THE CASES AGAINST CEDU FAMILY OF PROGRAMS

ANNOUNCEMENT: ALL CEDU PROGRAMS HAVE BEEN CLOSED. Some have re-opened under "new ownership".

155 Cal.Rptr. 552
93 Cal.App.3d 1
Michael Robert KRAMER, Plaintiff,
v.
CEDU FOUNDATION, INC., and Louis Rehm, Defendants.
OHIO CASUALTY INSURANCE COMPANY, Plaintiff in Intervention and Respondent,
v.
CEDU FOUNDATION, INC., and Louis Rehm, Defendants in Intervention and Appellants.
CEDU FOUNDATION, INC., Cross-Complainant and Appellant,
v.
Louis C. REHM, d/b/a Louis C. Rehm Construction Company, Cross-Defendant and Respondent.
Civ. 19437.
Court of Appeal, Fourth District, Division 2, California.
May 15, 1979.
Hearing Denied July 12, 1979.
Rehearing Denied July 16, 1979.

[93 Cal.App.3d 4]

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Chase, Rotchford, Drukker & Bogust, E. Michael Kaiser, San Bernandino and Toni Rae Bruno, Los Angeles, for defendant, defendant in intervention, cross-complainant and appellant Cedu Foundation, Inc.

Cooksey, Coleman & Howard and Paul Cooksey, Santa Ana, for defendant, defendant in intervention, cross-defendant and appellant Louis C. Rehm, dba Louis C. Rehm Constr. Co.

Trout, Heggeness & Sweet and Clifford D. Sweet, III, San Diego, for plaintiff in intervention and respondent Ohio Cas. Ins. Co.

Grancell, Kegel & Tobin, and Clinton M. Hodges, Los Angeles, for California Self-Insurers Ass'n, and John L. Maier, Los Angeles, for California Workers' Compensation Institute, as amici curiae in behalf of plaintiff in intervention and respondent Ohio Cas. Ins. Co.

[93 Cal.App.3d 5]

OPINION

TAMURA, Acting Presiding Justice.

These appeals involve two distinct problems: (1) A negligent employer's right to reimbursement of workers' compensation benefits in an employee's third party action and (2) an owner's right to be indemnified by a contractor employed to supervise a building project for liability resulting from an injury sustained by an employee of a subcontractor.

The background of these appeals is as follows:

Defendant Cedu Foundation, Inc. (Cedu), a nonprofit residential school for disturbed young people, contracted with Louis Rehm (Rehm) to supervise the construction of a training center director's residence.

Plaintiff, an employee of the drywall contractor on the project, fell from a ladder

scaffold while working in the interior of the structure and sustained serious injuries.

The following litigation ensued: Plaintiff sued Cedu and Rehm for damages for the injuries he sustained; Ohio Casualty Insurance Company (Ohio), the workers' compensation carrier for plaintiff's employer, filed a complaint in intervention to recover workers' compensation benefits paid to plaintiff; and Cedu filed a cross-complaint for indemnity against Rehm. Jury trial resulted in verdicts in favor of plaintiff and Ohio against Cedu and Rehm and a verdict in favor of Rehm on the cross-complaint for indemnity. In special findings, the jury assessed plaintiff's total damages in the sum of $664,000 and apportioned negligence as follows: 19 percent to plaintiff, 19 percent to plaintiff's employer, 38 percent to Cedu, and 24 percent to Rehm. Judgment was entered in favor of plaintiff and against Cedu and Rehm in the sum of $498,150.

In calculating the amount of Ohio's judgment, the trial court determined that Ohio's claim should be reduced by the amount of negligence attributed to plaintiff and his employer. Since Ohio had paid $49,621.45 in workers' compensation benefits to and for the benefit of plaintiff, the court reduced that amount by the percentages of negligence attributed to plaintiff and his employer and entered judgment for Ohio in the sum of $30,745.36.

Cedu and Rehm appealed from the judgment in favor of plaintiff and from the judgment in favor of Ohio. Cedu appealed from the judgment in favor of Rehm on the cross-complaint for indemnity. Pending the appeal, [93 Cal.App.3d 6] Cedu settled with plaintiff and thereafter Rehm abandoned his appeal from that judgment. [1] Since the two pending appeals are essentially unrelated both as to facts and issues, they will be treated separately.

REIMBURSEMENT OF WORKERS' COMPENSATION BENEFITS

The sole issue on the appeal from the judgment in favor of the workers' compensation carrier for plaintiff's employer is the proper method of determining the amount of reimbursement of workers' compensation benefits to which a negligent employer is entitled in an action against a third party tortfeasor. As has been noted, the trial court arrived at that amount by reducing the carrier's claim for benefits paid by the percentages of negligence attributed to the employee and his employer.

Cedu and Rehm contend that the correct application of the comparative fault principle enunciated in Li (Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226) to a Witt (Witt v. Jackson, 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641) situation would be to permit reimbursement to the negligent employer only to the extent that its claim exceeds the proportional share of the total damages sustained by the employee attributed to the employer's negligence. In other words, in the case at bench it is urged that since the jury found that plaintiff's total damages amounted to $664,000 and since the employer was found to be 19 percent negligent, $125,100 of the total damages should be attributed to the employer's negligence. Cedu and Rehm contend that the employer or its carrier should be reimbursed only to the extent that the compensation benefits paid exceed that amount.

