Winterthur Swiss Ins. Co. v. Socio Micronesia, Inc., 8 ROP Intrm. 169 (2000)
In re: THE K-B BRIDGE LITIGATION

WINTERTHUR SWISS INSURANCE CO.,
Appellant,

v.

SOCIO MICRONESIA, INC., ALFRED A.YEE & ASSOCIATES, INC., AIKEN, INC., LEO A. DALY COMPANY, SOCIO CONSTRUCTION COMPANY, INC., KOREAN REINSURANCE CORP., HARDING LAWSON ASSOCIATES, INC. HARDING LAWSON ASSOCIATES GROUP, INC., DYWDIDAG SYSTEMS INTERNATIONAL USA, DYCKERHOFF & WIDMANN AG, T.Y. LIN INTERNATIONAL,
Appellees.

CIVIL APPEAL NO. 99-36
Civil Action No. 132-97

Supreme Court, Appellate Division
Republic of Palau

Argued: April 7, 2000
Decided: April 19, 2000

Attorneys for Appellant Winterthur Swiss Insurance Co.: Robert Ted Parker, Berg & Parker LLP

Attorney for Appellee Socio Micronesia, Inc.: Thomas L. Roberts, Dooley Lannen Roberts & Fowler LLP

Attorneys for Appellees Harding Lawson Associates, Inc., and Harding Lawson Associates Group, Inc.: Bruce D. Celebrezze, Robert C. Diemer, Celebrezze & Wesley; Kenneth F. Strong

Attorneys for Appellee Dywidag Systems International USA, Inc.: Friedrich W. Seitz, Richard Moreno, Edmund G. Farrell, III, Murchison & Cummings

Attorneys for Appellee Korean Reinsurance Corp.: Stephen A. Postelnek, James F. O'Brien, Wilson, Elser, Moskowitz, Edelman & Dicker

Attorneys for Appellees Leo A. Daly Company and Alfred A. Yee, Trustee for Aiken, Inc., Alfred A. Yee & Associates, Inc.: Kenneth R. Kupchak, Damon Key Leong Kupchak Hast

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice

MICHELSEN, Justice:

Winterthur Swiss Ins. Co. v. Socio Micronesia, Inc., 8 ROP Intrm. 169 (2000)

This appeal concerns whether the Trial Division erred in holding that Wintherthur Swiss Insurance Co. has no right to indemnification from the specific defendants named in its Third-Party Complaint. We agree with the Trial Division's analysis, and affirm.

1. FACTUAL AND PROCEDURAL BACKGROUND

In the summer of 1996, extensive repairs were performed on the bridge connecting Koror and Babeldaob. The work was completed by August. On September 26, ⊥170 1996, the bridge suffered total structural failure, and the 800-foot span collapsed in a roar from shoreline to shoreline, resulting in the loss of two lives. Three other persons were also injured. Soon thereafter, the Republic of Palau [ROP], the estates of the deceased, and the injured survivors sued the contractor and subcontractors involved in the 1996 bridge repair, alleging that the work performed during 1996 by the defendants caused the collapse.

A year after the case was filed, most of the parties in the litigation met in San Francisco to mediate the case. A settlement was reached. Although the settlement involved payments totaling $18.1 million, it was, curiously enough, only memorialized by a handwritten document, complete with interdeletions, arrows, and margin additions. Representatives of the Plaintiffs, the original defendants, and Hawaiian Rock Products, a third party defendant, executed the agreement. [Hereinafter, "Settlement Agreement"]. It provided that once the ROP accepted the terms of the settlement, specific amounts paid by the named defendants would be "in complete satisfaction of all obligations by the defendants." It was further stipulated that there would be "[d]ismissal of lawsuits with prejudice, including all claims, counterclaims, cross claims and third-party claims by and between the parties to the settlement."

After the implementation of the agreement the defendants that we will collectively call the VSL defendants [1] proceeded with their Third Party Interpleader Complaint for Indemnity against the parties who were not signatories to the settlement. The continuation of that third party action was not what the ROP expected. Counsel for the ROP thought that all aspects of the pending litigation were to be dismissed, and moved for an interpretation of the settlement agreement.

In response to that motion, counsel for the VSL defendants, Mr. Parker, submitted an affidavit that explained some of the language in the margin and the reasons for word changes in the Settlement Agreement. He stated that the language referring to a "[f]ull mutual release by and between each of the plaintiff and each of defendants who are parties to the agreement" was, in his words, " to limit the effect of the mutual releases strictly to the participating parties, i.e. those who were 'parties to the agreement,' and to exclude parties that did not participate and thus were not parties to the agreement." (Emphasis in original.). He further stated that: "the language limiting the effect of the Settlement Agreement 'to the parties to this Agreement' appears ***three times*** on a single page of the document. In two instances, the phrase initially drafted was ***changed to provide expressly*** that the effect was limited to the 'parties to this Agreement.'" (Emphasis in original).

