

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>LONGWALL-ASSOCIATES, INC.,</b>	)	
	)	
Plaintiff,	)	Case No. 1:00CV00086
	)	
v.	)	<b>OPINION AND ORDER</b>
	)	
<b>WOLFGANG PREINFALK GmbH,</b>	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

*John C. Warley and Charlie R. Jesse, Durette, Irvin & Bradshaw, P.L.C., Richmond and Abingdon, Virginia, for Plaintiff; Dana M. Richens, Smith, Gambrell & Russell, LLP, Atlanta, Georgia, and Steven R. Minor, Elliott Lawson & Pomrenke, Bristol, Virginia, for Defendant.*

Defendant Wolfgang Preinfalk GmbH (“Preinfalk”) filed a motion seeking summary judgment as to Count I (Breach of Contract) and Count IV (Breach of Implied Warranty of Fitness for a Particular Purpose) of the complaint filed by plaintiff Longwall-Associates, Inc. (“Longwall”). Because it is unclear at this time what evidence will be presented on these issues, I deny the defendant’s motion with respect to both counts.

## I.

Longwall manufactures and sells heavy machinery used in the process of longwall mining. Longwall entered into a contract with Preinfalk, a German company that designs and manufactures certain mining equipment. The contract designates Longwall as the exclusive distributor of Preinfalk's mining equipment in the United States. Pursuant to the contract, Longwall purchased gearboxes and rack bar pins from Preinfalk, which were incorporated into mining machinery at Longwall's production facility and thereafter sold to its customers. The equipment failed, resulting in a temporary halt in production at various mines where the equipment was being used.

In Count I of its complaint, Longwall argues that Preinfalk breached the contract by failing to indemnify Longwall and hold it harmless for any liability directly or indirectly created or caused by Preinfalk, as set forth in paragraph nine of the contract.

Longwall asserts in Count IV that Preinfalk breached an implied warranty of fitness for a particular purpose because Clarence Bandy, an employee of Longwall who also served as an undisclosed paid consultant for Preinfalk, selected the equipment. Therefore, Longwall contends, it relied on the skill and judgment of the seller's agent (Bandy) in selecting equipment that would be suitable for the particular purpose for

which it was being purchased.<sup>1</sup>

## II.

On a motion for summary judgment, the court must view the facts in the light most favorable to the party opposing the motion. *See United States v. Diebold*, 369 U.S. 654, 655 (1962). Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c)*.

The contractual dispute stems from the parties' disagreement as to the application of the indemnity provision in paragraph nine, which states that:

Each party hereto shall hold harmless and forever indemnify the other from any defects or liabilities caused by the negligence of the other party. In other words, . . . PW [Preinfalk] shall indemnify and hold harmless LWA [Longwall] for any negligence or liability directly or indirectly created or caused by PW, whether foreseeable or unforeseeable.

Longwall-Preinfalk Agreement ¶ 9. Preinfalk relies on the language “caused by the negligence of the other party.” It submits that Longwall has not alleged, nor can it prove, any negligence on the part of Preinfalk that would trigger the indemnity language. Even if all the facts as alleged by Longwall were true, the only possible

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<sup>1</sup> Longwall has also asserted claims for breach of express warranties and the implied warranty of merchantability. These are recited in Counts II, III and V.

causes of action, if any, are breach of express and implied warranties. Furthermore, Preinfalk asserts, there is no “negligent” breach of contract under Virginia law. *See Sensenbrenner v. Rust*, 374 S.E.2d 55, 58 (Va. 1988). In sum, Longwall’s breach of warranty claims set forth in the complaint do not prompt application of the indemnity clause because negligence is a condition precedent.

Longwall’s response is that Preinfalk has ignored key terms in the agreement, specifically the words “or liability” that appear in the second sentence. The term “liability” is a broad legal term that encompasses “all character of debts and obligations . . . express or implied.” *Fried v. Smith*, 421 S.E.2d 437, 439 (Va. 1992). Longwall argues that “liability” clearly includes the type of warranty claims at issue in this case. Moreover, the introductory phrase “[i]n other words” implies that the sentence that follows is a more detailed explanation of the preceding sentence. Also, the word “unforeseeable” would not have been included if the provision were limited to actions involving negligence because foreseeability is an element of traditional negligence; therefore, if the conduct was unforeseeable then it would not be negligent, and the first sentence of the provision is rendered meaningless. Finally, a contract should be construed as a whole, and Longwall argues that “[t]here is nothing in the agreement which suggests that the parties’ mutual rights and obligations hinge on narrowly focused concepts of law, such as negligence.” Pl’s Brief Opp. Def’s Mot. Partial

Summ. J. at 3.

It is a settled rule of law that where a provision in a contract is ambiguous, the jury is entitled to interpret the language based upon evidence as to the situation of the parties, the subject matter of the contract, and the parties' conflicting interpretations of its meaning. *See C.G. Blake Co. v. W.R. Smith & Son, Ltd.*, 133 S.E. 685, 691 (Va. 1926). Ambiguous language "admits of being understood in more than one way or refers to two or more things simultaneously . . . [or] is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness." *Stuarts Draft Shopping Ctr., L.P. v. S-D Assocs.*, 468 S.E.2d 885, 888 (Va. 1996) (quoting *Brown v. Lukhard*, 330 S.E.2d 84, 87 (Va. 1985)). I find that the use of the words "negligence" and "liability" creates an ambiguity.

