NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 1216

O.V. SMITH, DAWN SMITH, FAWN SMITH,
AND DANIEL SMITH, CHARLES R. LANDRY, II,
DEAN HUNT

VERSUS

SKIP NOEL, INDIVIDUALLY AND D/B/A OUTDOOR
LIVING, CARL E. WOODWARD, LLC AND CARL E. WOODWARD,
INC., WARREN R. RUIZ D/B/A RUIZ CONTRACTORS,
SUNRISE BATON ROUGE ASSISTED LIVING, LLC AND
SUNRISE ASSISTED LIVING, INC.

Judgment Rendered: APR 2 3 2013

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 484,881

Honorable Timothy E. Kelley, Judge

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Regel L. Bisso Metairie, LA	Attorney for Appellants Cross-Claim Plaintiffs–Sunrise Baton Rouge Assisted Living, LLC and Sunrise Assisted Living, Inc.
Amos H. Davis Baton Rouge, LA	Attorney for Appellees Cross-Claim Defendants–Skip Noel d/b/a Outdoor Living and Colony Insurance Company
Leon Aucoin Covington, LA	Attorney for Appellee Cross-Claim Defendant–Carl E. Woodward, Inc.

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BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

[1] Hon. William F. Kline, Jr., retired, is serving as judge *ad hoc* by special appointment of the Louisiana Supreme Court.

WELCH, J.

Sunrise Baton Rouge Assisted Living, LLC and Sunrise Assisted Living, Inc. (collectively referred to as "Sunrise"), cross-claim plaintiffs, appeal a summary judgment rendered in favor of cross-claim defendants, Carl E. Woodward, Inc. (Woodward) and Skip Noel d/b/a Outdoor Living (Outdoor Living) and its insurer, Colony Insurance Company, and a judgment sustaining a peremptory exception raising the objection of no cause of action in favor of Woodward. We reverse.

BACKGROUND

On June 14, 2001, O.V. Smith, Charles R. Landry, II, and Dean Hunt filed a lawsuit seeking damages for injuries they allegedly sustained after having been exposed to certain chemicals while working on the construction of Sunrise's assisted living facility in Baton Rouge, Louisiana. The workers, along with O.V. Smith's wife and children, named as defendants: Sunrise, the owner of the facility; Woodward, the general contractor on the construction project; Outdoor Living, which entered into a subcontract with Woodward to furnish all landscaping and landscaping materials for the construction project, and its insurer, Colony Insurance Company (sometimes collectively referred to as "Outdoor Living"); and Warren Ruiz d/b/a Ruiz Contractors (Ruiz), a subcontractor engaged to provide carpentry services on the project, who was the workers' employer. Plaintiffs alleged that the hazardous chemicals to which the workers had been exposed were disbursed on the ground and in the air by Outdoor Living. On August 15, 2003, plaintiffs dismissed Ruiz from the litigation following a settlement and agreement on Ruiz's part to pay workers' compensation. At some point in the litigation, Charles Landry and Dean Hunt abandoned their claims, leaving O.V. Smith, his wife, and their children as the only remaining plaintiffs.

On October 28, 2004, Sunrise filed a third party demand against Woodward and Outdoor Living seeking indemnification for any and all sums for which it may be cast, including attorney's fees and costs incurred in defending the main demand and in prosecuting the third party demand. On November 28, 2006, Sunrise filed a motion for summary judgment, contending that it was not liable to O.V. Smith for the acts of its contractors and subcontractors as a matter of law. On April 9, 2007, the trial court signed a judgment dismissing all of plaintiffs' claims against Sunrise with prejudice.

On February 22, 2008, Outdoor Living filed a motion for summary judgment on the issue of liability, urging that plaintiffs could not establish the medical causation element of their claim. On May 19, 2008, the trial court granted summary judgment dismissing plaintiffs' claim with prejudice for lack of evidence of medical causation. Plaintiffs appealed that judgment, but the appeal was dismissed after they failed to timely file a brief. **Smith v. Noel**, 2008-2358 (La. App. 1st Cir. 3/2/09)(unpublished).