The approach advocated by Cedu and Rehm is the one adopted by the Court of Appeal in Arbaugh v. Procter & Gamble Mfg. Co., 80 Cal.App.3d 500, 145 Cal.Rptr. 608, (hg. den.) decided during the pendency of this appeal. There, in an employee's action against the third party, the jury returned a plaintiff's verdict for $340,000. In special findings, the jury found that the employee was not negligent but that the

employer and the third party were each 50 percent negligent. The intervenor workers' compensation carrier had paid benefits totaling $44,836.17. The trial court [93 Cal.App.3d 7] entered judgment for intervenor for 50 percent of the amount or $22,918.09. On appeal, the reviewing court held that, consistent with Li, the all-or-nothing approach of Witt should be modified but that the approach taken by the trial court was wrong. The court held that the employer's compensation carrier should be reimbursed only to the extent that the workers' compensation benefits paid exceeded the proportional share of the total damages suffered by the employee attributable to the employer's negligence.

The principle enunciated in Arbaugh was approved by the Supreme Court in Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd., 22 Cal.3d 829, 150 Cal.Rptr. 888, 587 P.2d 684. Although Associated involved an employer claiming credit under Labor Code section 3861 [2] in the amount of the employee's settlement of a third party action, the court made it clear that the comparative fault principle should apply to a credit or reimbursement situation. In either case, the court concluded "that the concurrently negligent employer should receive either credit or reimbursement for the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery. (See Arbaugh v. Procter & Gamble Mfg. Co. (1978) 80 Cal.App.3d 500, 508-509, 145 Cal.Rptr. 608.)" (Id., at p. 842, 150 Cal.Rptr. 896, 587 P.2d 692.) The court then proceeded to explain how the comparative fault principle should apply in the context of reimbursement and credit.

The court stated that when a negligent employer seeks reimbursement in a judicial forum, "application of comparative negligence principles is relatively straight-forward. The third party tortfeasor should be allowed to plead the employer's negligence as a partial defense, in the manner of Witt. Once this issue is injected into the trial, the trier of fact should determine the employer's degree of fault according to the principles of American Motorcycle. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liability up to the amount of the workers' compensation benefits assessed against the employer. Correspondingly, the employer should be denied any claim of reimbursement or any lien under section 3856, subdivision (b) to the extent that his contribution would then fall short [93 Cal.App.3d 8] of his percentage share of responsibility for the employee's total recovery." (Id., at p. 842, 150 Cal.Rptr. p. 896, 587 P.2d p. 692, fn. omitted.)

When the issue arises in the context of an employer's credit claim based on a third party settlement, the court stated that "the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong." (Id., at p. 843, 150 Cal.Rptr. at p. 896, fn. omitted.)

The court concluded its opinion by stating "that the doctrines of Roe and Witt must be modified to reflect the principles of comparative negligence developed in Li and American Motorcycle. Thus, an employer may be

allowed credit or reimbursement under the Labor Code, based on an employee's recovery from a third party, but only to the extent the employer's liability in workers' compensation exceeds its share of responsibility for the employee's full tort damages. When an employer claims a credit before the board after an employee's independent third party settlement, section 3861 operates as a delegation of authority to the board to make the necessary determinations to apply this rule. Any complication of board proceedings that may unavoidably result is justified by the same considerations of logic and justice that led us to apply comparative negligence in the first instance." (Id., at pp. 846-847, 150 Cal.Rptr. at p. 899, 587 P.2d at p. 695, fn. omitted.)

Amicus curiae California Workers' Compensation Institute implores us to treat Associated's approval of the Arbaugh method of applying comparative fault principles in a Witt situation as dictum and to decline to follow Arbaugh. We read Associated as a square holding approving the Arbaugh rationale and extending it to the Roe situation. In footnote 12 of the Associated opinion, the court made it crystal clear that trial courts are to follow the Arbaugh rationale. The court directs that BAJI Nos. 15.14-15.19 (6th ed. 1977, pp. 668-691) "to the extent they are inconsistent with this opinion, should not be used by trial courts." (Id., at p. 847, fn. 12, 150 Cal.Rptr. at p. 899, fn. 12, 587 P.2d at p. 695, fn. [93 Cal.App.3d 9] 12.) The approach taken by the referenced BAJI instructions and comments was the one followed by the trial courts in Arbaugh and in the case at bench.

For the foregoing reasons, the judgment in favor of intervenor Ohio Casualty Insurance Company must be reversed.

II

THE CROSS-COMPLAINT FOR INDEMNITY

Cedu's cross-complaint for indemnity was tried to the jury along with the main action and resulted in a verdict in favor of Rehm. Cedu has appealed from the judgment on the jury verdict. [3]

Indemnity has been defined as the obligation resting on one party to make good a loss or damage another party has incurred. (Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal.3d 622, 628, 119 Cal.Rptr. 475, 532 P.2d 97.) In this state the obligation may arise from either of two general sources: "First, it may arise by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances. Second, it may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case." (E. L. White, Inc. v. City of Huntington Beach, 21 Cal.3d 497, 506-507, 146 Cal.Rptr. 614, 619, 579 P.2d 505, 510; Rossmoor Sanitation, Inc. v. Pylon, Inc., supra, 13 Cal.3d 622, 628, 119 Cal.Rptr. 475, 532 P.2d 97.) In the case at bench, there was no express contractual obligation to indemnify; the matter was submitted to the jury on the theory of equitable indemnity.

Cedu argues that it should have prevailed on the cross-complaint because the evidence established as a matter of law (1) that Cedu's liability was predicated on a derivative or vicarious liability for Rehm's negligence or (2) that Rehm was liable on an implied contractual indemnity theory because Cedu's negligence, if any, was passive whereas Rehm's negligence was active. We have concluded that the contentions lack merit.

