, and 14. (L.F., Vol. V, pp. 607 – 630). The contract between Dunn and Starlight also has numerous portions similarly stricken. (L.F., Vol. V, at pp. 588 – 606).

Dunn and Starlight pretend that the limiting language does not exist. They have cited no cases that have discussed the meaning of the phrase "but only to the extent." PC has cited four cases on point, one of which comes from this very court. Those cases hold that the intent in employing this phrase is to limit

indemnification to the extent that the indemnitee is required to pay for the indemnitor's negligence. Stated conversely, the indemnitee is not entitled to indemnification for its own negligence. To read the clause any other way renders those limiting words meaningless.

Dunn and Starlight suggest that the language "regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified" requires indemnification for the indemnitees' own negligence. All this phrase clarifies is that an indemnitor can still recover partial indemnification, even if it is partially or even primarily negligent (so long as the indemnitor's negligence caused the claim in part). By ignoring the limiting words of the indemnification clause, the trial court erred in holding Starlight and Dunn entitled to indemnification for their own negligence. This matter should be reversed and remanded for entry of judgment in favor of PC on Dunn's claim for indemnification on amounts paid to settle plaintiffs' claims.

I.B.1 Dunn and Starlight are not entitled to indemnification for the amounts spent by them to settle plaintiffs' claims against each of them.

Dunn and Starlight rest their claims of entitlement to the amounts they spent to settle plaintiffs' claims solely or at least primarily on *Buchanan.* Dunn apparently concedes that it is due no amounts for its settlement if the

indemnification clause does not require PC to indemnify Dunn for Dunn's own negligence. Dunn advanced no argument to the contrary.

Starlight suggests that a "but for" test should be applied and that but for PC's actions, plaintiff would not have been harmed. The error in Starlight's argument is that inadequate lighting resulting from the downed lightpole had nothing (or very little) to do with plaintiff's fall. Starlight itself advanced this very point in support of its summary judgment motion against plaintiffs. Starlight stated: . . . "the deposition testimony of plaintiffs as well as their companions establish that at the time of plaintiff Zilma Nusbaum's alleged fall, the lighting was adequate and that a lack of lighting did not contribute to her alleged fall." (L.F., Vol. III, p. 395). Using the test urged by Starlight, but for Starlight's failure to warn plaintiff of the defective manhole in the sidewalk over which it exercised control, plaintiff would not have tripped and injured herself. PC submits that the weakness in plaintiffs' claim of inadequate lighting explains why plaintiffs were willing to settle with PC and Dunn for far less they were willing to settle with Starlight. Since each party settled with plaintiffs for their respective alleged negligence, and since the indemnification clauses only require indemnification for the indemnitor's negligence, neither Dunn nor Starlight is entitled to indemnification for their settlements with plaintiffs.

I.B.2 Dunn is only entitled to attorneys' fees if it can show it incurred such fees in defense of claims against it based solely upon the negligence of PC.

The same rationale discussed above also applies to the claims for attorneys' fees. Just as Dunn and Starlight are not entitled to indemnification for claims based upon their own negligence, they are not entitled to their attorneys' fees in defending against plaintiffs' direct claims of negligence against them. The cause should be remanded with directions for the trial court to determine whether Dunn, after demanding indemnification from PC, incurred attorneys' fees in defending claims based solely upon the negligence of PC as opposed to defending claims based on its own negligence.

CROSS – APPEAL

POINTS RELIED ON

I. The trial court did not err in refusing to award attorneys' fees spent by Dunn and Starlight in pursuing indemnification because those fees were not provided for under the contracts.

In re Morrison, 987 S.W.2d 475 (Mo.App. S.D. 1999)

RJF International Corp. v. B.F. Goodrich Co., 880 S.W.2d 366 (Mo.App. E.D. 1994)

Missouri Pac. Railroad Co. v. Rental Storage & Transit Co., 524 S.W.2d 898 (Mo.App. Spfld. 1975)

II. The trial court did not err in refusing to award pre-judgment interest under §408.020, RSMo, because the amounts awarded were unliquidated.

Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo.App. E.D. 1998)

§408.020, RSMo.

ARGUMENT

I. The trial court did not err in refusing to award attorneys' fees spent by Dunn and Starlight in pursuing indemnification because those fees were not provided for under the contracts.