Longwall concedes that it is not likely to rely upon the indemnity clause to seek damages at trial; rather, it plans to focus the jury's attention on its express warranty claims. Longwall did, however, express its intention to seek attorneys' fees through its claim for indemnification. Preinfalk argues that the language of paragraph nine of the contract does not contemplate the payment of attorneys' fees. Regardless of whether the contract specifically calls for the recovery of attorneys' fees, the rule in Virginia is that, unless the contract provides otherwise, an indemnitee is entitled to recover reasonable attorneys' fees as part of the damages. *See General Elec. Co. v.*

*Mason & Dixon Lines, Inc.*, 186 F. Supp. 761, 766 (W.D. Va. 1960) (construing Virginia law); *Southern Ry. Co. v. Arlen Realty & Dev. Co.*, 257 S.E.2d 841, 844-45 (Va. 1979). The exception to that rule, however, is that it does not apply to the costs of litigation against the defendant to establish the right of indemnity. *See General Elec.*, 186 F. Supp at 766; *Southern Ry.*, 257 S.E.2d at 844. Since the crux of Count I is a disagreement between the parties about whether Longwall deserves indemnification under these circumstances, the exception appears to apply. With that in mind, it is unlikely that I will allow attorneys' fees to be an element of Longwall's damages.

Count IV is premised upon the implied warranty of fitness for a particular purpose, which attaches when "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." Va. Code Ann. § 8.2-315 (Michie 2001). The plaintiff must prove that the product was purchased for a particular purpose, not its ordinary purpose. *See Lescs v. Dow Chem. Co.*, 976 F. Supp. 393, 400-01 (W.D. Va. 1997) (construing Virginia law). Longwall used the gearboxes and rack bar pins in the business of mining coal, which Preinfalk argues is not a special use for the equipment. Preinfalk also submits that there is no indication on the record that Longwall ever communicated to Preinfalk that it wished to use the

equipment for some purpose other than mining coal.

Furthermore, Preinfalk calls attention to the fact that Longwall set the specifications for the products purchased; in no manner did it rely on Preinfalk's representations of what equipment would be suitable for its purpose. Longwall chose the gearboxes from a Preinfalk catalogue and selected the rack bar pins based on its understanding of the bid specification requirements. Because there was no reliance on the seller's skill, Preinfalk asserts that the claim for breach of implied warranty of fitness for a particular purpose fails as a matter of law. *See* Va. Code Ann. § 8.2-315 cmt. 5 ("If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results."); *Shell v. Union Oil Co.*, 489 So.2d 569, 572 (Ala. 1986) (analyzing identical UCC provision and holding that because the buyer set the specifications for the product, it did not rely upon the seller's skill to select suitable goods).

Longwall argues in turn that there is a legitimate issue of fact as to whether such a warranty exists. It submits that the equipment was to be used for incorporation into a longwall mining system, which is a very specific use within the mining business and thus qualifies as a particular purpose. Furthermore, it contends that the Longwall employee, Clarence Bandy, who chose the products to be purchased, was in fact a paid agent for Preinfalk at the time the order was made. Even though Longwall was

unaware of the agency at the time of the order, it argues that it nonetheless unwittingly relied on Bandy's selection of the equipment and Bandy's knowledge of the particular purpose is imputed to Preinfalk.

A "particular purpose" is a use "which is peculiar to the nature of [the buyer's] business" whereas the ordinary purpose for a product includes "uses which are customarily made of the goods in question." Va. Code Ann. § 8.2-315 cmt. 2; *Lescs*, 976 F. Supp. at 400. The question is, therefore, whether gearboxes and rack bar pins are designed specifically for incorporation into the type of machinery manufactured by Longwall and customarily used in the coal mining business. Without knowing more about these products, the reasons for which they were purchased, and the business of longwall mining, I cannot say as a matter of law that the use of gearboxes and rack bar pins in the coal mining business is not a particular purpose.

Another problem for Longwall is in proving that it relied upon Preinfalk's skill and judgment in selecting the goods. I believe that Longwall has a substantial obstacle to overcome on this issue—namely, the fact that it identified the gearbox for purchase through use of Preinfalk's catalogue and ordered the rack bar pins by specification, without the assistance of the seller. "Where particular goods are purchased solely because the buyer has clearly decided to purchase those particular goods, it is clear that the buyer has not put any reliance on the seller and the implied warranty of fitness for

a particular purpose does not arise.” Am. L. Prod. Liab. 3d § 20:32 (1987). Unfortunately, the issue is not that simple due to Longwall’s claim that it relied on Clarence Bandy’s skill as an undisclosed agent of Preinfalk. At this time, there is no evidence on the record as to the scope of Bandy’s employment with Preinfalk, nor is there any evidence regarding the details of any negotiations or sales transactions that he may have made on behalf of either party. I believe it is therefore inappropriate to grant summary judgment without further illumination of these questions. The plaintiff will be allowed to present evidence to the jury on its claim for a warranty of fitness for a particular purpose; however, I may refuse to instruct the jury as to Count IV.

For the foregoing reasons, it is **ORDERED** that the defendant’s Motion for Partial Summary Judgment (Doc. No. 38) is denied.

ENTER: January 18, 2002

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United States District Judge