On March 10, 2009, Outdoor Living filed a motion for summary judgment on Sunrise's third party demand against it, claiming that it does not owe a defense or indemnity to Sunrise under the language of an indemnity provision contained in Outdoor Living's subcontract with Woodward. Woodward also filed a motion for summary judgment on Sunrise's third party demand, relying on the language of the indemnification provisions found in the Woodward/Outdoor Living subcontract and in its general contract with Sunrise. On April 29, 2009, counsel for Sunrise notified the court that Sunrise had no opposition to Outdoor Living and Woodward's motions for summary judgment, which had been set for hearing on May 4, 2009

On April 30, 2009, Sunrise sought leave of court to file a cross claim against Woodward and Outdoor Living. In its cross claims, Sunrise urged that Outdoor

Living and Woodward are liable for breach of contract. Specifically, Sunrise claimed that it is a third party beneficiary to the Woodward/Outdoor Living contract, which specifically required Outdoor Living to carry insurance and provide endorsements naming Sunrise as an additional insured under its policies of insurance. Sunrise asserted that Outdoor Living breached the contract by failing to name Sunrise as an additional insured, rendering Outdoor Living liable for all damages caused by that breach. The cross claim against Woodward was premised on Woodward's contract with Sunrise, pursuant to which, Sunrise argued, Woodward is responsible to Sunrise for all damages caused by Outdoor Living's breach of its subcontract with Woodward. On May 4, 2009, the trial court signed an order allowing the cross claim to be filed as prayed for.

On May 19, 2009, the trial court signed judgments granting Woodward and Outdoor Living's motions for summary judgment on Sunrise's third party demands. Thereafter, Woodward filed a peremptory exception raising the objections of *res judicata* and no cause of action and a motion for summary judgment with respect to Sunrise's cross claims against it. In support of its exception of no cause of action and motion for summary judgment, Woodward argued that all of Sunrise's claims for breach of contract for the failure to provide insurance coverage must necessarily fail because the underlying claims were not caused by the negligence of Woodward or its subcontractor, Outdoor Living. It also insisted that Louisiana law does not provide for additional insured coverage in cases in which indemnity and defense have been denied or when the underlying claim bears no connexity to the work performed under the contract.

Outdoor Living also filed a peremptory exception of *res judicata* and a motion for summary judgment. In support of its exception and motion, Outdoor Living attached the order granting its motion for summary judgment on the issue of medical causation; this court's order dismissing the plaintiffs' appeal of the

medical causation ruling; Sunrise's October 2004 third party demand; the April 29, 2009 letter from Sunrise's attorney advising that it had no oppositions to Outdoor Living and Woodward's motions for summary judgment on Sunrise's third party demand; the May 19, 2009 judgment granting its motion for summary judgment and dismissing Sunrise's third party demand; and Sunrise's cross claim. Outdoor Living argued that Sunrise should have raised its claim for breach of contract for failing to name Sunrise as an additional insured when it filed its third party demand against Outdoor Living seeking a defense and indemnity in October 2004, and that it is barred by the doctrine of *res judicata* from raising the breach of contract claims. On the merits of the breach of contract claim, Outdoor Living admitted that it is undisputed, for the purpose of the breach of contract claim, that: (1) the subcontract between Woodward and Outdoor Living required that both Woodward and Sunrise be named as additional insureds on Outdoor Living's policies of insurance; and (2) Outdoor Living did not name Sunrise as an additional insured on its policies of insurance. Outdoor Living argued that because Sunrise had consented to the summary judgment dismissing its third party demand for indemnity and a defense against Outdoor Living, Sunrise cannot be entitled to damages for breach of contract for Outdoor Living's failure to provide additional insured coverage, when that coverage would not have existed in this case where there was no duty to provide indemnity and a defense. It asserted that as a matter of law, Sunrise is not entitled to additional insured coverage broader than the contract's defense and indemnity coverage. Lastly, Outdoor Living contended that even if it breached its obligation to name Sunrise as an additional insured under its policies of insurance, Sunrise suffered no damage, as any additional insured coverage Sunrise may have received would not have covered the plaintiffs' claims because the trial court held that those claims did not arise out of the work performed by Outdoor Living in dismissing the underlying claims.

In opposition to the motions for summary judgment with respect to its cross claims, Sunrise argued the doctrine of *res judicata* did not bar the prosecution of its cross claims because the third party claims were filed *before* the dismissal of the third party actions. As to the merits of its breach of contract claim, Sunrise argued that the cross claim defendants' arguments were based on a misinterpretation of its claims as claims seeking indemnity or insurance coverage. Instead, Sunrise argued, it seeks neither, but is seeking damages arising from the defendants' failure to name Sunrise as an additional insured. Sunrise submitted that the damages it seeks in the cross claims are best illustrated by the following statements of Outdoor Living's attorney in a letter to Woodward's attorney dated February 5, 2009, attached to the motion for summary judgment:

> I note that a settlement has been reached between Contractor [Woodward] and Subcontractor [Outdoor Living] for partial reimbursement of attorneys' fees and defense costs. This decision was made due to Contractor's additional insured status. Although arguably no indemnity is owed under the terms of the contract, Contractor's additional insured status, a separate inquiry, would require such reimbursement.

