

SUPREME COURT OF LOUISIANA

No. 01-CC-3283

Yolanda BERRY, et al.

versus

ORLEANS PARISH SCHOOL BOARD, et al.

KNOLL, J., dissenting.

This writ concerns an indemnity agreement between the Lighthouse of the Blind in New Orleans, Inc. ("Lighthouse") and the Orleans Parish School Board ("OPSB"). The sole issue in this matter is whether the indemnity agreement *unequivocally* requires Lighthouse to indemnify the OPSB for the OPSB's negligence. Finding the indemnity agreement does not unequivocally require such indemnity, I respectfully dissent for the following reasons.

The OPSB entered into a contract with Lighthouse, whereby Lighthouse agreed to provide mobility training services to Orleans Parish public school students. Pursuant to the contract, Lighthouse also agreed to indemnify the OPSB as follows:

To the fullest extent permitted by the law, the Contractor [Lighthouse] shall indemnify, hold harmless and defend the School Board, its employees and agents from and against all claims, demands, suits, damages, judgments of sums of money, losses and expenses, including but not limited to attorney's fees and costs ("Claims"), arising out of the performance of any of the services to be performed pursuant to the terms of this Agreement, provided that any such Claims (i) are attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including the loss of use resulting therefrom; and, (ii) is [sic] caused in whole or in part by any act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. . . .

Under this indemnity agreement, Lighthouse is required to indemnify the OPSB

when: (1) the claim arises out of the performance of any of the services to be performed pursuant to the terms of the contract; (2) the claim is attributable to bodily injury; and (3) the claim is caused in whole or in part by any act or omission of Lighthouse or its employees. The primary dispute between Lighthouse and the OPSB is over the first requirement, *i.e.*, whether the claim arises out of the performance of any of the services to be performed pursuant to the terms of the contract. Lighthouse contends the plaintiffs' negligence claims against the OPSB do not arise out of the performance of any services to be performed pursuant to the terms of the contract. Instead, Lighthouse maintains the negligence claims are based on the OPSB's alleged breach of a legal duty owed to its students. It alleges this duty was owed irrespective of the contract and thus the claims for alleged breach of this duty do not arise out of any of the services to be performed pursuant to the terms of the contract.

On the other hand, the OPSB argues all of the acts the plaintiffs allege caused their daughters' injuries arose out of the performance of services provided by Francis O'Gara, a Lighthouse employee, pursuant to the terms of the contract with Lighthouse. Thus, the OPSB alleges, because the plaintiffs' negligence claims are based on Mr. O'Gara's conduct, the claims arise out of the performance of services to be performed under the contract and thus the language of the indemnity clause clearly requires Lighthouse to defend and indemnify it for these claims. The OPSB further contends the allegation that it is partly at fault does not affect Lighthouse's obligation to defend and indemnify because the indemnity agreement specifically applies "regardless of whether or not it [the injury] is caused in part by a party indemnified hereunder."

I find the indemnity agreement is subject to multiple interpretations and does not *unequivocally* require Lighthouse to indemnify the OPSB for the OPSB's own

negligence. All of the cases the OPSB cites and relies upon involve indemnity agreements specifically using the term negligence. The present indemnity agreement does not use the term negligence and is broad and general in its applicability. *See Stewart v. Winn Dixie Louisiana, Inc.*, 96-599 (La.App. 5th Cir. 12/11/96), 686 So.2d 907 (broad and general words alone do not necessarily import an intent to impose an obligation so extraordinary and harsh as to render an indemnitor liable to an indemnitee for damages occasioned by the sole negligence of the latter). Thus, considering this court's clear line of jurisprudence holding indemnity agreements will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent acts unless such an intention is expressed in unequivocal terms, *e.g., Polozola v. Garlock, Inc.*, 343 So.2d 1000, 1003 (La. 1977); *Perkins v. Rubicon, Inc.*, 563 So.2d 258, 259 (La. 1990), I would reverse the court of appeal's ruling and reinstate the district court's judgment.