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[1] VSL Prestressing (Guam), Inc., VSL Prestressing (Aust.) Pty. Ltd., VSL International AG, Bouygues SA, Winterthur Swiss Insurance Co., Republic Insurance Co.

The Trial Division did not rule on the merits of the motion, but apparently the ROP acceded and in November, 1998, the ROP [2] and the assignee of all the VSL defendants, Winterthur Swiss Insurance Co. ("Winterthur"), executed another agreement ("the November Agreement") reciting that Winterthur "intend[ed] to prosecute further ⊥171 proceedings in pursuit of their rights of indemnification and subrogation against entities and/or persons that are not parties to the April Settlement Agreement." The parties agreed that they would not seek court interpretation of that Settlement Agreement and it was further provided that the ROP would "take no action otherwise to interfere with the Winterthur entities' prosecution of such further proceedings."

In January, 1999, Winterthur, both in its own right and as assignee of the subrogation and indemnity rights of other defendants in the original action, sued the Appellees herein for $10 million.[3] The theory of these new claims was that the bridge's fall was caused by the alleged negligent design and construction of the bridge in 1975-1976. In addition to naming the original contractors, Winterthur named Socio Micronesia as a party, based on the theory that the collapse was caused by the 1996 repaving of the bridge, and the stress of the heavy paving equipment on the span.

In July, 1999, Socio moved for summary judgment on the basis that indemnity cannot be sought because Winterthur had not discharged Socio's potential liability. The other defendants joined the motion.[4]

The Trial Division granted summary judgment, holding that "Winterthur has not satisfied a necessary prerequisite for indemnity, since it has not discharged the third-party defendants' liability."

2. PRINCIPLES OF INDEMNIFICATION

The Palau National Code mentions indemnity in 14 PNC §3202. That provision states that the Contribution Among Joint Tort-Feasors Act (14 PNC § 3201 *et seq*.) "does not impair any right of indemnity under existing law." Because there are no sections in the Code that delimit the right of indemnity, the Trial Division properly turned to the Restatement for applicable law.[5]

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[2] The personal representative of one of the Estates signed as well.

[3] The figure of $10 million represented the amount the VSL defendants and certain other defendants who have assigned their claims to Winterthur had contributed to the payment of the Settlement Agreement.

[4] When Appellees moved for summary judgment, the argument was directed almost exclusively at the indemnity claims. In response, Appellant's attention has focused only on the indemnity issue, and on appeal does not question the dismissal of its subrogation claims. Therefore we need not express an opinion whether Appellant could have secured relief based upon subrogation principles, even if there was no right to indemnification.

[5] 1 PNC § 303 provides:

⊥172 The *Restatement (Second) of Torts*, Section 886B, provides:

> If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of liability.

The recently approved *Restatement (Third) of Torts* has reaffirmed this rule. Section 32(a) of this new Restatement provides:

> When two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover the indemnity in the amount paid to the plaintiff . . . .

The comment to the section emphasizes that "an indemnitee must extinguish the liability of the indemnitor to collect indemnity," and the Reporter's Note makes clear that this "perpetuates" the rule set forth in the Second Restatement.

3. ANALYSIS

Appellate review of the granting of summary judgment is de novo. "Therefore, this court must reach the same conclusion of law as the trial court did to uphold a summary judgment ruling, and no deference is appropriate." *Akiwo v. ROP,* 6 ROP Intrm. 105, 106 (1997).

The Appellant argues that summary judgment should not have been granted because the Settlement Agreement's language is ambiguous. Winterthur now suggests it is unclear whether the agreed-upon dismissals mentioned in the Settlement Agreement were meant to include just the signatories, or whether they were meant as all-inclusive releases of all potential defendants. In support of this position, Winterthur directs attention to the affidavit of one of the Republic's lawyers filed in support of the government's motion to interpret the Settlement Agreement, which seems to take an expansive view of this issue. However, at that time Winterthur's counsel correctly argued that mental impressions of a party to an agreement do not control, citing *Watanabe v. Nelson*, 4 ROP Intrm. 169, 170 (1994). *See also, Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 46, 50 (1999), ("a party's private understanding of what a contract means is . . . immaterial.").

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable under section 301 of this chapter or local customary law applicable under section 302 of this chapter to the contrary, and except as otherwise provided in section 305 of this chapter; provided that no person shall be subject to criminal prosecution except under the written law of the Republic or recognized local customary law not inconsistent therewith.

We therefore turn to the actual language used to discern the parties' intent. We find no ambiguity. As Winterthur's counsel pointed out at that time of the government's motion: "the original language providing for 'mutual release between defendants' was changed, with the word 'defendants' crossed out, and instead the phrase 'defendants who are parties to this ⊥173 Agreement' inserted . . . . The effect of this change is obvious: non-participating third-party defendants were ***not*** to receive releases." (Emphasis in original). The language of the agreement makes such a conclusion ineludible. Consequently, if ROP or any of the other plaintiffs decide that Appellants' current theories of liability are sufficiently viable, there is nothing in the Settlement Agreement that would prevent a second round of litigation by the original plaintiffs targeting these Appellees.