Sunrise asserted that if Outdoor Living had not breached the contractual provision requiring that it be named as an additional insured, Sunrise would be entitled to the same partial reimbursement as Woodward – not for indemnity -- but solely because of its status as an additional insured, an entirely separate inquiry.

Regarding Woodward's liability, Sunrise contended that Woodward is responsible to it for Outdoor Living's failure to name it as an additional insured, relying on Section 3.3.2 of the Sunrise/Woodward contract, attached to its motion in opposition to summary judgment, which provides that:

> 3.3.2 The Contractor shall be responsible to the Owner for the acts and omissions of his employees, Subcontractors and their agents and employees, and all other persons performing or supplying the Work, under a contract with the Contractor or a Subcontractor, at any tier, and for any damages, losses, costs and expenses, including, but not limited to, attorneys' fees, resulting from such acts and omissions.

Sunrise argued that this language clearly renders Woodward liable for Outdoor Living's omission in failing to name it as an additional insured on Outdoor Living's insurance policies. Alternatively, Sunrise submitted that the matter is not appropriate for summary judgment because there are genuine issues of material fact relating to Outdoor Living's decision to settle with Woodward for a partial reimbursement of attorney's fees and defense costs paid by Woodward.

On November 9, 2009, the trial court signed a judgment denying Outdoor Living's exception of *res judicata* and granting Outdoor Living and Woodward's motions for summary judgment. In oral reasons for judgment, the trial court noted only that there could be no recovery and there was no damage. The court also concluded that the exception of no cause of action was moot because of its rulings on the motions for summary judgment. On August 3, 2010, this court issued an interim order remanding the matter for the purpose of having the trial court sign a valid written judgment containing decretal language and disposing of the exception of no cause of action. **Smith v. Noel**, 2010-0859 (La. App. 1st Cir. 8/3/10)(unpublished). On October 19, 2010, the trial court signed a judgment granting the motions for summary judgment, denying Outdoor Living's exception of *res judicata*, decreeing that the exception of no cause of action was moot, and declaring that the judgment was an interlocutory ruling and not a final, appealable judgment. Thereafter, this court dismissed the appeal, again finding it lacked decretal language, but noting that Sunrise's right to appeal the ruling of the trial court was preserved until a final, appealable judgment containing appropriate decretal language was rendered. **Smith v. Noel**, 2010-0859 (La. App. 1st Cir. 12/23/10)(unpublished). On November 21, 2011, the trial court signed a revised and amended judgment granting Outdoor Living and Woodward's motions for summary judgment, sustaining Woodward's exception of no cause of action, and denying Outdoor Living's exception of *res judicata*. Sunrise appealed the

November 21, 2011 judgment. Noting that the November 21, 2011 judgment appeared to lack decretal language, this court issued a rule to show cause order as to whether this appeal should be maintained. On December 17, 2012, this court maintained the appeal. **Smith v. Noel**, 2012-1216 (La. App. 1st Cir. 12/17/12)(unpublished).[2]

SUMMARY JUDGMENT

An appellate court reviews a trial court's grant of a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Boland v. West Feliciana Parish Police Jury**, 2003-1297 (La. App. 1st Cir. 6/25/04), 878 So.2d 808, 812, writ denied, 2004-2286 (La. 11/24/04), 888 So.2d 231. A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). The trial court's role in ruling on the motion for summary judgment is not to evaluate the weight of the evidence or determine the truth of the matter, but to determine whether there is a genuine issue of triable fact. **Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corporation**, 2007-2206 (La. App. 1st Cir. 6/6/08), 992 So.2d 527, 530, writ denied, 2008-1478 (La. 10/3/08), 992 So.2d 1018.

