

Judgment rendered January 12, 2022.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 54,161-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

FEDERAL INSURANCE
COMPANY, COMMERCE AND
INDUSTRY INSURANCE
COMPANY, LEXINGTON
INSURANCE COMPANY, EXCO
OPERATING COMPANY,
LP AND EXCO RESOURCES,
INC.

Plaintiffs-Appellees

versus

SELECT ENERGY SERVICES,
LLC, SES HOLDINGS, LLC,
ZURICH AMERICAN
INSURANCE COMPANY,
AMERICAN GUARANTEE AND
LIABILITY INSURANCE
COMPANY AND EVANSTON
INSURANCE COMPANY

Defendants-Appellants

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Appealed from the
Forty-Second Judicial District Court for the
Parish of DeSoto, Louisiana
Trial Court No. 77378

Honorable Eric R. Harrington (*Pro Tempore*), Judge

* * * * *

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* * * * *

Before MOORE, STONE, and STEPHENS, JJ.

STONE, J.

FACTS AND PROCEDURAL HISTORY

Overview

This appeal concerns the enforceability of a mutual indemnity and defense provision in an agreement between the defendant-appellant, Select Energy Services¹ (“Select”), and plaintiff-appellees, Exco Operating Company, LP and Exco Resources, Inc. (collectively “Exco”).² Their respective insurers are also parties to this appeal. Federal Insurance Company (“Federal”) is the primary insurer and third layer of excess liability coverage for Exco.³ Zurich American Insurance Company is Select’s primary insurer.⁴

Exco lawyers drafted the agreement, which was negotiated and executed in Texas. The indemnity provision was implicated when three workers were severely injured on a Select oil rig when it collapsed while servicing an Exco drilling site in DeSoto Parish, Louisiana. Two of the workers, the Rodgerses (employees of a third party, Brant Tool Company), filed suit in the 42nd JDC in Louisiana; the other worker, Paredes (an employee of Select), filed suit in Texas. With respect to the Paredes suit, Select is the purported indemnitor, and Exco is the purported indemnitee.

¹ Select Energy Services is an LLC chartered under Delaware law; it has its principal place of business in Texas. Its corporate headquarters are in Gainesville, Texas. In some contexts, references to “Select” in this opinion include Select and its insurers.

² Throughout this opinion, “Exco” is used to refer collectively to two related entities: (1) Exco Resources, Inc., a Texas corporation with its principal place of business located in Dallas, Texas; and (2) Exco Operating Co., LP, a Delaware limited partnership and a subsidiary of Exco Resources, Inc.

³ Commerce & Industry Insurance Company is the second layer of excess liability for Exco; and Lexington Insurance Company is the fourth layer of excess liability for Exco.

⁴ American Guarantee and Liability Company and Alterra America Insurance Company are excess liability insurers of Select.

The roles of parties are reversed regarding the Rodgerses' suit: Exco is the indemnitor and Select is the indemnitee. Neither the Rodgerses nor Paredes are involved in the instant litigation – all of their respective claims have been settled and lawsuits dismissed.

In the Paredes suit, Exco demanded that Select honor its commitment to defend and indemnify Exco. Obliging, Select's primary insurer, Zurich American Insurance Company, provided a defense and ultimately paid \$31 million in settlement money to Paredes in the Texas lawsuit ("the Paredes settlement"). Exco claims that Select (Zurich) did not consult with it before making and paying the settlement. Meanwhile, the Rodgerses' lawsuit was pending, and Exco's primary insurer, Federal, initially agreed to defend Select subject to a reservation of rights letter.

After the Paredes settlement, Exco withdrew its defense in the Rodgerses' Louisiana personal injury lawsuit and filed the instant suit requesting a judgment declaring that the indemnity provision is unenforceable because it contravenes La. R.S. 9:2780, the Louisiana Oilfield Anti-Indemnity Act. Exco also demanded recovery of the amounts spent defending Select as unjust enrichment (payment of a thing not due). Select filed an answer asserting the enforceability of the mutual indemnity provision, and in the alternative, filed a reconventional demand to recover from Exco of the amount of the Paredes settlement.

Both parties filed motions for summary judgment. The trial court denied Select's motion and granted Exco's motion, holding that: (1) Louisiana law applies; (2) La. R.S. 9:2780 renders the mutual indemnity provision unenforceable; and, (3) Exco is entitled to recover its expenditure in defending Select in the Rodgerses' lawsuit. The trial court also dismissed

with prejudice Select's reconventional demand for reimbursement for the Paredes settlement and related expenses. This appeal ensued.

