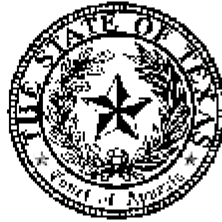
Reversed and Remanded and Opinion filed August 23, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00173-CV

CHESAPEAKE OPERATING, INC., Appellant

V.

NABORS DRILLING USA, INC., Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 4251JG98-1

O P I N I O N

This appeal addresses a contractual choice of law provision in a conflicts of law setting. Chesapeake Operating, Inc. appeals the trial court's summary judgment applying Texas law to an indemnity provision in favor of Nabors Drilling USA, Inc. While the contract provided for the application of Texas law, this oil field rig was located, and the accident occurred, in Louisiana, whose law disfavors oil field indemnity provisions. We reverse and remand.

Chesapeake is the operator of an oil and gas well and Nabors was hired by

Chesapeake to drill the well. This case arises from a lawsuit by Danny Alms, an employee of a subcontractor of Chesapeake, for personal injuries received at a well site in Vernon Parish, Louisiana. Nabors was named as a defendant in this suit and subsequently filed a cross-action against Chesapeake seeking indemnity and defense under the Daywork Drilling Contract between Nabors and Chesapeake. This contract contained a choice of law provision that provided for application of Texas law. The contract also contained an indemnity provision.

Nabors filed a motion for summary judgment claiming Texas law applied and that the indemnity provisions were enforceable under Texas law. The trial court granted Nabors' motion and found that Chesapeake was required (1) to reimburse Nabors for reasonable attorney's fees; and (2) to defend and indemnify Nabors in this cause. The trial court later severed this portion of the case from the underlying personal injury suit. This appeal ensued.

In its sole issue, Chesapeake claims the trial court erred in granting summary judgment because Texas law, which the court applied, does not govern this dispute. Chesapeake claims that Louisiana law applies and, under Louisiana law, the indemnity provision in the parties' contract is void and unenforceable.

In *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990), the supreme court explained the effect to be given contractual choice of law provisions. The court observed that Texas recognizes the "party autonomy" rule, which affords judicial respect for the parties' contractual choice of law. *See id.* at 677. Regarding party autonomy, the Legislature has enacted the following provision:

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

TEX. BUS. & COM. CODE ANN. § 1.105(a) (Vernon Supp. 2000). Section 6 of the Restatement mandates that, subject to constitutional restrictions, a court will follow a

statutory directive of its own state on choice of law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). The supreme court observed that the party autonomy rule is best formulated in section 187 of the Restatement. *See DeSantis*, 793 S.W.2d at 677. Section 187 provides:

> Law of the State Chosen by the Parties
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> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
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> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
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> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
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> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
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> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

Applying subsection (1) of section 187, the court in *DeSantis* determined that the issue was not "one which the parties could have resolved by an explicit provision in their agreement." *See* 793 S.W.2d at 678. Indeed, the issue before the court was whether a non-competition agreement was enforceable. *See id.* Appellant argues that, unlike the issue in *DeSantis*, the issue in this case was whether Nabors was entitled to indemnity, which may be and was resolved by an explicit contractual provision. Chesapeake disagrees with this reasoning and instead contends the issue is whether the indemnity provision is

enforceable, an issue that could not have been resolved by an explicit provision in the contract. In considering the choice of law issue in *DeSantis*, the supreme court held that the issue of enforceability of the noncompetition agreement is not an issue that could have been resolved by an explicit contractual provision.[1] *See id.* at 678.

In the instant case, appellant filed its cross-action, seeking enforcement of the indemnity agreement between the parties. Thus, we believe the issue facing the trial court was whether to enforce the indemnity provisions in the contract. We find this very similar to the facts in *DeSantis*. Accordingly, we hold that the issue whether the indemnity provision should be enforced is not one the parties could have resolved by a contractual provision. Because section 187(1) is inapplicable, we turn to section 187(2).

Under subsection (2), we must determine whether Texas has a substantial relationship to the parties or the transaction and if there is no other reasonable basis for the parties' choice. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971). Alternatively, we must decide whether application of the law of Texas would be contrary to a fundamental policy of a state which has a materially greater interest than Texas in the determination of the particular issue and which would be the state of the applicable law if the parties had not made an effective choice of law. *See id.* at § 187(2)(b).