[93 Cal.App.3d 10] In stating the facts, Cedu ignores the established rules of appellate review that the evidence must be viewed in the light most favorable to the party prevailing below and that all conflicts in the evidence and all issues of credibility of witnesses must be resolved in favor of the prevailing party. (Nestle v. City of Santa Monica, 6

Cal.3d 920, 925-926, 101 Cal.Rptr. 568, 496 P.2d 480; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.) Viewing the evidence in light of the foregoing principles, the salient facts may be summarized as follows:

The building being constructed for Cedu was primarily a residence for Mr. Wasserman, the president and executive director of the foundation. Cedu began work on the project itself but discovered that the work was more than it could handle alone. Rehm was a licensed general contractor. Cedu's general manager, Mr. Weiss, accepted the following contract proposal by Rehm: "I agree to furnish supervision as necessary to construct structure known as, Staff Training Center, & Directors Residence, for Cedu Foundation. (P) Compensation shall be at the rate of One Thousand Six Hundred Dollars per month, for a minimum of Five and one half months, and a Maximum of Seven and one half months. Beginning date be considered December 15th, 1973. (P) If structure is not complete at the end of the seven and one half month period, I furter (sic) agree to continue supervision until completion at no further cost to Cedu Foundation."

Under the agreement Rehm was to supervise construction, obtain bids from contractors and schedule the work. However, Rehm did not enter into any subcontracts; all contracts were executed by Mr. Weiss on behalf of Cedu. Cedu had two of its employees, Neil Weston and Richard Smith, serve as part of the construction management team. All materials required for the project were requisitioned through Rehm, Weston or Smith, and were obtained by Mr. Wasserman through donations or purchase. It was understood that Mr. Rehm would not be supervising construction activities during two days of the week (Tuesdays and Fridays) and that on the days of his absence either Weston or Smith would be in charge of construction activities.

On Rehm's recommendation, Mr. Weiss, on behalf of Cedu, entered into two separate letter agreements with Alfred J. Kephart for exterior and interior drywall work. On Friday, the day before the accident, Kephart's employee Perlatti erected the scaffold from which plaintiff fell. The scaffold consisted of a 2 inch by 14 inch board 12 feet long laid across a sawhorse on the mezzanine on one side and on an A-frame ladder on [93 Cal.App.3d 11] the other side. The scaffolding was approximately 12 feet above the living room floor. Earlier in the week, Mr. Rehm saw the same or similar scaffolding, tested it and found it to be stable. The contract between Cedu and Kephart for the exterior work required Cedu to furnish the

scaffolding but the contract for the interior work was silent on the subject. It was customary for drywall contractors to furnish scaffolding for all interior work.

Rehm did not remain on the premises on Friday and was not present on Saturday. Rehm had never been on the premises on any Saturday and this fact was known to Weiss. Rehm denied that Cedu had appointed him to be in charge of safety and testified that no one had been designated by Cedu to oversee the safety of the project.

Mr. Wasserman checked the building on almost a daily basis. It was understood that he had the right to discharge anyone working on the project, including Rehm, and had the right to tell Rehm what to do and how to do it. When Wasserman was gone, Weiss was in overall charge.

Kephart's crew worked in the building on Friday and some correctional work remained to be done on a chimney flue in an area some 12 feet above the living room floor. On Saturday morning, plaintiff and Perlatti had breakfast and met Harold Prestrud at the Sportsmen Club where they had beer. On the way to the job site, they bought a six-pack of beer and some brandy and upon arrival, plaintiff had at least one beer and Perlatti had some of the brandy. Plaintiff volunteered to do the work. He went up on the scaffold, completed part of the work and as he was returning to the other end of the scaffold for more material, he fell. Plaintiff had no recollection of the events of that day.

Wasserman was not on the premises but Weiss was in his office some 150 feet from the structure under construction. When

Weiss arrived at the scene, he detected the odor of liquor on all three individuals. He told Perlatti and Prestrude that they were fired. Rehm never permitted drinking on the job and Cedu was very strict about not permitting drinking on the premises.

The jury verdict negates any implication that it found Cedu liable on the theory of derivative or vicarious liability for the negligence of Rehm. In finding in favor of plaintiff and against Cedu and Rehm, the jury assessed 38 percent negligence to Cedu and 24 percent to Rehm. The jury manifestly found that Cedu was concurrently negligent.

[93 Cal.App.3d 12] There was substantial evidence to support the finding of concurrent negligence. The relationship between Cedu and Rehm was not that of an owner and general contractor. Rehm was to provide supervision and advice but Cedu retained control over the work. Cedu executed all contracts, obtained materials, and had the power to discharge anyone working on the project, including Rehm. Although the evidence was conflicting, Rehm denied that he was in charge of safety on the project and testified that Cedu had not designated anyone to serve in that capacity. The evidence was uncontradicted that Rehm was not expected to be on the premises during two days of each week, that he had never been on the premises on Saturday, and that when Rehm was away one of Cedu's employees was to supervise construction activities.

An employer of an independent contractor who has reserved control over any part of the work may be liable for negligent failure to exercise such control or supervision. (Holman v. State of California, 53 Cal.App.3d 317, 335, 124 Cal.Rptr. 773.) There was sufficient evidence from which the jury might reasonably infer that Cedu was negligent in failing to maintain adequate supervision over the safety of the construction activities. The contention that Cedu's liability was wholly derivative or vicarious, as a matter of law, lacks merit.

Equally untenable is Cedu's contention that it should have prevailed on the theory of implied contractual indemnity because it was, as a matter of law, only passively negligent at most.