Select urges the following assignments of error: (1) the trial court erred in holding that Louisiana law applies instead of Texas law; (2) even if Louisiana law does apply, the trial court erred in holding that La. R.S. 9:2780 invalidates indemnity obligations of an oil company to its subcontractor; (3) even if Louisiana law applies and La. R.S. 9:2780 invalidates the mutual indemnity agreement, Exco is equitably estopped from refusing to honor that agreement because Select already paid \$31 million on behalf of Exco pursuant to that agreement; (4) the trial court erred in awarding recovery to Exco of its expenditure in defending Select in the Rodgerses lawsuit; and, (5) Select's MSJ should have been granted.

Relevant contractual provisions

The agreement contains the following choice of law provision:

The parties agree and intend to provide that Texas law shall in all instances govern the interpretation of this agreement and the rights of the parties under this agreement and any amendments hereto, without regard, however, to any choice of laws or conflict of laws provision which would direct application of the laws of another jurisdiction.

However, the agreement also recognizes that courts have the power to disregard contractual choice of law provisions, and makes alternative provisions in case a court chooses to apply Louisiana law notwithstanding the parties' selection of Texas law:

Notwithstanding anything to the contrary provided herein, to the extent, and only to the extent, Louisiana law (specifically, the Louisiana Oilfield Anti-Indemnity Act) is found to govern the indemnity provisions found [in this agreement] the following substitute indemnity provisions...shall be inserted

Exco's obligations under the mutual indemnity provision are delineated as follows:

Company [Exco] shall defend, indemnify, hold harmless, and release contractor group [Select] from and against any and all claims, losses, damages, demands, causes of action, suits, and liability of every kind, including all expenses of litigation, court costs and attorney fees which may be incurred by contractor group as a result of such claims, demands, or suits brought or asserted against contractor group by any party whomsoever arising from any claim of loss, damage, injury, illness, or death described in subparagraphs (a) through (h) below, regardless (except as expressly provided herein) of who may be at fault or otherwise responsible under any other contract, or any statute, rule or theory of law.

Exco's indemnity obligation expressly applies to personal and bodily injury to Exco employees and/or invitees. Select's indemnity obligation mirrors the above-quoted language articulating Exco's obligation, and applies to claims by Select employees, invitees, as well as Select subcontractors, and their employees and invitees.

Article IV(A)(2) of the contract states:

The parties agree that the indemnity and insurance obligations contained in this agreement are separate and apart from each other, such that failure to fulfill the indemnity obligations does not alter or eliminate the insurance obligations or vice versa. The parties further agree that the insurance obligation shall support but shall not in any way limit the defense and indemnity obligations set forth herein.

Article IV(G)(1)(a) imposes an important limitation on the above-quoted provision. In relevant part, it states with reference to the Texas Oilfield Anti-Indemnity Act ("TOAIA"):

To the extent dictated by the Act, either party's obligations of indemnity for the other party's sole or concurrent negligence shall be limited to the [contractual indemnity] insurance carried by such party pursuant to [the mutual indemnity agreement].

Article IV(F)(5) of the agreement provides:

If a tender of [demand for] defense and indemnity is made by the indemnified party but rejected by the defending party [indemnitor], then upon a determination that the defending party [indemnitor] owed a duty of defense under this agreement, the defending party [indemnitor] shall be held liable for any amount paid by the settling party without a need for judicial determination as to whether the indemnified party had potential liability to the claimant or whether the settlement amount was reasonable.⁵

DISCUSSION

La. C.C.P. art. 966(A), in relevant part, states:

(3) After an opportunity for adequate discovery, a motion for summary judgment **shall** be granted if the motion, memorandum, and supporting documents show that there is **no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.** (Emphasis added).

...

The standard of review utilized by an appellate court reviewing a trial court's grant of a motion for summary judgment is de novo. *Duncan v.*

U.S.A.A. Ins. Co., 06-363 (La. 11/29/06), 950 So. 2d 544, 547.

The Louisiana Oilfield Anti-Indemnity Act

La. R.S. 9:2780, in relevant part, provides:

A. The legislature finds that an inequity is foisted on certain **contractors** and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the

⁵ This provision negates any potential significance of Exco's claim that Select did not notify Exco before making the Paredes settlement.

indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in...an agreement pertaining to a well for oil, gas, or water, or drilling for minerals...is void and unenforceable to the extent that it ...provide[s] for defense or indemnity...to the indemnitee against...liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term “agreement,” ...as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals...including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

D. (1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the workers’ compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner’s land. (Emphasis added).

