

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-822

Filed: 2 June 2015

New Hanover County, No. 13 CVS 2944

PATRICIA MITCHELL MALONE, Plaintiff,

v.

CALVIN EUGENE BARNETTE, PARKER TRUCKING SERVICES, INC.,
ADVANTAGE TRUCK LEASING, LLC, YOUNG'S TRUCK CENTER, INC,
VOLVO/GMC TRUCK CENTER OF THE CAROLINAS, AND PAXTON VAN LINES
OF NORTH CAROLINA, INC., Defendants,

YOUNG'S TRUCK CENTER, INC., Cross-Claimant,

v.

PAXTON VAN LINES OF NORTH CAROLINA, INC., Cross-Defendant,

CALVIN EUGENE BARNETTE, Cross-Claimant,

v.

ADVANTAGE TRUCK LEASING, LLC and YOUNG'S TRUCK CENTER, INC.,
Cross-Defendants,

v.

PAXTON VAN LINES OF NORTH CAROLINA, INC., Cross-Defendant.

Appeal by cross-defendant Paxton Van Lines of North Carolina, Inc. from order
entered 28 March 2014 by Judge Phyllis M. Gorham in New Hanover County
Superior Court. Heard in the Court of Appeals 7 January 2015.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for cross-claimant-appellee Young's Truck Center, Inc.

Teague Campbell Dennis & Gorham, L.L.P., by Leslie P. Lasher, for cross-defendant-appellant Paxton Van Lines of North Carolina, Inc.

DAVIS, Judge.

Paxton Van Lines of North Carolina, Inc. ("Paxton") appeals from the trial court's order granting partial summary judgment in favor of Young's Truck Center d/b/a Advantage Truck Leasing, LLC ("Young's") on Young's cross-claims against Paxton for contractual indemnification. On appeal, Paxton contends that the entry of partial summary judgment in favor of Young's was improper because the claims for which Young's seeks indemnification are not covered by the indemnity provision contained in the rental agreement between them. After careful review, we affirm the trial court's order.

Factual Background

On 1 August 2013, Patricia Mitchell Malone ("Malone") filed a complaint in New Hanover County Superior Court against Calvin Eugene Barnette ("Barnette"), Parker Trucking Services, Inc., Young's, Volvo/GMC Truck Center of the Carolinas, and Paxton (collectively "Defendants"). The complaint alleged that on 1 August 2010, Malone was driving east on Holly Tree Road in Wilmington, North Carolina when a 2004 GMC truck ("the Truck") driven by Barnette, an employee of Paxton, struck her vehicle at the intersection of Holly Tree Road and South College Road. In her

complaint, Plaintiff further asserted that the Truck had been leased from Young's by Paxton pursuant to a rental agreement ("the Rental Agreement") executed 29 July 2010 and that Defendants had been negligent in failing to inspect and maintain the braking system on the Truck, leading to Barnette's collision with Malone's vehicle and her resulting injuries.

On 21 October 2013, Barnette filed a cross-claim against Young's alleging that it had "breached its general and statutory duty of care by leasing a truck with defective brakes to Paxton . . . which [Young's] knew or should have known would cause injury to persons either driving the truck or traveling on roadways." Barnette's cross-claim alleged that Young's negligence proximately caused the physical injuries he suffered in the collision and sought compensatory and punitive damages. Barnette filed an amended cross-claim against Young's on 10 January 2014, which eliminated his prior allegations of gross negligence and his request for punitive damages.

In response to both Malone's and Barnette's negligence claims, Young's filed cross-claims against Paxton on 1 October 2013 and 15 January 2014, respectively. In these cross-claims, Young's alleged that pursuant to the Rental Agreement, Paxton was contractually required to indemnify Young's for any monetary damages that Young's may be obligated to pay as a result of a settlement or judgment relating to the 1 August 2010 accident as well as for any attorneys' fees and costs Young's incurs in defending such claims.

Young's filed a motion for partial summary judgment as to its cross-claims for contractual indemnification on 16 January 2014. The motion came on for hearing on 17 February 2014 before the Honorable Phyllis M. Gorham, and on 28 March 2014, Judge Gorham entered an order granting partial summary judgment in Young's favor, stating in pertinent part as follows:

After reviewing the pleadings and other documents of record, and after hearing arguments of counsel, the Court finds that there are no genuine issues of material fact and Defendant Young's . . . is entitled to judgment in its favor as a matter of law. After reviewing the pleadings of record, and after hearing arguments of counsel, the court further finds that Paxton is not entitled to judgment on the pleadings as to [Young's].

IT IS THEREFORE, ordered that Young's . . . MOTION FOR PARTIAL SUMMARY JUDGMENT is GRANTED and Young's . . . is entitled to contractual indemnification for monetary damages payable as a result of settlement or judgment against Young's . . . and for defense costs and attorney fees incurred by Young's . . . as a result of or in defense of the actions asserted by Patricia Mitchell Malone, Calvin Eugene Barnett [sic] and/or any other party in this matter.

