

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LULA RAINES, Personal Representative of the Estate  
of JOYCELYN HARVEY, deceased, and Assignee of  
NORTH DETROIT GENERAL HOSPITAL,

Plaintiff-Appellant,

v

NATIONAL EMERGENCY SERVICES, INC.,

Defendant-Appellee.

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UNPUBLISHED  
December 13, 1996

No. 189997  
Wayne County  
LC No. 94-402690 CZ

Before: Jansen, P.J., and Saad and M.D. Schwartz,\* JJ.

PER CURIAM.

In this indemnification action, plaintiff appeals as of right from an order of dismissal entered after the trial court granted a directed verdict in favor of defendant at the close of plaintiff's proofs in a bench trial. We affirm.

In the early afternoon of September 12, 1987, plaintiff's decedent, Joycelyn Harvey, arrived at the emergency room of North Detroit General Hospital ("NDGH"), complaining of lower abdominal pain and hematuria. While in the emergency room, Harvey was treated by Dr. Amiya Samanta, a physician provided by defendant under its contract with NDGH to staff the emergency room. Harvey died later that night. In 1989, plaintiff commenced a wrongful death action against several doctors and NDGH, alleging, in part, that NDGH breached a duty of care to provide prompt medical treatment including a blood transfusion. Neither defendant nor Dr. Samanta were named as defendants in the wrongful death action. Four months later, NDGH filed for bankruptcy and the proceedings were stayed.

In early 1993, the bankruptcy court confirmed NDGH's plan of reorganization pursuant to which plaintiff was assigned NDGH's indemnity rights under its contract with defendant. A default was entered against NDGH when it did not appear and defend against plaintiff's claims after the bankruptcy

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\* Circuit judge, sitting on the Court of Appeals by assignment.

stay was lifted. After a jury trial on the issue of damages and plaintiff's claims against one of the doctors, a judgment in the amount of \$585,000 was entered against NDGH. Thereafter, plaintiff, as assignee of NDGH's indemnity rights, commenced the present action against defendant for common law and contractual indemnification. At the close of plaintiff's proofs in a bench trial, defendant moved for a directed verdict. The trial court orally granted a directed verdict on plaintiff's claim for common law indemnification, and granted the motion with respect to the claim for contractual indemnification in a written opinion issued one week later. Plaintiff's motions for mistrial, to reopen proofs, for reconsideration, and to amend her complaint to add a claim for contribution were subsequently denied.

Plaintiff contends that the trial court erred when it granted a directed verdict in favor of defendant on her claim for contractual indemnification.<sup>1</sup> A motion for directed verdict in a bench trial is actually a motion for involuntary dismissal pursuant to MCR 2.504(B)(2), and we will treat it as such for purposes of appellate review. *Samuel D. Begola Services, Inc v Wild Brothers*, 210 Mich App 636, 639; 534 NW2d 217 (1995). We review a trial court's findings of fact in a bench trial for clear error. *Triple E. Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding is clearly erroneous only if, upon review of the evidence, we are left with a definite and firm conviction that a mistake has been made. *Id.*

Plaintiff's claim for contractual indemnification is premised on Section 7(a) of the agreement between defendant and NDGH, which provides:

*National agrees to indemnify and hold harmless the hospital and its officers, trustees, members, agents and employees from and against any and all claims, costs, actions, causes of action, losses or expenses (including attorneys' fees) arising out of any failure by National, its employees or the physicians performing services pursuant to this Agreement to perform its obligations or duties hereunder or the negligent performance of any such obligations or duties. Further, National shall procure and maintain in effect during the term hereof professional liability insurance covering the acts and omissions of National and the physicians providing services pursuant to this Agreement in an aggregate amount not less than Fifteen Million Dollars (\$15,000,000.00). Such insurance shall name the Hospital as an additional insured and shall provide that Hospital shall receive at least ten days' written notice prior to the termination thereof. Such insurance shall also provide that it will be the primary source of coverage for the Hospital in relation to the actions or omissions of National and the physicians rendering services pursuant to this Agreement. National shall provide Hospital with an appropriate certificate evidencing said insurance prior to the commencement of services pursuant to this Agreement and prior to any renewal of this Agreement. [Emphasis added.]*

The trial court found that "by the language of the contract, the parties indicated that [defendant] was to indemnify the hospital only when its own negligence, solely, was the cause of a loss."