Implied contractual indemnity is a form of equitable indemnity; it implies a contractual obligation to indemnify despite the absence of an express indemnity agreement where equitable considerations make it just to shift the loss to the other party. Consistent with Li, American Motorcycle Assn. v. Superior Court, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899, modified the all-or-nothing nature of the principle of equitable indemnity as followed in this state and placed it on a comparative fault basis. The court traced the history of equitable indemnity in California and recounted the futile attempts to formulate a fair and predictable rule for its application, including the characterization of the negligence of the parties as

"active" and "primary" or "passive" and "secondary." The court concluded that the all-or-nothing approach precluded a fair apportionment of loss and that it should give way to a sharing of loss on a comparative fault basis. (Id., at pp. 595-598, 146 Cal.Rptr. 182, 578 P.2d 899.) In E. L. White, Inc. v. City of Huntington Beach, supra, 21 Cal.3d 497, 506-510, 146 Cal.Rptr. 614, 579 P.2d 505, the court pointed out that parties were still free to formulate express contracts under which a [93 Cal.App.3d 13] "passive" or even an "actively negligent" party would be completely indemnified. However, the court reaffirmed that in the absence of express contract, the American Motorcycle principles of implied equitable indemnity requiring apportionment according to comparative fault must be applied.

In the instant case, the parties introduced no evidence of an express indemnification contract. Consequently, in light of American Motorcycle, Cedu's attempt to shift the entire loss to Rehm on the theory of implied contractual indemnity must fail.

The judgment in favor of plaintiff in intervention Ohio Casualty Insurance Company is reversed.

The judgment in favor of Rehm on Cedu's cross-complaint for indemnity is affirmed.

McDANIEL and MORRIS, JJ., concur.

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1 Following Cedu's settlement with plaintiff, Rehm made a motion in this court to summarily reverse the judgment for plaintiff. The motion was calendared, heard and disposed of by a nonpublished opinion in which we denied Rehm's motion "without prejudice to litigation of the release issue in a proper forum following disposition of the appeal." (Kramer v. Cedu Foundation, Inc., et al., 4 Civil 19437.)

In view of Cedu's settlement and Rehm's abandonment of the appeal from the judgment in favor of plaintiff, the appeal from that judgment is ordered dismissed.

2 Labor Code section 3861 provides:

"The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer."

3 Although Cedu's appeal from the judgment was filed on October 3, 1977, the judgment on the cross-complaint was not entered until October 20, 1977. Nevertheless under rule 2 of the Rules on Appeal, the notice of appeal will be deemed to have been filed after entry of the judgment on the cross-complaint.

**STANTON LEWIS AND NANCY DARK,
PLAINTIFFS-RESPONDENTS,
v.
CEDU EDUCATIONAL SERVICES, INC., AND ROCKY MOUNTAIN ACADEMY, INC., AN IDAHO CORPORATION; NORTHWEST ACADEMY, INC., AN IDAHO CORPORATION; ASCENT; AND BOULDER CREEK ACADEMY,
DEFENDANTS-APPELLANTS.**

[3] **Docket No. 25495**

[4] **Idaho Supreme Court**

[5] **December 28, 2000**

[6] Ramsden & Lyons, Coeur d'Alene, for appellants. Michael E. Ramsden argued. Verby Law Offices and Todd M. Reed, Sandpoint, for respondents. Steven C. Verby argued.

[7] The opinion of the court was delivered by: Schroeder, Justice

[8] Coeur d'Alene, October 2000 Term

[9] 2000 Opinion No. 139

[10] Frederick C. Lyon, Clerk

[11] Appeal from the District Court of the First Judicial District of the State of Idaho, Bonner County. Hon. Gary M. Haman, District Judge.

[12] The district court decision denying in part a motion to compel arbitration is affirmed in part and remanded.

[13] CEDU Educational Services, Inc., Rocky Mountain Academy, Northwest Academy, Ascent, and Boulder Creek Academy (CEDU) *fn1 appeal from the order denying in part a motion to compel arbitration.

[14] I. BACKGROUND AND PRIOR PROCEEDINGS

[15] Nancy Dark (Dark) is the mother of Stanton Lewis (Lewis). CEDU provides educational programs designed for juveniles who have experienced emotional, behavioral, and/or academic problems. Lewis was enrolled in three of these programs: Boulder Creek Academy, Ascent, and

[16] Northwest Academy. Boulder Creek Academy is an educational program and division of Rocky Mountain Academy. Ascent is an educational program and division of Northwest Academy. CES acts, at least in part, as a billing company for the programs.

[17] Lewis enrolled at Boulder Creek Academy July 29, 1995. Dark and a representative of Boulder Creek Academy signed the "Student Enrollment Contract" for Lewis to enroll in the Academy. The contract included the following provision:

[18] Any controversy between the parties arising out of this contract or any breach thereof and which the parties do not properly adjust and determine to the satisfaction of the parties hereto shall be submitted to binding arbitration of the American Arbitration Association in Boundary County, Idaho in accordance with the rules of the American Arbitration Association and the prevailing party shall be entitled to reasonable costs and attorney fees. Judgments on the award rendered in arbitration may be entered in any court having jurisdiction thereof. (Emphasis added).

[19] On June 6, 1996, Lewis enrolled in Ascent. Dark signed an ASCENT "Participation Admission Contract." The contract contained the following provision:

[20] (D) ARBITRATION PROVISION...Any controversy between the Parties arising out of this contract or any breach thereof and which the Parties do not properly adjust and determine to the satisfaction of the Parties hereto shall be submitted to binding arbitration of the American Arbitration Association in Idaho in accordance with the rules of the American Arbitration Association in Boundary County, Idaho and the prevailing party shall be entitled to reasonable costs and attorney fees. Judgments on the award rendered in arbitration may be entered in any court having jurisdiction thereof. (Emphasis added).

[21] On December 5, 1996, Lewis enrolled in Northwest Academy. Dark signed a Northwest Academy. "Participant Contract." That contract contains the same provision for arbitration found in the Boulder Creek Academy contract.