Winterthur also argues that the Settlement Agreement, in conjunction with a November Agreement, operates as a complete release of claims. It does not. We first note that the November Agreement was not signed by all of the original plaintiffs, so it is not a discharge of the third-party defendants' liability which, as has already been noted, is a requirement for indemnification. But even if we examine the language of the Agreement, Winterthur's argument must be rejected.

There are three substantive provisions in the November Agreement: (1) that the parties will file a stipulation of dismissal of the original litigation, after which the parties will not ask the court to interpret the Settlement Agreement; (2) ROP and the Rengiil Estate "will take no action otherwise to interfere with the Winterthur entities' prosecution of such further proceedings"; and (3) Winterthur shall indemnify the ROP and the Rengiil Estate for loss or expense they experience "arising from or related to prosecution of any further proceedings." The November Agreement cannot be construed to be a release of any potential claims of the original plaintiffs against the current third-party defendants.

Winterthur argues that any attempt by ROP to litigate a claim against a non-settling party would interfere with its third party complaint because ROP's claims, necessarily, would be competing with Winterthur's own claims. However, the Trial Division provided an apt example how the original plaintiffs could bring an action against the third-party defendants without interfering with Winterthur's action for indemnity. They could join Winterthur's indemnity action as third-party plaintiffs to recover any amounts above $10,000,000. As Socio pointed out, this could be accomplished by the copying of Winterthur's complaint verbatim, and seeking additional damages when and if Winterthur's $10 million claim is paid or settled. The Trial Division correctly held that the November Agreement "adds nothing to the analysis."

Because of the wording of the Settlement Agreement, Winterthur is now in the same predicament as the Plaintiff in *District of Columbia v. Washington Hospital Center*, 722 A.2d 332 (D.C. 1998). In that case, the District of Columbia settled a tort claim with a plaintiff who was injured in a motor vehicle accident. The District obtained a release and then brought suit against the hospital where the plaintiff had been treated, alleging that the hospital's negligent treatment exacerbated the plaintiff's injuries. The appellate court affirmed the trial court's order dismissing the complaint, holding that the release did not extinguish any claims against the hospital or

release the hospital from liability to the plaintiff. *Id.* at 342. The court stated that the language in the release was clear and facially unambiguous, and "did not settle any liability of [the hospital] for which it can recover by way of equitable indemnity." *Id.*

⊥174 This same principle was applied in *Long Term Care, Inc. v. Jesco, Inc.* , 560 So.2d 717 (Miss. 1990). In that case, the plaintiff fell and sued the property lessee for compensation for her injuries. They settled, with plaintiff reserving the right to sue the property's builder for her injuries. Plaintiff then sued the builder, and that case also settled, with plaintiff releasing all of her claims against the builder. When the lessee sought indemnity from the builder for the amount paid in its settlement with the plaintiff, the trial court held that the lessee had not discharged the builder's liability, and thus could not recover indemnity. *Id.* at 719-720, 722. This determination was upheld on appeal.

Winterthur also raises two procedural arguments. First Winterthur argues that the Trial Court erred in granting summary judgment because the third-party defendants did not comply with the procedural rule requiring them to submit a separate statement of undisputed facts, which hindered Winterthur from identifying the factual basis for the motion and responding to it.

Rule 11(a) of the Motion Practice Rules provide that:

> A party moving for summary judgment shall set forth in the supporting brief a separate statement of each material fact as to which the moving party contends there is no genuine issue to be tried and as to each shall identify the specific document or affidavit, portion thereof, or discovery response or deposition testimony, by line and page, which it is claimed established the fact.

Trial court determinations concerning compliance with the Motion Practice Rules will be reviewed for abuse of discretion. In our view, Socio's brief accompanying its motion for summary judgment, as supplemented after Winterthur's initial objection, set out a complete recitation of the facts and a clear statement of its allegations of legal insufficiencies in the complaint. Because the case centered on the contract language, the motion for summary judgment was a legal question for the court. Despite Winterthur's present allegations that it could not adequately respond to the motion, Winterthur submitted a detailed response brief, and another brief subsequent to Socio's reply to the response brief. This argument is without merit.

Winterthur also objects to entry of summary judgment before discovery was completed, preventing it from identifying specific material facts in dispute that created a genuine issue of material fact. The Rules of Civil Procedure provide a party opposing a motion for summary judgment with an opportunity to request a court to delay its ruling on the motion until the party can obtain discovery pertinent to the motion. *See* ROP R. Civ. P. 56(f); *Wolff v. Sugiyama* , 5 ROP Intrm. 105, 108 (1995). Winterthur did not avail itself of this procedure, and cannot now complain that the Trial Court failed to provide it with an opportunity for discovery. We also cannot imagine what discovery was needed since summary judgment was granted based upon the wording of documents whose admissibility was not questioned.

⊥175 The Trial Division's decision is upheld in all respects. Appellees may submit their costs on appeal within thirty days from the date of the filing of this opinion.