We turn first to the relationship between the parties or the contract and the chosen state. Nabors' corporate offices are located in Texas. Nabors argues that at least part of

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[1] We are troubled by the supreme court's discussion regarding whether the issue was one the parties could not have resolved by an explicit agreement. Because the parties in *DeSantis* had entered into a noncompetition agreement, they certainly *attempted* to resolve the issue by explicit provisions in the agreement. The supreme court nonetheless found the issue was not one that could be resolved by agreement because the court framed the issue as a question only a court could answer: whether the noncompetition agreement was enforceable. 793 S.W.2d at 678. Because most contractual issues in cases of this type could be framed as enforceability issues, it follows that, depending on how a court phrases the issue, there could be no issues resolvable by explicit provisions in the contract, thereby rendering section 187(1) of the Restatement meaningless.

the contract negotiations occurred in Texas; however, the record references for this argument include the contract itself, which does not specify the place of negotiation or execution, and two letters from Nabors to Chesapeake, which discuss Nabors' acquisition of Nicklos-Hinton Drilling Co., the original contracting party, and its equipment and assets. The second letter does request and contain Chesapeake's signature of approval regarding Nabors' assignment of drilling contracts for three designated wells. However, Chesapeake signed this letter in Oklahoma and returned it to Nabors in Texas. Therefore, the record does not show actual negotiation or execution of the contract in Texas. Because one of the parties is located in Texas, we find that the chosen state does have a relationship to one party. However, we do not believe the existence of one party in Texas constitutes a *substantial* relationship to Texas, especially given that the performance of the contract and the accident giving rise to the lawsuit occurred in Louisiana. Thus, we must turn to subsection (2).

> Whether the exception in section 187(2)(b) applies depends on three findings:
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> [F]irst, whether there is a state the law of which would apply under section 188 of the RESTATEMENT absent an effective choice of law by the parties, or in other words, whether a state has a more significant relationship with the parties and their transaction than the state they chose; second, whether that state has a materially greater interest than the chosen state in deciding whether this [indemnity] agreement should be enforced; and third, whether that state's fundamental policy would be contravened by the application of the law of the chosen state in this case.

793 S.W.2d at 678. More particularly, we must determine: first, whether Louisiana has a more significant relationship to the parties and their transaction than the chosen state, Texas; second, whether Louisiana has a materially greater interest than Texas in deciding the enforceability of the indemnity agreement; and third, whether application of Texas law would be contrary to a fundamental policy of the Louisiana, if Louisiana is determined to be the state with the materially greater interest. *See id.*

Section 188 of the Restatement provides that a contract is governed by the law of the state having "the most significant relationship to the transaction and the parties," considering various contacts in light of the basic conflict of laws principles of section 6 of the Restatement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).[2]

In this case, Texas has a relationship to a party to the contract since Nabors is a Texas-based company. Nonetheless, Chesapeake's principal place of business is in Oklahoma. The contract was apparently negotiated and signed in both Texas and Oklahoma. The drilling of the well, which was the basis of the contract between the parties, occurred in Louisiana. Given these facts, we cannot say that Texas has a more significant relationship to the transaction than Louisiana.

Next, we must decide if Texas or Louisiana has a materially greater interest in deciding the enforceability of the indemnity agreement in this case. Chesapeake maintains that Louisiana has a materially greater interest because the incident occurred in Louisiana between two companies working in that state, the parties contemplated performing services in Louisiana and, presumably also contemplated following the law and public policies of Louisiana. Chesapeake claims that the only interest Texas has is that one of the parties to the contract is a Texas corporation, which does not establish that Texas has a materially greater interest than Louisiana in deciding the enforceability of the contractual indemnity

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[2] The factors listed in section 6 of the Restatement include:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the laws to be applied.

Id. at § 6(2).

provision.

Nabors, however, argues that Texas has a materially greater interest in determining the enforceability of indemnity language in a contract between Texas and Oklahoma corporations. Nabors adds that Texas has a greater interest in applying its indemnity law to Texas corporations.