The Louisiana Supreme Court, in *Fontenot v. Chevron U.S.A. Inc.*, 95-1425 (La. 7/2/96), 676 So. 2d 557, 563, explained the legislature’s intent in enacting La. R.S. 9:2780 was to protect oilfield contractors from adhesionary indemnity provisions required by oligopsonistic oil companies:

Louisiana’s Anti-Indemnity Act arose out of a concern about the unequal bargaining power of oil companies and contractors and was an attempt to avoid adhesionary contracts under which contractors would have no choice but to agree to indemnify the oil company, lest they risk losing the contract. It is also clear from the specific language of this Subsection A that the Anti-Indemnity Act was designed not only to protect oilfield contractors but also their employees.

Nonetheless, in *Silverman v. Mike Rogers Drilling Co., Inc.*, 45,119 (La. App. 2 Cir. 1/14/10), 34 So. 3d 1099, *writ denied*, 10-1128 (La.

9/17/10) 45 So. 3d 1049, this Court held that La. R.S. 9:2780 invalidated the obligation of an oil company to indemnify its contractor, based on the following statutory language:

It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee

Accordingly, if Louisiana law applies, La. R.S. 9:2780 invalidates Exco's defense and indemnity obligations to Select.

Texas Oilfield Anti-Indemnity Act

Conversely, if Texas law applies, the TOAIA does not invalidate the mutual indemnity provision. It is true that the TOAIA generally invalidates oilfield indemnity agreements such as the one involved in this case:

- (a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:
 - (1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and
 - (2) arises from:
 - (A) personal injury or death;
 - (B) property injury; or
 - (C) any other loss, damage, or expense that arises from personal injury, death, or property injury.

Tex. Civ. Prac. & Rem. Code Ann. § 127.003 (West)

However, the TOAIA contains an exception which allows enforcement of mutual indemnity obligations limited to the scope and amount of contractual indemnity insurance each party as indemnitor has agreed to provide to the other as indemnitee:

- (a) This chapter does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).
- (b) With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee.

Tex. Civ. Prac. & Rem. Code Ann. § 127.005. Thus, a mutual indemnity obligation is only enforceable when the indemnitor's obligation is limited to the extent of the coverage and dollar limits of the contractual indemnity insurance.

Article (G)(1)(a) of the Exco-Select contract, *supra*, brings the mutual indemnity agreement within the exception to voidness set forth in Tex. Civ. Prac. & Rem. Code Ann. § 127.005. Therefore, whether the mutual indemnity agreement is enforceable depends on which state's law is applicable.

Choice of law

La. C.C. art. 3515 sets forth the general framework for conflict of law analysis in Louisiana court:

Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue. That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

La. C.C. art. 3537 specifically addresses conflict of law issues in contractual disputes:

Except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.

La. C.C. art. 3540 purports to allow parties to a contract a degree of autonomy:

All...issues of conventional obligations [other than formal validity and capacity of the parties] and are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.

In *King v. I.E. Miller of Eunice, Inc.*, 970 So. 2d 703 (La. App. 3 Cir. 11/21/07), *writ denied*, 07-2460 (La. 2/22/08), 976 So. 2d 1285, the Third Circuit respected the parties' agreement selecting Texas law and upheld a Texas contractor's indemnity obligation to its Louisiana subcontractor for an injury to the contractor's employee in Louisiana. The injured employee was a Louisiana resident, and the injury resulted from the negligence of the subcontractor's employees. The Third Circuit observed that the Texas policy of allowing freedom of contract (embodied in the TOAIA) conflicted with the LOAIA's policy of protecting oilfield contractors from adhesionsary indemnity obligations to oil companies, and that indemnity obligations of contractors to subcontractors were beyond the ambit of the LOAIA's

protection.⁶ The court also found that Louisiana had a stronger relationship to each of the parties than did Texas, but found it more important that the Texas contractor had drafted the Texas choice of law provision and the Louisiana subcontractor agreed to it and had a justified expectation that it had an enforceable right to indemnity from the Texas contractor under Texas law. Finally, the *King* court observed that this justified expectation was especially important because the Louisiana subcontractor had already satisfied its own indemnity obligation to the Texas contractor in another case. The court opined that to allow the subcontractor to satisfy the burden of the mutual indemnity agreement then deny it the benefit of that agreement would be an injustice to the Louisiana subcontractor. *Id.* at 706-07.