[22] On March 31, 1998, Dark and Lewis filed a complaint for injunctive relief and damages, setting forth the following causes of action: (1) breach of contract; (2) common law fraud/misrepresentation; (3) violation of the Idaho Consumer Protection Act; (4) negligence; (5) violation of the Idaho Racketeering Act; and (6) breach of express warranty. CEDU answered and moved to compel arbitration based on the Idaho Uniform Arbitration Act and contract provisions for arbitration. Dark and Lewis moved to stay arbitration based on the grounds that (1) there was no agreement to arbitrate between Lewis and CEDU; (2) there was no agreement to arbitrate between Dark and CES; and (3) the majority of the causes of action arose outside of the contract and are not subject to the contractual provision for arbitration. The district court held that (1) there was a valid and enforceable agreement to arbitrate between the parties to the agreement, but Lewis and CES were not subject to the arbitration agreement because they were not parties to the contract; (2) all causes of action except the claim for breach of express warranty arose from the contract and were therefore subject to arbitration; and (3) litigation was stayed on issues subject to arbitration as between Dark and defendants other than CES, except as to the issue of breach of express warranty. Litigation was not stayed as to the claim by Lewis against CES. CEDU appealed.

[23] II. STANDARD OF REVIEW

[24] "The question of arbitrability is a question of law properly decided by the court." Local 2-652 v. EG&G Idaho, Inc., 115 Idaho 671, 674, 769 P.2d 548, 551 (1989), citing AT&T Technologies, Inc. v. Communications Workers, 475 U.S.

Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986). When questions of law are presented, this Court exercises free review and is not bound by findings of the district court, but is free to draw its own conclusions from the evidence presented. Mutual of Enumclaw v. Box, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995), citing Automobile Club Ins. Co. v. Jackson, 124 Idaho 874, 876, 865 P.2d 965, 967 (1993).

[25] The district court in this case found there was a valid agreement to arbitrate. The determinations regarding whether the parties are bound to arbitrate and the arbitrability or severability of issues and decisions surrounding cross motions to compel or stay arbitration are within the discretion of the trial court. *fn2

[26] III. THE DISTRICT COURT PROPERLY DENIED CEDU'S MOTION TO COMPEL LEWIS TO ARBITRATE ON THE GROUNDS THAT HE WAS NOT A PARTY TO THE CONTRACT.

[27] CEDU argues that Lewis' claims were subject to arbitration because he was a third party beneficiary of the agreement between his mother and CEDU. CEDU relies upon I.C. § 29-102 which states "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." CEDU claims that as a third party beneficiary Lewis is a party to the contract, and because he is suing on the contract he is subject to its terms even though he was a minor incapable of contracting at the time. *fn3 Lewis admits in the complaint that he was a third party beneficiary to the contract.

[28] Bantz v. Mutual of Enumclaw Ins., 124 Idaho 780, 785, 864 P.2d 618, 623 (1993), the Court held that a third party beneficiary of an insurance policy must comply with all the terms and provisions of the policy, even if that person is not a signatory to the policy. Following the rationale of Bantz, CEDU maintains that Lewis is subject to the terms of the contract.

[29] Rath v. Managed Health Network, Inc., 123 Idaho 30, 844 P.2d 12 (1992), this Court held that if a contract is unambiguous and the person at issue is not a named party to the contract, that person is not subject to the arbitration agreement. Rath, 123 Idaho at 31, 844 P.2d at 13. In Rath, there existed a three-party "Group Services Agreement" between Managed Health Network (MHN), First Interstate Bancorp and Metropolitan Life Insurance Company. The agreement was made in order to provide insurance coverage for the employees of First Interstate Bancorp. Mrs. Rath was an employee of First Interstate Bancorp and requested coverage for mental health services for her son. MHN denied coverage. Mrs. Rath filed an action in state court. MHN moved to invoke the arbitration provision of the agreement which stated the following:

[30] Any controversy between the parties to this Agreement shall be resolved to the extent possible, by informal meetings or discussions between the appropriate representative of the parties.

[31] Except as set forth herein, in the event the parties are unable to resolve the controversy informally, the parties agree to submit the matter to binding arbitration. Rath

agree to submit the matter to binding arbitration . . . . Rath, 123 at 30-31, 844 P.2d at 12-13.

[32] This Court held that the Raths were not parties to the agreement because they were not signatories on the agreement--only MHN, First Interstate Bancorp, and Metropolitan Life Insurance representatives signed the agreement. The agreement referred to an employee covered by the agreement as a "covered enrollee." Nowhere in the agreement was the word "parties" used to designate "covered enrollee". Id. This Court stated that "[r]eading the agreement as a whole, we conclude that the Raths are not 'parties' to the Agreement as that word is used in . . . Section XXIV. . . ." Id. The language of the agreement expressly limited the arbitration clause to "parties" to the agreement. Consequently, the status of the Raths as third party beneficiaries was not controlling given the express language of the agreement.

[33] The district court correctly held that the reasoning in Rath is controlling in this case. The contract in Rath was between First Interstate Bancorp, Metropolitan Life insurance Co. and Managed Health Network to provide services to First Interstate employees. The arbitration clause in the contract was expressly applicable to the "parties" to the agreement, i.e., the three entities that signed the contract, not the covered employees.

[34] The arbitration clause in Rath is similar to the clauses present in the contracts in this case which use the same "between the parties" language: "[a]ny controversy between the parties arising out of this contract or any breach thereof and which the parties do not properly adjust and determine to the satisfactions of the parties hereto shall be submitted to binding arbitration . . . ." Rath determined that if a third party beneficiary did not sign an agreement that compels arbitration as to the parties to the agreement, the third party beneficiary is not bound to arbitrate: although as 'covered enrollees' the employees were third-party beneficiaries of agreement, language in agreement expressly limited arbitration clause to 'parties' thereto . . . [t]he trial court held that the Raths were bound by the arbitration provision in the Agreement based on their status as third party beneficiaries. However, the cases relied upon by the trial court are inapposite in the face of the language in the Agreement expressly limiting the arbitration clause to the 'parties' to the Agreement. The Raths are not parties to the Agreement as the term is used in Section XXIV, and the trial court erred in ordering the coverage issue to be submitted to arbitration and staying the Raths' suit against MHN. Rath, 123 Idaho at 31, 844 P.2d at 13.