We turn first to the factors listed in section 188 of the Restatement. Texas certainly has a substantial relationship to Nabors and there is a reasonable basis for the application of Texas law in this case since Nabors is domiciled here. *See id.* at § 187 comment f. However, this is not dispositive of which state has a materially greater interest in deciding the issue presented. The summary judgment record does not establish that the place of contracting or the place of negotiation of the contract was in any one state. Indeed, the contract appears to be a form contract, although the parties struck through the form provision regarding indemnity, both parties initialed this change, and there is a typewritten note stating "SEE ATTACHED OPERATOR'S ADDENDUM." The operator is Chesapeake and the addendum contains two replacement paragraphs concerning indemnity. The place of performance was Louisiana as was the oil and gas well, which was the subject matter of the drilling contract. As stated earlier, the parties are from Texas and Oklahoma. Thus, consideration of the section 188 factors does not assist in determining which state has the materially greater interest.

In *DeSantis*, the parties chose Florida law to govern the contract, Wackenhut's corporate offices were located there, and some of the negotiations of the contract occurred there. *See* 793 S.W.2d at 678. On the other hand, DeSantis was a Texas resident, the gist of the agreement was for the performance of services in Texas, and DeSantis formed his competing company in Texas. *See id.* at 678-79. The supreme court held that the place of performance for both parties was Texas and that, as a rule, that factor alone is conclusive in determining what state's law must apply. *See id.* at 679. Thus, the court found that

Texas had a more significant relationship to the parties and the transaction than Florida. *See id.* The court also found that Texas had a materially greater interest than Florida in that DeSantis was an employee in Texas, working for a national employer doing business in Texas, DeSantis' new company was formed in Texas, and the consumers of the services furnished in Texas of Wackenhut and DeSantis' new company were Texas residents. *See id.*

In this case, however, the only connection to Texas is that one of the parties is a Texas corporation. In considering the factors utilized by the supreme court, we find that Louisiana has a materially greater interest in deciding the issue of enforceability of the indemnity provisions. First, the place of performance of the contract was Louisiana, and, as the supreme court observed in *DeSantis*, that factor alone is conclusive. 793 S.W.2d at 679. Certainly, Louisiana has a more significant relationship to the transaction than Texas. The injured employee who filed the underlying lawsuit was an employee in Louisiana, working for an employer doing business in Louisiana. Although Texas has an interest in protecting its citizens, Louisiana has a stronger interest in regulating and supervising the contracts of parties drilling wells in that state. Louisiana also has enacted laws, including the anti-indemnification provisions of the Louisiana Oilfield Indemnification Act ("LOIA"). Although Texas has laws regarding indemnification provisions in oil and gas contracts, the well in question was not located in Texas. We find that Louisiana has a materially greater interest in the determination of the issue in this case. In the absence of an effective choice of law by the parties, Louisiana would be the state of the applicable law.

Furthermore, application of Texas law would be contrary to a fundamental policy of Louisiana. The Texas supreme court has held that a "fundamental" policy is a "substantial" one. *DeSantis*, 793 S.W.2d at 680. It is not enough that application of the law of another state would lead to a different result than application of the law of the chosen state. *Id.* Instead, "the focus is on whether the law in question is a part of state

policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction." *Id.*

A review of the LOIA indicates that the Louisiana legislature finds indemnity agreements to violate public policy and thus, the indemnity agreement in this case would be found unenforceable. The LOIA provides:

> A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals, which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to person, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.
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> B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

LA. REV. STAT. ANN. § 9.2780(A)-(B) (West Supp. 2001).

Clearly, the Louisiana legislature found it inequitable and against public policy to require subcontractors to indemnify their employers for any and all injuries that might arise in connection with their work contracts. *Id.* It is abundantly clear from the language of the statute that the Louisiana policy against indemnity provisions in oilfield drilling

contracts is a fundamental one and the Louisiana courts construing the LOIA would refuse to enforce such an indemnity provision.

The provisions in the contract in this case provide that the Contractor (Nabors) shall indemnify the Operator (Chesapeake) for any claims brought by the Contractor's employees or agents, and the Operator shall indemnify the Contractor for any claims brought by the Operator's employees or agents. Thus, in applying the LOIA to these indemnity provisions, the Louisiana courts would refuse to enforce the partys' indemnity agreement. The trial court in this case applied Texas law and granted summary judgment to Nabors, ordering Chesapeake to defend and indemnify Nabors. Based on this determination, we hold that Louisiana has a materially greater interest in deciding the enforceability of the indemnity agreement in this case. Accordingly, the trial court should have determined that Louisiana law applied.

We hold that the trial court erred in applying Texas law to the parties' contract. Therefore, we reverse the trial court's judgment and we remand for further proceedings.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed August 23, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

Publish — TEX. R. APP. P. 47.3(b).