Paxton filed a notice of appeal to this Court.¹

Analysis

I. Appellate Jurisdiction

¹ Prior to oral argument, the parties filed a "Notice Regarding Partial Settlement," informing the Court that a confidential settlement had been reached relating to Barnette's cross-claims. However, the parties advised the Court that the settlement did not resolve the parties' dispute as to the issues raised in this appeal. Therefore, we proceed to consider the merits of the appeal.

We first note that the trial court's order granting partial summary judgment in favor of Young's is interlocutory as it does not dispose of all the claims asserted by the parties. *See Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) ("An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." (citation and quotation marks omitted)). Generally, interlocutory orders are not immediately appealable. *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). However, when the trial court's order constitutes a final determination as to some, but not all, of the claims asserted and the trial court certifies the order for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, an immediate appeal will lie. *Id.* at 734, 460 S.E.2d at 334.

Here, in its 28 March 2014 order, the trial court noted that its order constituted a final judgment as to Young's cross-claims for indemnification and certified the order for immediate appeal pursuant to Rule 54(b). Therefore, we possess jurisdiction over Paxton's appeal. *See Feltman v. City of Wilson*, ___ N.C. App. ___, ___, 767 S.E.2d 615, 619 (2014) (explaining that appellate jurisdiction existed where trial court resolved two of four claims asserted by plaintiff and certified case pursuant to Rule 54(b)).

II. Entitlement of Young's to Contractual Indemnity

On appeal, this Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). The entry of summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c). A trial court may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact. *See Premier, Inc. v. Peterson*, ___ N.C. App. ___, ___, 755 S.E.2d 56, 59 (2014) (“In a contract dispute between two parties, the trial court may interpret a plain and unambiguous contract as a matter of law if there are no genuine issues of material fact.”); *Metcalf v. Black Dog Realty, LLC*, 200 N.C App. 619, 633, 684 S.E.2d 709, 719 (2009) (“[W]hen the language of a contract is not ambiguous, no factual issue appears and only a question of law which is appropriate for summary judgment is presented to the court.”).

Paxton and Young’s entered into the Rental Agreement on 29 July 2010, and it took effect as of that date. The Truck is the only vehicle covered in the agreement. In this appeal, the parties disagree as to whether the indemnification provision contained within the Rental Agreement should be construed as obligating Paxton, the lessee of the Truck, to indemnify Young’s, the lessor, in connection with the personal injury claims brought against Young’s stemming from the 1 August 2010 accident.

The indemnification provision states as follows:

10. [Paxton] agrees to release, indemnify and hold [Young's] harmless from and against any and all claims, demands, suits, causes of action or judgments for death or injury to persons or loss or damage to property arising out of or caused by the ownership, maintenance, leasing, repair, possession, use or operation of any Vehicle covered by this Agreement, including, but not limited to the following:
- (a) Any claims or causes of action arising from requirements of Insurance and which [Young's] would not otherwise, pursuant to the terms hereof, be required to pay.
 - (b) Any and all losses, damages, costs and expenses incurred because of injury or damage sustained by any occupant of said Vehicle, including without limitation [Paxton], [Paxton's] employees, agents or representatives and loss or damage to cargo or property owned by or in the possession of [Paxton], [Paxton's] employees, agents or representatives or occupants.
 - (c) All loss, damage, cost and expense resulting from [Paxton's] violation of any term of this agreement or breach of [Paxton's] warranties as expressed herein.
 - (d) The value of all tires, tools and accessories damaged, lost or stolen from the Vehicle.
 - (e) All cost of retaking the Vehicle, including but not restricted to attorney's fees and court costs.
 - (f) Any fines or penalties including forfeiture or seizure resulting from the use of the Vehicle.
 - (g) All claims for damages which [Paxton] or any other party may sustain as a result of any actions taken by [Young's] under paragraphs 13 and 14 hereof.

- (h) All costs of defense and expenses of every kind, including attorneys' fees incurred in connection with any suits or claims covered under this Paragraph 10.

Paxton essentially makes three arguments on appeal. First, Paxton argues that, as a general proposition, North Carolina law does not permit the contractual indemnification of a party for its own prior negligent acts. Second, it contends that the language contained in the indemnification provision here should not be construed as indemnifying Young's for its own past acts of negligence. Third, Paxton asserts that Young's interpretation of the indemnification provision is inconsistent with the Federal Motor Carrier Safety Act. We address each of these arguments in turn.

