

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

The Lamson & Sessions Co.,	)	CASE NO. 05-CV-2702
	)	
Plaintiff,	)	JUDGE PATRICIA A. GAUGHAN
	)	
v.	)	AMICUS BRIEF OF THE
	)	TRUCKING INDUSTRY DEFENSE
	)	INDUSTRY ASSOCIATION IN
ATS Logistics Services, Inc.,	)	SUPPORT OF DEFENDANT
	)	ATS LOGISTICS SERVICES, INC.'S
Defendant.	)	MOTION FOR
	)	RECONSIDERATION

Now comes the Trucking Industry Defense Association (“TIDA”) and submits the following Amicus Brief in support of Defendant ATS Logistics Services, Inc.’s Motion for Reconsideration of the Court’s Order granting summary judgment to the Plaintiff. TIDA’s Brief is supported by the attached memorandum of law, which is incorporated by reference.

**MEMORANDUM OF LAW**

**I. INTRODUCTION**

This Brief is submitted by the Trucking Industry Defense Association (“TIDA”) in support of Defendant ATS Logistics Services, Inc’s motion for reconsideration.

While ATS Logistics raise multiple issues in its opposition brief and motion for reconsideration, this Brief will only address the issue of whether an indemnification agreement is so contrary to Ohio law and public policy that ATS Logistics should not be required to indemnify Plaintiff The Lamson & Sessions Company (“Lamson” or “Plaintiff”) for Plaintiff’s alleged negligence in causing a fatal highway accident. TIDA contends that the indemnity clause at issue falls well short of the legal standard required under the law and public policy for such clauses to

impose liability on ATS Logistics. If Plaintiff prevails in its motion for summary judgment, there is little incentive for shippers like Plaintiff to take responsibility for their negligent loading of tractor trailers which lead to horrific accidents on our highways.

TIDA is an international organization comprised of trucking companies, transportation logistics companies, trucking insurance companies, third party claims administrators and defense counsel. The trucking companies range from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding risk management, personal injury, property damage and workers compensation claims. TIDA's members, both those involved in the operation of motor carriers as well as those involved in the insurance aspects of the trucking business, have a substantial interest in having this Court properly apply Ohio law and public policy to the issue of indemnity clauses in transportation contracts. Because TIDA believes the granting of Plaintiff's summary judgment motion was in contravention of Ohio law and public policy and injurious to the trucking industry and the general public driving on our highways, TIDA respectfully submits its Amicus Brief and requests that the Court reconsider its decision granting summary judgment in favor of the plaintiff.

## II. ARGUMENT

### A. ENFORCING AMBIGUOUS INDEMNITY LANGUAGE AGAINST A NON-NEGLIGENT TRANSPORTATION LOGISTICS COMPANY WOULD BE CONTRARY TO THE LAW AND PUBLIC POLICY OF THE STATE OF OHIO.

It is no wonder that the Estate of Robert Moerke brought its wrongful death action only against the shipper Lamson. ATS Logistics had no fault in the highway accident that led to the death of Mr. Moerke. In the wrongful death action, Mr. Moerke's widow, Judith Moerke, has alleged that the wrongful death of her husband was the result of Lamson's negligence in loading and securing the shipment of Lamson's product onto the tractor trailer driven by Mr. Moerke. On August 11, 2003,

the load allegedly shifted while Mr. Moerke was hauling Lamson's product and the fatal accident occurred. In the captioned indemnity action against ATS Logistics, Lamson alleges that Mr. Moerke was an agent of ATS Logistics, the shipment of Lamson's product was subject to the transportation agreement between Lamson and ATS Logistics, and the agreement's indemnity clause requires ATS Logistics to indemnify Lamson. Yet the agreement imposed the duty to load the truck properly on Lamson alone. Nowhere in the Moerke action or Lamson action is it alleged that ATS Logistics negligently caused the death of Mr. Moerke or breached the terms of the transportation agreement. In fact, the sole basis for Lamson imposing an alleged indemnity obligation on ATS Logistics is that the accident allegedly arose out of the performance of the transportation agreement.