[35] CEDU maintains that Lewis is bound to the terms of the contracts because he is in essence suing on the breach of those contracts. Bantz illustrates this Court's position that a third-party beneficiary must comply with all the terms and provisions of an agreement to the same extent as they apply to the beneficiary. Bantz, 124 Idaho at 785, 864 P.2d at 623. The consent-to-sue provision at issue in Bantz was much broader as to its application than the "between the parties" language in Rath or the language in the contracts in this case. A third party beneficiary must comply with all of the terms of a contract the third party beneficiary seeks to enforce. However, the third party beneficiary is only bound to the extent those terms apply to him or her.

to the extent those terms apply to him or her.

[36] In this case, the arbitration provisions at issue only apply to the contracting parties. Lewis was not a party to the contracts and is not bound by the arbitration provisions.

[37] Alternatively, CEDU points to other jurisdictions which hold that an agreement made by parents for the benefit of a minor child that contain an arbitration clause requires the minor child's claims be arbitrated. Doyle v. Giuliucci, 401 P.2d 1 (Cal. 1965) and Leong v. Kaiser Foundation Hospitals, 788 P.2d 164 (Haw. 1990). Doyle and Leong deal with malpractice claims made by children of enrollees of health care plans that contained arbitration clauses.

[38] It is not necessary in this case to determine the extent to which minors should or should not be bound to arbitrate disputes arising out of contracts entered into on their behalf by their parents. When this case was filed, Lewis was the age of majority. Lewis ratified the contract as a third party beneficiary by bringing a cause of action alleging its breach, among other claims. Lewis is bound to the terms of those contracts as they apply to him. However, the language of the contracts excludes him from the mandatory arbitration provisions.

[39] IV. THE DISTRICT COURT ERRED IN DENYING CEDU'S MOTION TO COMPEL ARBITRATION REGARDING THE ALLEGED CLAIM OF BREACH OF EXPRESS WARRANTY.

[40] Dark and Lewis alleged a claim for breach of express warranty in count six of the complaint. Dark alleges that after a riot took place at Northwest Academy, an employee orally promised her that Lewis would not be injured and assured his safety if Dark allowed Lewis to stay. Shortly thereafter, Lewis was injured when he was struck in the head by a weapon wielded by another student. The district court ruled that the claim for breach of an express warranty arising out of these events was not subject to arbitration on the basis that the controversy regarding an express warranty for the safety of Lewis and the subsequent injury to him did not arise out the terms of the contract.

[41] CEDU argues that the district court erred in determining that the alleged breach of express warranty was not subject to arbitration. Idaho Code § 7-901 provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." CEDU argues that the alleged express warranty in this case arose out of and relates to the contract and that in construing an arbitration clause "any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983).

[42] According to this Court, "when a contract is clear and unambiguous, the determination and legal effect of a contractual provision is a question of law to be decided by the court." Terteling v. Payne, 131 Idaho 389, 391, 957 P.2d 1387, 1389 (1998). The determination of whether a document is ambiguous is itself a question of law, which the

document is ambiguous is itself a question of law, which the Court resolves by examining the document's relevant provisions to determine whether the contract is reasonably subject to conflicting interpretations. Terteling, 131 Idaho at 392, 957 P.2d at 1390, citing DeLancey v. Delancey, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986).

[43] The arbitration clause in the contract provides the following: Any controversy between the parties arising out of this contract on any breach thereof and which the parties do not properly adjust and determine to the satisfaction of the parties hereto shall be submitted to binding arbitration . . . .

[44] The contract also makes this provision: "This agreement contains the entire agreement of the parties hereto, and no agreement or promise that is not contained in this contract, made by any party, employee, or agent of the party shall be valid or binding." The claim of breach of express warranty is based on a promise made to Dark by an employee of Northwest Academy. The contract contains a provision that addresses such promises. The claim for the breach of an express warranty arises out of the contract between Dark and Northwest Academy. Although Dark and Lewis discuss this claim in terms of tort law, breach of express warranty sounds in contract, and this claim is directly related to the terms and provisions within the contract.

[45] The claim for breach of express warranty is subject to arbitration.

[46] V. THE DISTRICT COURT DID NOT ERR IN THE DETERMINATION NOT TO STAY LITIGATION AGAINST CES PENDING THE OUTCOME OF ARBITRATION.

[47] The district court determined that litigation against CES (referred to as CEDU in the district court) would not be stayed because it was not a party to any of the agreements. CEDU argues that I.C. § 7-902(c) permits the court to stay arbitration "if an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court . . . ." This statute closely parallels Section 3 of the Federal Arbitration Act, which permits a court to stay any suit brought in any of the courts of the United States upon any issue referable for arbitration. American Home Assurance Co. v. Vecco Concrete Construction Co., 629 F.2d 961, 963-964 (4 th Cir. 1980).

[48] CEDU claims CES is a mere billing agent for the other entities, with a very limited role in the dispute. Because the district court already ordered arbitration on many of the issues, CEDU argues that any action regarding CES should be stayed.

[49] While there are instances in which a district court may elect to stay litigation pending the outcome of arbitration between other parties, there is no requirement that it do so. There is no written agreement to arbitrate between CES and Dark or Lewis. Consequently, there is no basis to compel arbitration as to the claims of Dark and Lewis and CES. The district court elected not to stay litigation pending the outcome of arbitration between the parties with arbitration agreements. There is no error in that decision.