A. Limits on Indemnity Provisions under North Carolina Law

Our Supreme Court has previously recognized the right of a party to contractually provide for indemnification against its own negligence. *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). In so doing, the Court emphasized the fundamental principle of freedom of contract that exists in North Carolina. *See id.* (explaining that “[f]reedom of contract is a fundamental basic right” in upholding indemnity agreement providing that defendant-company would be indemnified against liability for its own negligence). This Court has expressly held that North Carolina public policy is not violated by an indemnity contract that provides for the indemnification of a party against the consequences of its own negligent conduct, particularly when the agreement is made

“at arms length and without the exercise of superior bargaining power.”² *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 267, 258 S.E.2d 842, 846 (1979). We further noted that the enforcement of such provisions “would have no greater tendency to promote carelessness on the part of the indemnitee than would enforcement against the insurer of a policy of liability insurance” and recognized that “the occasion for the indemnitee seeking indemnity would not arise unless it had itself been guilty of some fault, for otherwise no judgment could be recovered against it.” *Id.* at 266-68, 258 S.E.2d at 846 (citation and brackets omitted).

Paxton attempts to distinguish the present case from our previous decisions enforcing indemnification contracts that hold a party harmless against the consequences of its own negligence by emphasizing that here Young’s alleged negligent acts occurred *prior* to the parties’ execution of the Rental Agreement (and the indemnity provision included therein). However, neither Paxton’s brief nor our own research reveal any North Carolina case expressly articulating a *per se* prohibition against indemnity contracts that hold an indemnitee harmless from its past negligent conduct. Indeed, to the contrary, in discussing the nature of a contract for indemnity, our Supreme Court has stated the following: “In indemnity contracts the engagement is to make good and save another harmless from loss on some

² Because Young’s and Paxton were similarly situated commercial entities, this case does not require us to address the extent to which public policy concerns may be triggered by the existence of unequal bargaining power between the contracting parties.

obligation which *he has incurred or is about to incur* to a third party” *New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 537, 64 S.E.2d 826, 827 (1951) (emphasis added). Accordingly, we reject Paxton’s argument on this issue.

B. Applicability of Indemnity Provision in Rental Agreement to Prior Negligent Acts by Young’s

Paxton’s next argument is that the parties did not intend for the indemnity provision to cover the prior negligent acts of Young’s. When interpreting an indemnification clause within a contract, a court’s primary objective “is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply.” *Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citation and quotation marks omitted). An indemnification provision “will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract.” *Dixie Container Corp. of N.C. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (citation and quotation marks omitted).

Paxton contends that the indemnity Young’s seeks in this action was neither contemplated nor intended by the parties because “the indemnification provision on its face applies only prospectively to the operation and maintenance of the [T]ruck which occurred on or after 29 July 2010,” the date of the Rental Agreement.

Specifically, Paxton asserts, it is not required to provide indemnification for the claims asserted against Young's by Malone and Barnette — which allege that Young's "failed to properly inspect, maintain and repair the brakes on the [T]ruck prior to leasing the [T]ruck to Paxton" — because these alleged negligent acts occurred before the Rental Agreement was executed. We disagree.

The indemnification provision is devoid of any language suggesting that the parties intended for Young's to be indemnified only as to liability or claims arising from *future* acts of negligence. Instead, the indemnification provision broadly requires Paxton to "release, indemnify and hold [Young's] harmless from and against *any and all* claims, demands, suits, causes of action or judgments for . . . injury to persons . . . arising out of or caused by the ownership, maintenance, leasing, repair, possession, use or operation of any Vehicle covered by this Agreement" without containing the restriction advanced by Paxton in this appeal. (Emphasis added.) *See Cooper*, 43 N.C. App. at 267, 258 S.E.2d at 846 (explaining that language used by parties in indemnification agreement did not lend itself to narrow construction advanced by indemnitor where parties had agreed that indemnitee would be held harmless from any claims "[a]rising from the use of, transportation of, or in any way connected with the said equipment or any part thereof, from whatsoever cause arising").

While the negligent acts attributed to Young's are alleged to have occurred

prior to the execution of the Rental Agreement, the claims for which Young's seeks indemnity are nevertheless covered under the indemnification provision as they are predicated on injuries that occurred on 1 August 2010 (the date of the subject motor vehicle accident and the resulting injuries to Malone and Barnette), which was during the term in which the Rental Agreement was in effect. *See Blue Ridge Sportcycle Co. v. Schroader*, 60 N.C. App. 578, 581, 299 S.E.2d 303, 305 (1983) (explaining that "[i]njury, or damage, is an essential element of the tort [of negligence]" and that where there is no injury, there is no actionable negligence). Thus, because the Truck was a "Vehicle covered by this Agreement" on the date of the accident, the claims asserted against Young's fall squarely within the scope of the indemnification provision, and as such, Paxton is obligated to hold Young's harmless from such claims based on the plain language of the indemnification provision.