The terms of the indemnity clause in the transportation agreement at issue are as follows:

CARRIER shall defend, indemnify and hold SHIPPER harmless from and against any and all claims, liabilities, loss, cost, or expense (including court costs and reasonable attorneys' fees) (collectively "Losses") including, but not limited to Losses for injury to or death of persons or damage to property arising out of the performance of this Agreement and for any claims, costs and expense, including but not limited to court costs and reasonable attorney's fees incurred by SHIPPER as a result of the CARRIER's breach of any of these terms of this Agreement and the services contemplated hereunder.

Under Lamson's interpretation of this indemnity provision, ATS Logistics is required to indemnify Lamson even for acts of negligence solely under Lamson's control. However, the indemnification clause is unclear, equivocal and ambiguous and, thus, contrary to Ohio law and public policy.

1. **Ohio Rejects Agreements for Indemnification Against One's Own Negligence Unless They Are Clear and Unequivocal.**

If an indemnity agreement attempts to cover the indemnitee's own negligent acts it is subject to heightened scrutiny by the courts. The general rule in Ohio on indemnity clauses is as follows:

Unless otherwise provided by statute, contracts of indemnity purporting to relieve one from the results of his or her own negligence are valid and do not contravene public policy. . . . However, such contracts are invalid if they tend to promote a breach of duty to the public. **In addition, indemnity agreements purporting to release a party from the consequences of his or her negligence and failing to express that intent in clear and unequivocal terms are unenforceable.**

18 Ohio Jur. 3d, Contribution, Indemnity and Subrogation, Section 34 (emphasis added).

As stated by the Ohio Court of Appeals for the Tenth Appellate District, “[p]ublic policy clearly requires that such contracts shall be restricted, rather than extended. It is a fundamental rule in the construction of contracts of indemnity that such a contract shall not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in clear and unequivocal terms. . . . [T]here can be no presumption that the indemnitor intended to assume the liability unless the contract puts it beyond doubt by express stipulation.” *Burkette v. Chrysler Industries, Inc.*, 48 Ohio App.3d 35, 37, 547 N.E.2d 1223, 1226 (1988) (quoting *George H. Dingley Lumber Co. v. Erie RR. Co.*, 102 Ohio St. 236, 242, 131 N.E. 723, 725 (1921)) (emphasis added).

In *Burkette*, a personal injury suit was brought against the trailer lessor Dick’s Trailer Rental and trailer lessee Patricia Hull to recover for damages sustained when the trailer separated from the Hull’s vehicle and ran into the path of plaintiff’s truck. *Id.* at 36, 547 N.E.2d at 1224. Lessor cross-claimed against lessee based upon an indemnification clause in the rental agreement. *Id.* The rental agreement stated that “In consideration of the bailment of trailer, and/or equipment I, the undersigned hereby agree . . . that I expressly waive and discharge Dick’s Trailers . . . from any and all liability for damages by reason of any imperfection in said trailer whatsoever; . . . that I will be solely responsible for all traffic violations, losses by fire or theft, and all other damage to said trailer while in my use or possession; that I will hold harmless, protect and indemnify (sic) Dick’s of all losses, claims, actions, demands, and expenses arising out of my possession or use of said trailer.” *Id.* The trial court granted summary judgment for the lessor. Reversing the trial court on, *inter*

*alia*, public policy grounds, the appellate court held that absent clear and unequivocal language, the indemnity clause could not have the effect of relieving the trailer lessor from the results of its own negligence in improperly attaching the trailer to the lessee's vehicle. *Id.* at 38, 547 N.E.2d at 1226.

The court stated:

In the case at bar, the language of the indemnity clause in the rental agreement is not clear and unequivocal and is subject to different interpretations. Therefore, a determination must be made as to the meaning of the clause and whether the provision is against public policy. The rental agreement in this case appears to have been designed to release Dick's from the consequences of its negligence. However, that intent is not set out in clear and unequivocal terms. Nowhere does the form mention release from liability for negligence, and the form does not clearly state the kinds of "other damage" that it covers. . . . Since the language in the agreement is not clear and unequivocal, it cannot have the effect of relieving Dick's from the results of its own negligence. . . . Strictly construed, such language implies that indemnification is only as to the bailee's conduct.