Unlike common law or implied contractual indemnification, where the potential indemnitee must be free from negligence or fault, *Universal Gym Equipment, Inc v Vic Tanny International, Inc*, 207 Mich App 364, 372; 526 NW2d 5 (1994), a party may contract to indemnify another against liability for its own negligence. *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). Several factors are used to determine whether the parties to an indemnity contract intended to protect the indemnitee against its own negligence. First, the presence of an exclusionary clause expressly precluding indemnification for injuries caused by the indemnitee's sole negligence indicates an intent to provide indemnification in all other situations involving the indemnitee's negligence. Second, the situation of the parties and the circumstances surrounding the contract may signal an intent to provide indemnification for the indemnitee's own negligence. *Sherman v DeMaria Building Co*, 203 Mich App 593, 597-600; 513 NW2d 187 (1994); *Paquin v Harnischfeger Corp*, 113 Mich App 43, 52-53; 317 NW2d 279 (1982).

Upon review of the contract language and the other evidence presented at trial, we find that the trial court did not clearly err in construing the contract. Plaintiff admits that she presented no evidence regarding the intent of the contracting parties, but argues that although the indemnity provision does not contain an exclusionary clause, sections 2(a) and 2(b)(2) the agreement evince the parties' intent that defendant would indemnify NDGH for the negligence of defendant's agents and NDGH's emergency room employees. While these contractual provisions demonstrate that the parties agreed that defendant's physicians would be in charge of emergency room personnel, they do not shed light on whether defendant agreed to indemnify NDGH for the negligence of NDGH employees. Through the clear language of the indemnity provision and the complementary provision requiring that defendant procure professional liability insurance covering the acts and omissions of its physicians, the parties demonstrated their intent that defendant would not indemnify NDGH for the negligence of NDGH employees. Because there was no evidence presented suggesting that defendant agreed to indemnify NDGH for the negligence of NDGH employees working in the emergency room or when there was concurrent negligence, we are not left with a definite and firm conviction that the trial court made a mistake in finding that the parties intended that defendant would indemnify NDGH only when defendant's agent was solely negligent.

Plaintiff had to prove that NDGH's loss was covered by the contract. See *Ford v Clark Equipment Co*, 87 Mich App 270, 277-278; 274 NW2d 33 (1978). We agree with the trial court that given the construction of the contract, plaintiff did not, and could not, meet this burden. In the underlying wrongful death action, a default judgment was entered against NDGH. "[T]he entry of a default judgment is equivalent to an admission by the defaulting party to all the matters well pleaded." *Sahn v Brisson*, 43 Mich App 666, 670-671; 204 NW2d 692 (1972). As admitted by plaintiff in her response to defendant's request for admissions, the complaint in the wrongful death action contained several allegations of negligence by NDGH's employees. Accordingly, because NDGH's loss, *i.e.* the judgment, arose out of its own active negligence as well as that of the emergency room physician provided by defendant, plaintiff, as assignee of NDGH's indemnity rights, cannot support a claim under the indemnity contract because its loss was not solely the result of the negligence of defendant or its agents.

Plaintiff next argues that the trial court should have reopened proofs so that she could present evidence regarding Dr. Samanta's negligent supervision of NDGH's employees and the meaning of the contract language. The decision to reopen proofs is within the sound discretion of the trial court and will not be interfered with on appeal absent an abuse of that discretion. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959), *Kornicks v Lindy's Supermarket*, 24 Mich App 668, 672; 180 NW2d 847 (1970). However, a trial court's discretion is not unfettered.

[P]roper judicial discretion requires that no cause should be dismissed for failure of proof until the plaintiff has been given the opportunity to supply any deficiencies if it appears he has been diligent in prosecuting his claim and that no disruption of the court or prejudice to the opposing parties will result. Good faith attempts to remedy an obvious harm to the plaintiffs should not be made to fail on technicalities . . . or even on mistakes of counsel where they can be remedied without hardship to the other parties concerned. [*Serijanian v Associated Material & Supply Co*, 7 Mich App 275, 281; 151 NW2d 345 (1967) (citations omitted).]

Upon review of the circumstances surrounding plaintiff's motion in the instant case, we find that the trial court did not abuse its discretion. Given that the judgment against NDGH was premised in part on NDGH's active negligence, plaintiff had to establish that the contracting parties intended that defendant indemnify NDGH for losses involving concurrent negligence in order to support a claim for contractual indemnification. Even assuming that plaintiff was surprised by the need to present evidence on the contract issue, she withdrew her request to present a witness to testify regarding the intent of the contracting parties and identified no other evidence relevant to the dispositive issue to be proffered in the event the proofs were reopened.

Affirmed.

/s/ Kathleen Jansen

/s/ Henry William Saad

/s/ Michael D. Schwartz

<sup>1</sup> Plaintiff does not challenge the trial court's decision with respect to her claim for common law indemnification.