Moreover, were we to adopt Paxton's narrow interpretation of the indemnity provision, the language therein providing for indemnification for claims arising out of the *maintenance* of the Truck would be rendered essentially meaningless. As Young's notes in its brief, the federal regulations governing the leasing of trucks, tractors, and trailers between motor carriers required Paxton to "have exclusive possession, control, and use of the [Truck] for the duration of the lease." 49 C.F.R. 376.12 (c)(1) (2012). Thus, it is unlikely that Young's would have had the ability to perform *any* maintenance on the Truck while the Rental Agreement was in effect as

the Truck would have been in Paxton's exclusive possession and control during that time period.

Basic rules of construction applicable to contracts preclude an interpretation rendering such language in the parties' agreement purposeless. *See Cooper*, 43 N.C. App. at 267, 258 S.E.2d at 846 (declining to construe indemnification clause in manner that "render[ed] it largely purposeless"); *see also S. Seeding Serv., Inc. v. W.C. English, Inc.*, 217 N.C. App. 300, 305, 719 S.E.2d 211, 215 (2011) (noting that "[t]his Court has long acknowledged that an interpretation which gives a reasonable meaning to all provisions of a contract will be preferred to one which leaves a portion of the writing useless or superfluous" (citation omitted)). Accordingly, we do not accept Paxton's contention that it only contracted to indemnify Young's from claims arising out of the negligent maintenance of the Truck occurring during the lease period.

C. Federal Motor Carrier Safety Act

Paxton's final argument is that construing the indemnity provision so as to allow Young's to be indemnified for its own prior acts of negligence would be inconsistent with the requirements of the Federal Motor Carrier Safety Act ("the Act"). Once again, we reject Paxton's argument.

The Act was enacted by Congress to "ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment

. . . , thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants.” *Tamez v. Sw. Motor Transport, Inc.*, 155 S.W.3d 564, 572 (Tex. App. 2004). Paxton contends that requiring it to indemnify Young’s for negligence that occurred prior to the execution of the Rental Agreement would be contrary to the Act because the Act only requires the lessees of trucks and other leased equipment to “assume complete responsibility for the operation of the equipment *for the duration of the lease*.” 49 C.F.R. 376.12 (c)(1) (emphasis added).

In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 46 L.Ed.2d 169 (1975), the United States Supreme Court addressed the issue of whether the enforcement of indemnification provisions between motor carriers conflicted with the provisions of the Act and the regulations promulgated thereunder regarding operational control and responsibility over leased vehicles.³ The Supreme Court held that the existence of an indemnification provision between motor carriers is not in itself contrary to the Act’s provisions because it “affect[s] only the relationship between the lessee and the lessor” and does not affect the basic responsibilities of the parties to the public and the public’s safety. *Id.* at 39, 46 L.Ed.2d at 178. The Court further ruled that the indemnification provision at issue

³ While the regulations addressed in *Transamerican* have since been amended, the requirements concerning control and responsibility for leased vehicles discussed therein are substantially the same as those contained in the current version of the regulations.

in that case — providing that the lessor would be responsible for and bear the costs of its own negligence while the leased tractor-trailer was in the lessee’s control — did not contravene the purpose of the Act because placing ultimate financial responsibility on one party “is not in conflict with the safety concerns of the [Interstate Commerce] Commission or with the regulations it has promulgated.” *Id.* at 40-41, 46 L.Ed.2d at 178-79 (noting that applicable regulations “neither sanction nor forbid” indemnification between lessors and lessees and that such provisions do not “offend the regulations so long as the lessee does not absolve itself from the duties to the public and to shippers imposed upon it by the Commission’s regulations”).

We believe the same is true of the indemnification provision at issue here. Enforcement of the indemnity provision in the present case does not leave victims of the alleged negligent acts of Young’s without financial recourse. Instead, it merely shifts the financial responsibility for such negligence from one entity to another. As noted above, a primary focus of the Act is to protect the public by ensuring the presence of a responsible party from whom persons harmed in accidents involving motor carriers may seek recovery for their injuries. *See id.* at 37, 46 L.E.2d at 177 (explaining that policy goal of Act, in addition to safety of operation, is to “fix[] financial responsibility for damage and injuries to shippers and members of the public”). That purpose is not undermined by the enforcement of the indemnification provision here.

Moreover, it is appropriate to reiterate that the indemnity provision between Young's and Paxton reflects an arms-length, bargained-for contractual agreement between two commercial entities, which "prevent[s] public confusion about who [is] financially responsible if accidents occur[]" by specifically identifying the party bearing financial responsibility for claims arising out of injuries occurring during the lease term that result from the maintenance or operation of the Truck. *Tamez*, 155 S.W.3d at 572. Accordingly, the trial court did not err in entering partial summary judgment in favor of Young's.

Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and TYSON concur.