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STATE OF VERMONT
WASHINGTON COUNTY

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State of Vermont,)	
Plaintiff,)	Washington Superior Court
)	Docket No. 229-4-06 Wincey
v.)	
)	
Great Northeast Productions, Inc.,)	
Defendant.)	

DECISION
Cross-Motions for Summary Judgment

The State of Vermont seeks reimbursement from Defendant Great Northeast Productions, Inc., based on an indemnification agreement, for benefits paid to a State employee on a worker's compensation claim. The parties have filed cross-motions for summary judgment on the issue of the State's claim for indemnification.

In 2004, the State Agency of Transportation and Great Northeast entered into a 17 page written contract whereby Great Northeast acquired the right to use certain State-owned property in Coventry, Vermont for a two-day concert by the musical group Phish. The State's Department of Liquor Control (DLC) assigned investigators to cover the concert. One such investigator at the concert, Paul Farnham, slipped, without falling, while walking in the course of his work at the concert. The slip resulted in a "groin pull." He later developed a rare bacterial infection in his groin known as "Fournier's Gangrene." The State has paid a total of \$259,422.59 in worker's compensation benefits to Mr. Farnham. It is this amount for which it seeks indemnification.

State's Motion for Summary Judgment

The State claims that the worker's compensation benefits paid to Mr. Farnham fall within the scope of the indemnification clause in the contract with Great Northeast concerning the concert. It cites the portion of paragraph 8 entitled "Independence and Indemnification," which provides: "GNP [Great Northern] agrees to defend and indemnify and hold the State of Vermont and the AOT harmless of and from any and all loss or liability with respect to any and all claims, causes of action, losses, or other expenses, that arise out of, relate to, or are in any manner connected with the Event or AOT's supervision of the Event" Contract for Outdoor Concert, ¶ 8. The State argues that Great Northeast's liability for indemnity is clear on the face of the contract because Mr. Farnham's worker's compensation claim "arose out of and was connected with the Event." State's Motion for Summary Judgment at 3 (filed Dec. 20, 2006).

Great Northeast argues that it has no indemnity obligation for such expense by the State on two grounds. First, it argues that worker's compensation benefits are outside the scope of the indemnification agreement because under paragraph 12 of the contract, each party was required to be responsible for its own debts and obligations. The contract did not specifically provide for

DLC investigators to work at the site, and Great Northern is therefore not obliged to pay for the State's ordinary obligations to its employees. It argues that payment of a worker's compensation claim is solely the obligation of the State.

Secondly, Great Northeast argues that the State is unable to prove, as a matter of fact, that Mr. Farnham's Fournier's Gangrene arose out of or bears any relation to the concert. Specifically, Great Northeast argues that the State has no admissible evidence to support a connection. The State replies that it is undisputed that Mr. Farnham filed a worker's compensation claim based on a slip at the concert, and it need only prove that the claim itself was connected with the concert, and not whether the injury was connected with the concert. "Whether Mr. Farnham pulled his left groin muscle or ended up developing Fournier's Gangrene. . .is immaterial. The State is entitled to summary judgment because Mr. Farnham's claim arose out of the Event." State's Reply at 4 (filed February 21, 2007). According to the State, the worker's compensation claim arose out of the groin pull which happened at the concert, so it does not have to make proof that the Fournier's Gangrene arose out of the concert.

Great Northeast's Cross Motion for Summary Judgment

Great Northeast argues in its cross motion that the State cannot produce admissible evidence demonstrating that the Fournier's Gangrene bears any relation to the concert. In response, the State specifically declines to produce such evidence, arguing that it would be "immaterial." See *id.*

Great Northern points out that the only record evidence pertaining to whether there is a causal relationship between the slip and the Fournier's consists of handwritten responses by Mr. Farnham's treating physician to questions in a letter from the State's Risk Management Division. In the letter, the case manager stated, "The claims adjuster has requested that I obtain additional information regarding the causation and relationship of the diagnosis of "Fournier's Gangrene" to the reported injury of "groin pull". This information is essential for claims processing." She put the following questions, to which the handwritten responses of Dr. Mark Healey, Mr. Farnham's treating surgeon, dated September 2, 2004, are shown in italics:

Is the diagnosis of "Fourniers' Gangrene" directly related to the reported injury of 8/12/04 "groin pull"? *I am unable to identify source of his infection*

Is the resulting diagnosis of Fourniers' Gangrene directly caused by reported injury of "groin pull"? *Unable to determine*

Please offer any medical information that would assist with the understanding of the diagnosis of Fourniers' Gangrene and its relation to the report injury "groin pull". *The Fournier's developed when the skin in the left groin became innoculated with multiple different organisms. The source of the innoculation is not clear. They may have been introduced @ the time of the groin pull because of the unsanitary conditions @ the concert.*

Letter from Kathy Peterson to Mark Healey (8/31/04, with Dr. Healey's 9/2/04 responses).