[50] VI. CONCLUSION

[51] The decision of the district court is affirmed except as to the determination that the claim for breach of an express warranty is not subject to the arbitration agreement. The case is remanded for inclusion of that claim in the arbitration. Each party prevailed in part. No costs or attorney fees are allowed.

[52] Chief Justice TROUT, and Justices SILAK, WALTERS, and KIDWELL CONCUR.

Opinion Footnotes

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[53] *fn1 The acronym "CEDU" will be used when referring to the appellants (all defendants) and "CES" will be used when referring to the specific appellant, CEDU Educational Services, Inc.

[54] *fn2 I.C. § 7-902(d): "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section, or if the issue is severable, the stay may be with respect thereto only."

[55] *fn3 I.C. § 29-101 states that "[a]ll persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights;" I.C. § 32-103 states that in all cases other than those specified (contracts for necessaries and authorized by statute) "the contract of a minor, if made whilst he is an unmarried minor may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards . . . ."

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[2] **RONALD ACCOMAZZO AND MARSHA ACCOMAZZO, HUSBAND AND WIFE, AND KEVIN ACCOMAZZO PLAINTIFFS-RESPONDENTS,
v.
CEDU EDUCATIONAL SERVICES, INC., AND ROCKY MOUNTAIN ACADEMY, INC., AN IDAHO CORPORATION; NORTHWEST ACADEMY, INC., AN IDAHO CORPORATION; ASCENT; AND BOULDER CREEK ACADEMY, DEFENDANTS-APPELLANTS.**

[3] **Docket No. 25494**

[4] **Idaho Supreme Court**

[5] **December 28, 2000**

[6] Ramsden & Lyons, Coeur d'Alene, for appellants. Michael E. Ramsden argued. Verby Law Office and Todd M. Reed, Sandpoint, for respondents. Steven C. Verby argued.

[7] The opinion of the court was delivered by: Schroeder, Justice

[8] Coeur d'Alene, October 2000 Term

[9] 2000 Opinion No. 138

[10] Appeal from the District Court of the First Judicial District of the State of Idaho, Bonner County. Hon. Gary M. Haman, District Judge.

[11] The district court decision denying in part a motion to compel arbitration is affirmed in part and remanded.

[12] This case was unofficially consolidated with Lewis v. CEDU, (Docket No. 25495), in the district court which wrote a single opinion and order applicable to both cases. The parties are represented by the same counsel in each case. The arguments raised are the same with a few exceptions. Dark and Lewis allege a claim of breach of express warranty, which Accomazzo does not. Accomazzo alleges battery, negligence and violation of Idaho laws relating to children, which Lewis does not. Only the facts and legal conclusions peculiar to this case are set forth in this opinion. For legal conclusions common to both cases reference is made to Lewis v. CEDU.

[13] CEDU *fn1 appealed from the order denying in part its motion to compel arbitration.

[14] I. BACKGROUND AND PRIOR PROCEEDINGS

[15] Ronald and Marsha Accomazzo are the parents of Kevin Accomazzo (Kevin). CEDU provides educational programs designed for juveniles who have experienced emotional, behavioral, and/or academic problems. Kevin was enrolled in three of these programs; Rocky Mountain Academy, Ascent, and Northwest Academy. Rocky Mountain Academy is an educational program and division of Rocky Mountain Academy. Ascent is an educational program and division of Northwest Academy. CES acts, at least in part, as a billing company for the programs.

[16] Kevin originally enrolled at Ascent on April 21, 1995. Ronald Accomazzo signed a "Participant Admission Contract." A representative of Ascent did not sign the contract. The contract included the following provision:

[17] (D) ARBITRATION PROVISION...Any controversy between the Parties arising out of this contract or any breach thereof and which the Parties do not properly adjust and determine to the satisfaction of the Parties hereto shall be submitted to binding arbitration of the American Arbitration Association in Idaho in accordance with the rules of the American Arbitration Association in Boundary County, Idaho and the prevailing party shall be entitled

Arbitration Association in Boundary County, Idaho and the prevailing party shall be entitled to reasonable costs and attorney fees. Judgments on the award rendered in arbitration may be entered in any court having jurisdiction thereof. (Emphasis added).

[18] In June of 1995 Kevin transferred to Rocky Mountain Academy. Ronald and Marsha Accomazzo signed a "Student Enrollment Contract." A representative of Rocky Mountain Academy signed the contract. The contract contained the following provision.

[19] Any controversy between the parties arising out of this contract or any breach thereof and which the parties do not properly adjust and determine to the satisfaction of the parties hereto shall be submitted to binding arbitration of the American Arbitration Association in Boundary County, Idaho in accordance with the rules of the American Arbitration Association and the prevailing party shall be entitled to reasonable costs and attorney fees. Judgments on the award rendered in arbitration may be entered in any court having jurisdiction thereof. (Emphasis added).

[20] In August of 1996, Kevin enrolled in Northwest Academy. Ronald Accomazzo signed a Northwest Academy "Participant Contract." The contract contains the same provision for arbitration found in the Rocky Mountain and Boulder Creek Academy contracts.

[21] On March 31, 1998, the Accomazzos filed a complaint for injunctive relief and damages. The Accomazzos set forth the following causes of action: (1) breach of contract; (2) common law fraud/misrepresentation; (3) violation of the Idaho Consumer Protection Act; (4) negligence (5) battery, negligence and violation of Idaho laws relating to children; and (6) violation of the Idaho Racketeering Act.

