

**THE EFFECTS OF § 895.447, WIS. STATS., VOIDING CERTAIN
AGREEMENTS THAT LIMIT OR ELIMINATE TORT LIABILITY UPON
INDEMNITY AGREEMENTS IN STANDARD DESIGN CONTRACTS**

In the last issue of this publication I discussed the indemnity agreements that are found in standard design contracts. In that article I discussed the indemnification provisions found in AIA Document A201 - 2007, § 3.18 and EJCDC C-700 - 2007, § 6.20. Those indemnity provisions in standard design contracts must be evaluated along with § 895.447 of the Wisconsin Statutes which provides:

895.447 Certain agreements to limit or eliminate tort liability void.

- (1) Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.
- (2) This section does not apply to any insurance contract or worker's compensation plan.
- (3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.

The Wisconsin Court of Appeals has addressed the issue of whether § 895.447, Wis. Stats., voided indemnity agreements contained in construction contracts for a project. In Gerdmann v. U.S. Fire Insurance Company, 119 Wis. 2d 367, 350 N.W.2d 730 (Ct. App. 1984), the Wisconsin Court of Appeals held that § 895.49, Wis. Stats. (renumbered § 895.447 by 2005 Act 155, § 49, effective April 5, 2006) did not void indemnity agreements contained in construction contracts. The Court held that indemnity clauses were not mentioned in the statute and that it would be unreasonable to conclude that the legislature intended to apply the statute to indemnity agreements. The effect of the decision was to permit owners and contractors on a construction project to enter into construction agreements that contained indemnity provisions notwithstanding § 895.447, Wis. Stats.

In the Gerdmann case, Gerdmann, an employee of Bay Shipbuilding was injured when he was accidentally struck by a wooden pole when a Roen Salvage Company truck flipped the pole

along a haul road on property owned by the Manitowoc Company, Inc. Roen and its insurance carrier settled with Gerdmann for \$3,000,000 and Roen brought an action against Manitowoc claiming that Manitowoc had violated the Safe Place Statute by laying the poles near the haul road. The jury found in favor of Manitowoc and the circuit court entered judgment in favor of Manitowoc and against Roen because Manitowoc had counterclaimed for indemnification. The construction contract between Manitowoc and Roen stated:

Contractor shall indemnify the Owner and Engineer against and hold the Owner and Engineer harmless from any and all liability for damages on account of injury, including death, to persons, including employees of Contractor, or damage to property resulting from or arising out of or in any way connected with the performance of work under this Contract by Contractor or any Subcontractor. In addition, Contractor shall reimburse Owner for all costs, expenses, and loss incurred by them in consequence of any claims, demands, and causes of action, whether meritorious or not, which may be brought against them and arising out of the operations covered by the Contract Contractor shall pay any costs, including Attorney's fees, that may be incurred by Owner in enforcing this indemnity

The Court of Appeals in Gerdmann was willing to apply the indemnity agreement to Roen's action for contribution against Manitowoc. The Court stated:

Roen claims that the plain meaning of the clause's language shows that the clause does not apply when the parties to the agreement are adverse. Both parties contend that the language of the agreement is clear, and the trial court's decision was based only upon the language of the written agreement

The plain language of the clause is unambiguous. Roen argues that the use of the word 'them' in the clause refers to both Roen and Manitowoc, and that the clause only covers actions brought against both. The clause, however, requires Roen to reimburse 'Owner for all costs . . . incurred by them.' . . .

The indemnity clause provides for reimbursement of costs and fees Manitowoc incurs 'in consequence of any claims, demands, and causes of action . . . which may be brought against them and arising out of the operations covered by the Contract.' The clause does not distinguish between claims brought by third parties and actions brought for contribution. It covers 'any claims' arising from the dredging operations, which includes an action for contribution.

The Court of Appeals in Gerdmann noted that the Wisconsin Supreme Court in Dykstra

v. Arthur G. McKee, decided in 1981, noted that § 895.49 does not necessarily outlaw indemnity agreements of this type, although the court in Dykstra did not have to decide that question because the statute was not in effect when the Dykstra indemnity agreement was made.

Nonetheless, the Gerdmann court noted that Supreme Court's observation was important. The Gerdmann court stated:

This indemnity agreement neither limits nor eliminates Manitowoc's tort liability to third parties. Rather, it makes Roen the insurer should damages result. The Dykstra footnote indicates that the supreme court did not believe that the statute clearly voids such indemnity agreements, and since the statute must be interpreted as narrowly as possible, we will not extend its coverage to void this indemnity agreement.

The Gerdmann decision demonstrates that the indemnity agreements found in construction contracts protecting owners and design professionals is alive and well, notwithstanding § 895.447 of the Wisconsin Statutes.