Great Northern disputes whether the expenses for the claim are related to the concert. It argues that the State cannot produce any admissible evidence that the origin of the Fourniers' Gangrene was the concert, as opposed to some other source. It argues that because the most the doctor wrote was that the inoculation "may have" occurred at the time of the groin pull and therefore 'may be' related to conditions at the concert, the State has not met its burden to produce evidence showing a causal connection between the claim and the concert.

Analysis

The factual record submitted by the parties shows Mr. Farnham filed his First Report of Injury immediately after his slip on August 12, 2004, when the only injury he was aware of was a pulled groin muscle. It appears from the record that the Fournier's developed subsequently, as a result of the introduction into the left groin of "multiple organisms," but at an unknown time and from an unidentified source. The State essentially asks for a summary judgment ruling that because it paid for the expenses related to the Fournier's Gangrene in response to Mr. Farnham's worker's compensation claim, Great Northern must indemnify it, and is not entitled to require proof that the expenses paid for the Fournier's Gangrene were connected with the concert.

The case requires a close look at the language of paragraph 8, and interpretation of it within the context of the contract as a whole. The various paragraphs and provisions of the contract make it clear that Great Northern was required to assume responsibility for everything that happened on the State's land in connection with the Phish concert, as if Great Northern owned the land itself. The terms also make clear that the State was not to be considered as any kind of partner in the production of the concert just because it owned the underlying land. Great Northern acquired only a license for use of the land, and the State was not a participant in the concert. Great Northern agreed under paragraph 8 to indemnify the State for claims against it arising from the concert, and was required to obtain specified insurance coverage, naming the State as additional insured. Worker's compensation insurance is mentioned under a provision that required Great Northern to carry it with "respect to all operations performed. . .in accordance with the laws of the State of Vermont." Contract at ¶ 9.

The indemnification obligation in ¶ 8 is broad ("any and all loss or liability with respect to any and all claims, causes of action, losses, or other expenses, that arise out of, relate to, or are in any manner connected with the Event or AOT's supervision of the Event. . ."). However, it does require that Great Northern is only obligated to indemnify for items for which there is a connection to the concert. The State relies heavily on the argument that the worker's compensation "claim" arose out of the concert, which is true, but the use of the word "claim" in ¶8 must be interpreted in its ordinary legal sense. It is a general term that includes a wide variety of causes of action. Ordinary legal principles require that a claimant is only entitled to recover damages to the extent that there is a causal connection between the basis for liability on the claim and the amount of damages.

Paragraph 8 limits indemnity claims to those that are related to the concert. Thus, in order to be entitled to indemnification under the terms of ¶ 8, the State must be able to show that the damages for which a valid claim exists are causally related to the basis for liability, and that

the basis for liability is connected with the concert. The State has the burden to prove these elements in its cause of action for indemnification against Great Northern. While the State may have accepted Dr. Healey's statement (that the Fournier's Gangrene "may have" been related to conditions at the concert) as sufficient for purposes of paying worker's compensation benefits to Mr. Farnham, if it seeks indemnification for the payment of those benefits under the contract, it must be able to show, with admissible evidence, the required causal connection between the concert and the source of the Fournier's Gangrene.

"Summary judgment is mandated under the plain language of V.R.C.P. 56(c) where, after an adequate time for discovery, a party 'fails to make a showing sufficient to establish the existence of an element' essential to his case and on which he has the burden of proof at trial." *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (construing Fed. R. Civ. P. 56(c)).

The State has not brought forth admissible evidence to establish a causal connection between the concert and the source of the Fournier's Gangrene. Because the State has not produced admissible evidence on this element of the case, Great Northern is entitled to summary judgment and the State's claim fails.

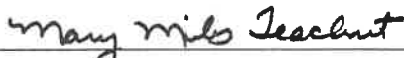
Because of this disposition, the court does not need to address the issue of whether worker's compensation benefits, as a general matter, are within the scope of the indemnity provisions of the agreement.

ORDER

For the foregoing reasons,

- 1) The State's summary judgment motion filed December 20, 2006 is *denied*, and
- 2) Great Northeast's summary judgment motion filed January 22, 2007 is *granted*.

Dated at Montpelier, Vermont this 5th day of July 2007.



Mary Miles Teachout
Superior Court Judge