[22] CEDU answered and moved to compel arbitration based on the Idaho Uniform Arbitration Act and contract provisions for arbitration. The Accomazzos moved to stay arbitration upon the following grounds: (1) there was no agreement to arbitrate between Kevin and CEDU; (2) there was no agreement to arbitrate between the Accomazzos and CES; and (3) the majority of the causes of action arise outside of the contract and are not subject to the contractual provisions for arbitration. The district court held that there was a valid and enforceable agreement to arbitrate as between the parties to the agreement. However, Kevin and CES were not subject to the arbitration agreement because they were not parties to the contract. Further, all causes of action except the claim for negligence, battery, and violation of Idaho laws relating to children arose from the contract and were subject to arbitration.

[23] The district court stayed litigation on issues subject to arbitration as between the Accomazzos (Ronald and Marsha) and the defendants other than CES except as to the issues deemed arising outside the contract. The district court did not stay litigation as to Kevin and CES.

[24] II. STANDARD OF REVIEW

[25] "The question of arbitrability is a question of law properly decided by the court." Local 2-652 v. EG&G Idaho, Inc., 115 Idaho 671, 674, 769 P.2d 548, 551 (1989), citing AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986). When questions of law are presented, this court exercises free review and is not bound by findings of the district court, but is free to draw its own conclusions from the evidence presented. Mutual of Enumclaw v. Box, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995), citing Automobile Club Ins. Co. v. Jackson, 124 Idaho 874, 876, 865 P.2d 965, 967 (1993).

[26] The district court in this case found there was a valid agreement to arbitrate. The determinations regarding whether the parties were bound to arbitrate and the arbitrability or severability of issues and decisions surrounding cross motions to compel or stay arbitration are within the discretion of the trial court. *fn2

[27] III. THE DISTRICT COURT PROPERLY DENIED CEDU'S MOTION TO COMPEL KEVIN TO ARBITRATION.

[28] The district court did not err in denying CEDU's motion to compel Kevin to arbitration on the grounds that, although he is a third party beneficiary to the contract, because of the

the grounds that, although he is a third party beneficiary to the contract, because of the language of the contract, he is not bound to the arbitration clause. See Lewis v. CEDU, (***).

[29] IV. THE CLAIMS OF BATTERY, NEGLIGENCE AND VIOLATION OF IDAHO LAWS RELATING TO CHILDREN ARE SUBJECT TO ARBITRATION.

[30] The Accomazzos fifth cause of action (battery, negligence and violation of Idaho laws relating to children) is based on allegations of negligent hiring and emotional and physical abuse of students by staff members, including an injury to Kevin which occurred during a counseling session resulting from a physical confrontation with a staff counselor. The Accomazzos contend that this cause of action is not subject to arbitration.

[31] The Northwest Academy Enrollment Contract contains the following waiver provision: Parent(s)/Guardian(s) hereby voluntarily release and discharge NORTHWEST ACADEMY, INC., its affiliated entities, and its officers, directors, shareholders, employees, attorneys, and agents from any and all claims, demands, actions, suits or proceedings which such parent(s) or guardians(s)the student, or any other parent, relative or next of kin of the participant, may have for any and all injuries, damages, and expenses, including but not limited to all personal injuries and illness and all damages to personal and real property, caused by, arising out of, or otherwise related to the participant's admittance at NORTHWEST ACADEMY, INC., the running away and/or the participation in any activity or program conducted by or on behalf of NORTHWEST ACADEMY, INC. (Emphasis added).

[32] This Court has held a "duty owed by one party to another in contract could give rise to a cause of action in tort if the relation of the plaintiff and defendant is such that a duty to take care arises therefrom independently of the contract." Featherston v. Allstate Ins. Co., 125 Idaho 840, 843, 875 P.2d 937, 940 (1994). However, in this case the duty owed to the Accomazzos did arise in the contract. Northwest Academy promised to administer its "program." It can be reasonably implied that the employees of Northwest Academy took measures to effectuate the goals of the Northwest Academy program. Kevin's injury occurred during a counseling session and was caused by a confrontation with a counselor presumably administering that program. What the nature of the program is, what tactics were used by employees, whether the allegations are true or false, or what level of knowledge the Accomazzos had of these activities is not a matter for this Court to decide. The contract contains a provision that serves as a waiver for all personal injuries caused by or otherwise relating to the participants' attending Northwest Academy. The issue was contemplated and agreed to by the parties to the contract.

[33] In order to determine liability and/or damages the arbitrator will necessarily have to determine, taking into account the above waiver, if CEDU will be held liable for its employee causing Kevin's injury. This is not a case where the plaintiff can frame an issue differently in order to circumvent arbitration. The contract specifically addresses those facts alleged in the complaint, and the arbitration clause is sufficiently broad to cover the claims for battery, negligence and violation of Idaho laws relating to children. These claims are subject to arbitration.

[34] V. THE DISTRICT COURT DID NOT ERR IN DENYING CEDU'S MOTION TO STAY LITIGATION AGAINST CES PENDING THE OUTCOME OF ARBITRATION.

[35] The district court did not err in denying CEDU's motion to compel arbitration on the ground that CES was not a party to the agreement to arbitrate. See Lewis v. CEDU, (Docket No. 25495).

[36] VI. CONCLUSION

[37] The decision of the district court is affirmed except as to the determination that the claim of battery, negligence and violation of Idaho laws relating to children is not subject to the arbitration agreement. The case is remanded for inclusion of that claim in arbitration. Each party prevailed in part. No costs or attorney fees are allowed.

[38] Chief Justice TROUT, and Justices SILAK, WALTERS, and KIDWELL CONCUR.

Opinion Footnotes

[39] *fn1 The acronym "CEDU" is used when referring to the appellants (all defendants) and "CES" is used when referring to the specific appellant, CEDU Educational Services., Inc.

[40] *fn2 I.C. § 7-902(d): "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section, or if the issue is severable, the stay may be with respect thereto only."