*Id.* at 37-38, 547 N.E.2d at 1225-1226.

The *Burkett* court noted that it would take "clear language to show that an indemnity contract was intended to cover conditions or operations under the control of the party indemnified, and not under the control of the indemnifying party, for instance accidents, the proximate cause of which is the negligence of the party indemnified." *Id.* at 37, 547 N.E.2d at 1225 (*quoting North American Ry. Constr. Co. v. Cincinnati Traction Co.*, 172 F. 214, 216 (7<sup>th</sup> Cir. 1909)). The court also noted that "[c]ontracts of indemnity purporting to relieve one from the results of his negligence must be construed strictly. The intention to provide such indemnification must be expressed in clear, unequivocal terms." *Id.* at 37, 547 N.E.2d at 1225 (*quoting Kay v. Pennsylvania R. Co.*, 156 Ohio St. 503, 504, 103 N.E.2d 751, 752 (1952)). Accordingly, relying largely on the law from the Ohio Supreme Court precedent of *Kay* and *Dingledey*, the Court of Appeals held that the language in the rental agreement was not clear enough under the strict construction test to satisfy Ohio law and public policy.

Lamson may cite to the Ohio Supreme Court case, *Glaspell v. Ohio Edison Co.*, 29 Ohio St.3d 44, 46, 505 N.E.2d 264, 266 (1987), for the proposition that where the parties are sophisticated companies the court need not strictly construe the indemnification language against the party to be indemnified. However, the *Glaspell* court did not state it was overruling or expressly modifying the precedent of *Kay* and *Dingledy*, both cases of which involved sophisticated businesses and the striking down of an ambiguous indemnity clause using the strict construction test. <sup>1</sup> One federal district court in Ohio made note of the continued validity of *Kay* and *Dingledy* and proceeded to analyze an indemnity provision under their strict construction requirements. *See City of Toledo v. Beazer Materials and Services, Inc.*, 912 F.Supp. 1051, 1064, 1065 (N.D. Ohio, 1995) (“[s]ignificantly, 18 Ohio Jurisprudence 3d, Contribution, Indemnity, etc., Section 41, published in 1980, but updated by annual supplements, recognizes *Kay* and *Dingledy*, supra, as still the law of Ohio.”) (published), *rev’d on other grounds*, 103 F.3d 128 (6th Cir. 1996) (unpublished). Not long after the *Glaspell* decision was issued, the Ohio Supreme Court recognized that an indemnity agreement, negotiated between sophisticated businesses, must still be express and unambiguous, *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 241, 513 N.E.2d 253, 256 (1987), and the Ohio Court of Appeals did the same. *Teledyne Osco Steel v. Woods*, 39 Ohio App.3d 145, 529 N.E.2d 1271 (1987). The Ninth Appellate District in *Teledyne* cited the basic rule on indemnification clauses:

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<sup>1</sup> In *Dingledy*, an agreement to indemnify “from loss, damage, or injury ‘by fire or otherwise’ include[d] only loss, damage or injury arising from fire or causes kindred thereto, and [did] not include injury caused to an employee of the [indemnitor] by the negligent operation of the indemnitee’s locomotive.” 102 Ohio St. at 239, 131 N.E. at 723. In *Kay*, a contract to indemnify “for loss and damage resulting from the negligent operation on an ‘unloading machine and appurtenances or other buildings, structures or fixtures’ does not impliedly include loss or damage arising from the negligent operation of a drawbridge.” 156 Ohio St. at 503, 103 N.E.2d at 752.

A general indemnification clause cannot relieve a negligent indemnitee from the results of its own failure to exercise ordinary care. Public policy requires that under such circumstances the indemnification clause must be strictly construed against the one seeking indemnity and indemnification will not be provided unless so expressed in clear and unequivocal language.

*Id.* at 146, 529 N.E.2d at 1276 (citing *Kay* and *Dingley*) (emphasis added).