Missouri has adopted the "American Rule" which requires litigants to bear the expense of their own attorneys' fees. *In re Morrison*, 987 S.W.2d 475, 478 (Mo.App. S.D. 1999). Attorneys' fees may be recovered: 1) when provided pursuant to statute or contract; 2 to a wronged party involved in collateral litigation; or, 3) by a court of equity to balance benefits. *Id.* Dunn and Starlight seek not only their attorneys' fees in defending the underlying claim, but also seek their fees in prosecuting their claims for indemnification. In support of these claim, Dunn and Starlight cite *RJF International Corp. v. B.F. Goodrich Co.*, 880 S.W.2d 366 (Mo.App. E.D. 1994). *RJF* is distinguishable because that indemnification clause provided for recovery of expenses defending claims **and** allowed for attorneys' fees resulting from a breach of the agreement itself. The court in *RJF* noted:

> "The terms of the agreement are not limited to attorney's fees and costs incurred while defending against plaintiff's case in the trial court. Section 8.2 provides that BFG may recover reasonable attorney's fees and disbursements resulting from *any* breach or default in the performance or observance by RJF under the agreement and failure to satisfy any Assumed Liability. This includes attorney's fees and costs on appeal in defending the indemnity provisions of the contract that arose from the breach of the agreement by RJF. *Id.* at p. 372 (emphasis in the original)

Whereas *RJF* granted indemnification for breach or default under the agreement, the subcontract between Dunn and PC limited indemnification to expenses of defending claims "attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property . . .." There is no language here granting indemnification for attorneys' fees incurred in pursuing indemnification. In the absence of such language, Dunn and Starlight are not entitled to their attorneys' fees in pursuing indemnification. See *Missouri Pac. Railroad Co. v. Rental Storage & Transit Co.*, 524 S.W.2d 898 (Mo.App. Spfld. 1975).

II. The trial court did not err in refusing to award pre-judgment interest under §408.020, RSMo, because the amounts awarded were unliquidated.

Dunn and Starlight are not entitled to prejudgment interest under §408.020 RSMo., because their claims were not liquidated. As stated above, PC denies that Dunn and Starlight are entitled to indemnification, and PC likewise denies any prejudgment interest is owed. In *Monsanto Co. v. Gould Electronics, Inc.*, 965 S.W.2d 314, 318 (Mo.App. E.D. 1998) the court held that an indemnitee is not entitled to prejudgment interest unless the indemnitee has made a demand and has specified the amount owed. In *Monsanto* the indemnitee had demanded indemnification in November of 1990, but did not specify the amount claimed until March of 1993. The court reversed the award of prejudgment interest prior to March of 1993. In this case Dunn demanded indemnification years before it

settled with plaintiffs, but it did not provide PC with a demand for a specific total amount until the damages hearing after the trial court entered summary judgment. The trial court found that Dunn and Starlight were not entitled to all the attorneys' fees they sought. Therefore, the amounts sought by them remained unliquidated until the court entered judgment and therefore the court properly refused prejudgment interest.

III. Conclusion

The mere fact that four courts, including this one, have held that the indemnification clause here is not sufficiently clear or unequivocal to require indemnification for an indemnitee's own negligence should prevent this court from finding the same clause clear and unequivocal for that purpose under Missouri law. The *Buchanan* case cited by Dunn and Starlight merely held that the indemnitee had sufficiently plead a claim for indemnification. Any statements beyond that holding are *obiter dictum* and have no precedential value. Each party was present as a defendant to plaintiffs' cause and each settled for its own alleged fault in causing plaintiffs' injuries. Therefore, neither Starlight nor Dunn is entitled to seek indemnification for those settlement amounts. PC requests that the court reverse on the issue of indemnification for settlement amounts, and remand the matter for the trial court's determination whether, after Dunn demanded

indemnification and defense, it incurred attorneys' fees in defending claims solely based upon PC's negligence as opposed to its own.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

COMES NOW, the undersigned attorney for Appellant/Respondent PC Contractors, Inc., on this 29th day of January, 2001, and hereby certifies pursuant to Rule 84.06(c), the following:

1. To the best of the undersigned's belief, this brief complies with Rule 55.03;

2. This brief complies with the limitations contained in Rule 84.06(b);

3. This brief, according to statistics compiled by the Microsoft Word program, contains 3334 words and 432 lines of text.

4. A Microsoft Word file containing this brief is being submitted on a disk which has been scanned with Norton AntiVirus Version 5.02.00.

5. Two (2) copies each of this brief have been hand-delivered to the following:

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