In the context of an exception of no cause of action, *Silverman, supra*, held unenforceable a Texas oil company's agreement to indemnify an Arkansas oilfield contractor against claims by a Louisiana plaintiff injured at a Louisiana work site. The agreement included a provision that Arkansas law would apply. This Court held that the LOAIA, by its literal terms, invalidates both contractor indemnity obligations *and* oil company indemnity obligations, and therefore, if applicable, would invalidate the Texas oil company's indemnity obligation to its contractor. Despite the parties' agreement selecting Arkansas law, this court further held that Louisiana law, rather than Arkansas law, applied to the case, because: (1) the LOAIA would invalidate the indemnity obligation in question if Louisiana law were applied; and (2) the contractor's attorney "essentially conceded

⁶ Annaleigh Drost Richardson, *The Texas Oilfield Anti-Indemnity Act Versus the Louisiana Oilfield Indemnity Act: How, When, and Where Indemnification Provisions Are Void*, 73 Baylor L. Rev. 467, 472 (2021), provides a discussion of the policies underlying the LOAIA and the TOAIA.

that Arkansas law would apply only if the LOAIA was found to be inapplicable.” *Id.* at 1104.

Silverman, supra, is distinguishable from the instant case. That is because Select, the indemnitee in the instant case, has already satisfied its obligation as indemnitor by securing insurance to pay the Paredes plaintiff a \$31 million settlement on behalf of Exco. In *Silverman*, neither party had performed in its capacity as indemnitor. It would be a grave injustice and an undue imposition on Select to now allow Exco to avoid honoring its own obligation under the mutual indemnity agreement.⁷ For the same reason that *Silverman* is distinguishable, *King, supra*, is persuasive.⁸

Because this dispute is between Texas companies which agreed to the application of Texas law⁹ and Select already performed its obligation pursuant to Texas law, Texas’ policy of freedom of contract would be severely impaired if that contract is now invalidated pursuant to Louisiana law. That impairment to Texas policy is far greater than any impairment to Louisiana policy that could result from upholding Exco’s indemnity obligation. Indeed, the policy underlying the LOAIA is to protect oilfield contractors from adhesionary indemnity obligations to oil companies.

⁷ Furthermore, Select Services (unlike the Arkansas contractor in *Silverman*) certainly has not conceded that Texas law would only apply if the LOAIA would be inapplicable.

⁸ *Silverman*’s holding that the LOAIA invalidates both contractors’ indemnity obligations and oil company’s indemnity obligations is reconcilable with the Louisiana Supreme Court’s statement in *Fontenot* that the purpose of the LOAIA is to protect oilfield contractors from oil companies. The legislature, in drafting the LOAIA, deemed it necessary to broadly define the scope of the statute’s operation, rather than trying to explicitly limit that scope based on the identity of the contracting parties. This breadth makes it more difficult or impossible for oil companies to circumvent the LOAIA.

⁹ The trial court erred in holding that the parties actually agreed to Louisiana law for purposes of disputes such as this one. The conditionality of the language on which the trial court relied establishes that this so-called “agreement” was merely an acknowledgment that a court might choose to apply Louisiana law regardless of the parties’ agreement selecting Texas law.

Fontenot, supra. That policy is not impaired at all by upholding an oil company's indemnity obligation to its contractor – especially where the contractor has already satisfied its indemnity obligation to the oil company. Additionally, the injured workers have already been paid handsomely in settlement of their claims. Thus, Louisiana's policy of compensating injured oilfield workers would not be impaired by the application of Texas law in this case.

The trial court erred in holding that Louisiana law applies. Texas law, particularly the TOAIA, applies to this case, and thereunder the mutual indemnity obligation is enforceable. In refusing to honor its indemnity obligation under the agreement, Exco (and its insurers) committed breach of contract. Select's insurers are entitled to reimbursement from Exco's insurers for the respective amounts paid pursuant to the Rodgerses settlement. Zurich is also entitled to reimbursement from Federal for the amount spent defending select in the Rodgerses litigation because Federal would have directly borne those expenses had it honored its obligations; this amount includes attorney fees.

However, Select and its insurers have not established entitlement to attorney fees with respect to the instant suit. Under Texas law, attorney fees are not recoverable unless specifically provided by contract or statute.

Cypress Creek EMS v. Dolcefino, 548 S.W.3d 673, 690 (Tex. App. 1st Dist. 2018). The summary judgment evidence does not establish prima facie proof of the amount of attorney fees incurred with respect to the instant suit. Nor do the plaintiffs-in-reconvention cite any statute or contractual language to support an award of these attorney fees under Texas law.

This court is unable to render a money judgment on the record because the Select and its insurers' summary judgment evidence does not prove the policy limits of the respective policies that Federal, Commerce & Industry, and Lexington issued to Exco. Without that information, it is impossible to determine how much of the total amount each of these insurers owes.

CONCLUSION

The trial court judgment granting Exco and its insurers' motion for summary judgment and denying Select and its insurers' motion for summary judgment is REVERSED. Select and its insurers' cross motion for summary judgment is hereby GRANTED IN PART AND DENIED IN PART. All costs of this appeal are taxed to Exco and its insurers. This matter is REMANDED for the further proceedings in accordance with this opinion.