2. **The Indemnity Agreement Between Lamson and ATS Logistics Is Equivocal, Unclear and Contrary to Ohio Law and Public Policy.**

The indemnity sought by Lamson in this case -- for its own alleged negligent loading of the tractor trailer -- was not contemplated by the terms of the contract of indemnity made by the parties. It is undisputed that the indemnification provision states that ATS Logistics shall indemnify Lamson against “any and all claims, liabilities, loss, cost, or expense (including court costs and reasonable attorneys’ fees) (collectively ‘Losses’) including, but not limited to Losses for injury to or death of persons or damage to property arising out of the performance of this Agreement and for any claims, costs and expense, including but not limited to court costs and reasonable attorney’s fees incurred by [Lamson] as a result of [ATS Logistics’] breach of any of these terms of this Agreement and the services contemplated hereunder.” However, with no explicit reference in the clause to Lamson’s negligence or fault or their equivalent, it is unclear whether the parties intended defendant’s indemnity obligation to encompass Lamson’s negligent conduct. Nowhere in the indemnity provision is it clearly stated that ATS Logistics has agreed to indemnify against the negligence of Lamson and assume such liability. The phrase “arising out of the performance of this Agreement” is devoid of any reference to Lamson’s negligence or fault. It also is vague as to what cause of loss is necessary in order to trigger the indemnity obligation – caused by Lamson, ATS Logistics or a third party.

Adding to the uncertainty is the effect of the language “and for any claims, costs and expense, . . . incurred by [Lamson] as a result of [ATS Logistics’] breach of any of these terms of

this Agreement. . . .” A fair reading of this specific language is that the entire indemnity clause is dependent on ATS Logistics’ breach of the transportation agreement, even the phrase “arising out of the performance of the Agreement.” Otherwise, why add this specific reference to “as a result of Carrier’s breach”? Indeed, the reference to “Carrier’s breach” raises doubt as to the intent of the parties. ATS Logistics’ breach of the transportation agreement would necessarily “aris[e] out of the performance of the Agreement,” which begs the question of what did the parties intend with the phrase “arising out of the performance of the Agreement.” It is anybody’s guess. Had the parties intended it to refer to performance by both parties, including their negligent acts or omissions, they would have used such language in the indemnity provision.

Jurisdictions across the country take the same approach when one party seeks indemnity for its own negligence – the indemnity agreement is unenforceable and against public policy unless it is clear and unequivocal.

In *Caballero v. Stafford*, \_\_\_ S.W.3d \_\_\_, 2006 WL 2422558 (Mo.App. 2006), the Missouri Court of Appeals held an indemnity agreement ineffective to relieve the indemnitee of liability for its own negligence. An independent trucking contractor and a motor carrier entered into contracts enabling the contractor to haul freight for the motor carrier’s customers. In a personal services agreement, the contractor agreed not to hold the motor carrier “responsible for any damage or injuries suffered by [contractor] . . . as a result of any action by [motor carrier’s driver leased to contractor] and hereby releases [motor carrier] and [its driver leased to contractor] from any such claims.” *Id.* at 3. Likewise, in the independent contractor operating agreement the contractor agreed to indemnify the motor carrier “from and against any and all liabilities and expenses whatsoever, . . . which [motor carrier] may incur or become obligated to pay arising out of [contractor’s] acts or omission or those of [contractor’s] agents and employees (including drivers leased from [motor

carrier]). [Contractor] further agree[s] to hold [motor carrier] harmless and to indemnify [motor carrier] against all claims by [contractor] and [contractor's] agents and employees.” *Id.* at 2. The court considered the above provisions to be exculpatory in nature because they seek to relieve the motor carrier from liability for its employee’s negligence. *Id.* at 10. The contractor alleged that a tractor trailer operated by a driver leased from the motor carrier left the roadway and overturned on its side while the contractor was a passenger in the sleeping berth. *Id.* at 1. The appellate court noted that “a contract of indemnity will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms.” *Id.* at 11 (*quoting Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 105 (Mo. Banc 2003)). The court held that the exculpatory clauses “do not use the words ‘negligence’ or ‘fault’ or their equivalents, therefore such provisions do not relieve [motor carrier] from liability for [its employee’s] negligence.” *Id.* at 11.