Sunrise contends that the trial court's ruling dismissing its cross claims against Woodward and Outdoor Living is based on a fundamental misinterpretation of the claims being asserted by Sunrise therein. Sunrise claims

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[2] In its appellate brief, Outdoor Living challenges that portion of the trial court's judgment overruling its peremptory exception of *res judicata*. An appellee who seeks to have a judgment modified, revised, or reversed in part on appeal must file an answer in accordance with La. C.C.P. art. 2133. Outdoor Living's failure to answer the appeal precludes this court from consideration of its argument that the trial court erred in overruling the exception of *res judicata*. See **Wilbert v. Wilbert**, 155 La. 197, 202, 99 So. 36, 38 (La. 1923); **Hoag v. State ex rel. Kennedy**, 2001-1076 (La. App. 1st Cir. 11/20/02), 836 So.2d 207, 234, writ denied, 2002-3199 (La. 3/28/03), 840 So.2d 570; **Keith v. Lee**, 127 So. 139, 143 (La. App. 2nd Cir. 1930).

that its third party demands were based on La. C.C.P. art. 1111, which permits the defendant in the principal action to bring in any person who may be liable to him for all or part of the principal demand. Sunrise contends that because recovery by a third party plaintiff is conditioned upon recovery in the main demand, it did not object to the dismissal of its third party demands against Woodward and Outdoor Living when the claims of the plaintiffs in the main demand were dismissed and neither Woodward or Outdoor Living were cast in judgment. However, Sunrise urges, the same is not true of the cross claims it filed under La. C.C.P. art. 1071, which permits a party to assert a claim against a co-party arising out of the transaction or occurrence that is the subject of the original action. Article 1071 also permits a co-party to assert a demand against a party who may be liable to the cross-claimant for all or part of the demand asserted in the action against the cross-claimant. Sunrise argues that while Article 1071 permits a claim for indemnity, such is not necessary, as a cross claim need only be related to the subject matter of the original action. Thus, it insists, any claims for indemnity or other damages in a cross claim are not dependent upon the original defendant being cast in judgment.

Sunrise argues that in its cross claims, it is seeking damages for breach of the subcontract entered into by Woodward and Outdoor Living as a third party beneficiary of that contract. It relies on Paragraph 13 of the Woodward/Outdoor Living subcontract in which Outdoor Living agreed to defend, indemnify, and hold harmless Woodward and Sunrise "from and against any claim, cost, expense or liability (including attorneys' fees), attributable to bodily injury... arising out of, resulting from or occurring in connection with the performance of the Work" by Outdoor Living. It also relies on the specific insurance obligations of Outdoor Living set forth in Paragraph 13 of the Woodward/Outdoor Living subcontract which imposes an obligation on Outdoor Living to name Sunrise as an additional insured on its general liability policies of insurance. Sunrise submits that the

benefits conferred upon it by the Woodward/Outdoor Living contract are specific and express. It contends that it was damaged by two breaches of the third party beneficiary contract: (1) the breach of Outdoor Living's obligation to defend it; and (2) the breach of Outdoor Living's obligation to name it as an additional insured on all required insurance policies. Sunrise argues that both of these breaches resulted in its incurring attorney's fees it would not have incurred if the contract had not been breached. Sunrise contends that if Outdoor Living had fulfilled its obligation to defend, Sunrise would not have had to hire its own attorneys to do so, and had Outdoor Living named Sunrise as an additional insured on Outdoor Living's liability policy, Outdoor Living's insurance company would have provided attorneys to represent Sunrise and paid for the cost of defending Sunrise and Outdoor Living. This would have occurred, Sunrise posits, regardless of the outcome of the underlying litigation, for it is well established in Louisiana law that the duty to defend is broader than the duty to provide coverage.

We first address Outdoor Living's motion for summary judgment. The Woodward/Outdoor Living subcontract specifically obligated Outdoor Living to indemnify Sunrise from any claims, costs, or expenses, including attorney's fees, arising out of, resulting from, or occurring in connection with the performance of the work by Outdoor Living. Moreover, the Woodward/Outdoor Living subcontract also specifically obligated Outdoor Living to provide endorsements naming Sunrise on its insurance policies as an additional insured, and Outdoor Living did not do so. Outdoor Living admitted in support of its motion for summary judgment on the cross claims that the Woodward and Outdoor Living subcontract required that Sunrise be named as an additional insured on Outdoor Living's policies of insurance and that Outdoor Living did not name Sunrise as an additional insured. Despite its admitted breach of this obligation, Outdoor Living contends that, as a matter of law, it cannot be held liable to Sunrise. It insists that

the plaintiffs' claims bore no connexity to the work it performed under the contract, and therefore, no duty to defend or indemnify Sunrise exists. Further, Outdoor Living argues that Louisiana law does not permit additional insured coverage where the underlying claim bears no connexity to the work performed under the contract or where defense and indemnity have been denied. Finally, Outdoor Living argues that even if it breached its obligation to name Sunrise as an additional insured, Sunrise suffered no damage as the additional insured coverage it would have received would not have covered the plaintiffs' claims in any event.