In *Azurak v. Corporate Property Investors*, 175 N.J. 110, 814 A.2d 600 (2003), the New Jersey Supreme Court rejected the enforcement of an equivocal indemnity agreement sought by the indemnitee for its own negligence. A customer injured in a falling incident at a shopping mall sued the mall and the janitorial service company in negligence. *Id.* at 111, 814 A.2d at 600. The mall defended on grounds of indemnity. *Id.* The indemnity agreement with the janitorial service required the contractor to “indemnify, defend and hold harmless [the mall] from and against any claim (including any claim brought by employees of Contractor), liability, damage or expense (including attorney’s fees) that [the mall] may incur relating to, arising out of or existing by reason of (i) Contractor’s performance of this Agreement or the conditions created thereby (including the use, misuse or failure of any equipment used by Contractor or its subcontractors, servants or employees) or (ii) Contractor’s breach of this Agreement or the inadequate or improper performance of this

Agreement by Contractor or its subcontractors, servants or employees.” *Id.* A jury returned a verdict finding the mall partially negligent. The Appellate Division found that the indemnity provision did not encompass the mall’s negligence because the language was neither explicit nor unequivocal on the subject of the mall’s negligence. *Id.* at 111, 814 A.2d at 601. The Supreme Court affirmed the Appellate Division and went a step further. *Id.* at 112, 814 A.2d at 601. The Supreme Court held that an indemnity clause seeking to bring a negligent indemnitee within an indemnity clause is ineffective “without explicitly referring to the indemnitee’s ‘negligence’ or ‘fault’”. *Id.* The court “reiterate[d] that the agreement must specifically reference the negligence or fault of the indemnitee.” *Id.* at 112-113, 814 A.2d at 601.

In *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Company*, 374 So.2d 487, 489 (Fla. 1979), the Florida Supreme Court relied on public policy to refuse indemnity for a negligent manufacturer/lessor. An employee of a general contractor suffered serious injury when he fell from a scaffold on a construction site. *Id.* at 488. He sued the manufacturer of the scaffolding who then asserted a third party claim for contractual indemnity against the subcontractor who leased the scaffolding. *Id.* In the lease agreement, the subcontractor agreed to “assume[] all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold [manufacturer/lessor] harmless from all such claims.” *Id.* at 489. The Supreme Court held that “[t]he language of the lease agreement demonstrates nothing more than an undertaking by [subcontractor] to hold [manufacturer/lessor] harmless from any vicarious liability which might result from [subcontractor’s] erection, maintenance or use of the scaffold. It does not envision indemnity for [manufacturer/lessor’s] affirmative misconduct, whether in connection with design and manufacture or erection, maintenance and use of the scaffold.” *Id.* The court went so far as to conclude that this

legal principle applies even when the indemnitee and indemnitor are jointly negligent, not just when the indemnitee is solely negligent. *Id.*

As in *Stafford*, *Azurak* and *Charles Poe Masonry*, the indemnity agreement between Plaintiff and ATS Logistics contains no express term requiring ATS Logistics to indemnify Plaintiff for its own negligence. It does not encompass the Plaintiff's negligent acts because the language is ambiguous on the subject of Plaintiff's negligence.

### **III. CONCLUSION**

The indemnification agreement between Lamson and ATS Logistics is unenforceable due to the ambiguous nature of the language. It is neither clear nor unequivocal and accordingly violates Ohio law and public policy. The motion for summary judgment should be denied. If Plaintiff prevails in its motion, shippers like Plaintiff would not take responsibility for their negligent loading of tractor trailers that cause serious injuries and fatalities on our highways. TIDA has a substantial interest in having this Court properly apply Ohio law and public policy and send a message in the trucking industry that indemnifying a party from its own negligence will not be permitted in the absence of clear and unequivocal language in the contract.

Based on the foregoing arguments and legal authorities, TIDA respectfully requests that the Court reconsider its decision granting the plaintiff summary judgment, and overrule plaintiff's motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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