Outdoor Living's argument must fail for two reasons. First, the language of the Woodward/Outdoor Living contractual indemnity provision does not require that the loss actually arise out of or result from the performance of the subcontract; it also provides that Outdoor Living must defend and indemnify Sunrise for attorney's fees with respect to claims for bodily injury "occurring in connection with" the performance of the contract by Outdoor Living. It does not condition this contractual obligation on a finding that Outdoor Living was in fact negligent in causing the loss.[3] Moreover, it is well settled in Louisiana law that an insurer's obligation to defend lawsuits brought against its insured is much broader in scope than the duty to provide coverage for damage claims and is determined by the allegations of the plaintiff's petition, with the insurer being obligated to provide a defense unless the petition unambiguously excludes coverage. See **Elliott v. Continental Casualty Company**, 2006-1505 (La. 2/22/07), 949 So.2d 1247, 1250, and cases cited therein. See also **Waste Management of Louisiana, L.L.C. v. Labor Finders International**, 43,052 (La. App. 2nd Cir. 2/27/08), 978 So.2d 1058, 1062(concluding that the real issue in the case of a breach of contract claim for the failure to name a party as an additional insured is the duty to defend, which can

[3] In contrast, Paragraph 3.18.1 of the Woodward/Sunrise general contract plainly limited Woodward's obligation to indemnify Sunrise from damages, including attorney's fees arising out of or resulting from the performance of the Work, but only to the extent that the loss was caused by the negligent acts or omission of Woodward or a subcontractor.

only be determined by examining the well-pleaded allegations of the plaintiff's petition). In this case, examining the allegations of the underlying petition as to the liability of Outdoor Living, it cannot be said, as a matter of law, that Outdoor Living would not have been obligated to provide Sunrise with a defense to the claims asserted by the plaintiffs in the main demand. Whether Sunrise incurred attorney's fees in connection with the performance of the work by Outdoor Living, whether Colony would in fact have had an obligation to defend Sunrise had Outdoor Living named Sunrise as an additional insured on the Colony policy, and whether Sunrise incurred damages as a result of Outdoor Living's asserted breach of the contract, are questions that can only be determined on the merits of the breach of contract claims. Because there are genuine issues of material fact regarding Outdoor Living's contractual liability to Sunrise, we find that the trial court erred in granting summary judgment dismissing Sunrise's breach of contract claims against Outdoor Living, and we reverse that judgment.

As to Woodward's motion for summary judgment, Sunrise has admitted that there is nothing in the Woodward/Outdoor Living subcontract obligating Woodward to name Sunrise as an additional insured on its policies of insurance. We also note that the indemnification provision of the Woodward/Sunrise general contract specifically conditioned Woodward's obligation to pay attorney's fees in connection with claims arising under the contract on a finding of negligence on the part of Woodward or a subcontractor. As the underlying claims have been dismissed for failure of proof, there can be no liability on Woodward's part for the cost of Sunrise's defense of the underlying demand pursuant to Paragraph 13 of the Woodward/Outdoor Living contract or the indemnity provision of the Sunrise/Woodward contract. However, in its motion for summary judgment, Sunrise urged that Woodward breached paragraph 3.3.2 of the Sunrise/Woodward contract, which plainly provides that Woodward shall be responsible to Sunrise for

the acts and omissions of its subcontractors for any damages, losses, costs, expenses, including but not limited to attorney's fees, resulting from such acts and omissions. Because the question of Woodward's liability to Sunrise for breach of the general contract is contingent on Outdoor Living's liability to Sunrise under the subcontract, there are genuine issues of material fact as to Woodward's liability to Sunrise, precluding summary judgment in its favor. Therefore, we find that the trial court erred in granting summary judgment in favor of Woodward on Sunrise's cross claims. Furthermore, because Woodward's exception of no cause of action was based on the same arguments as its motion for summary judgment, we also reverse the trial court's action in sustaining Woodward's exception of no cause of action.

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed. The case is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to Skip Noel d/b/a Outdoor Living and Carl E. Woodward Inc.

REVERSED AND REMANDED.