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IN THE
COURT OF APPEALS OF INDIANA

MICHELLE HARTWELL, Appellant-Plaintiff vs. UNITED CONSULTING ENGINEERS, INC., Appellant-Defendant,	)	No. 49A02-0511-CV-1089
UNITED CONSULTING ENGINEERS, INC., Appellant, (Third-Party Plaintiff), vs. HUNT PAVING COMPANY, INC., Appellee, (Third-Party Defendant).	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gerald S. Zore, Judge
Cause No. 49D07-0012-CT-1849

December 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

United Consulting Engineers, Inc. ("UCE") appeals the trial court's grant of summary judgment in favor of Hunt Paving Company, Inc. ("Hunt"). We reverse and remand.

Issue

The restated issue before us is whether the trial court properly concluded UCE was not entitled to indemnification from Hunt with respect to an injury and damages suffered by one of Hunt's employees.

Facts

In July 2000, the City of Indianapolis ("the City") and Hunt entered into a contract for Hunt to perform construction work related to street, sewer, and sidewalk improvements. The engineer who prepared the designs for this project was Mid-States Engineering, LLC ("Mid-States"). Also in July 2000, the City entered into a contract with UCE for UCE to supervise and perform ongoing inspections of the construction

project on behalf of the City. Mid-States had no ongoing involvement in the project after preparing the designs for it. On or about October 20, 2000, an employee of Hunt, Michelle Hartwell, was injured when a trench she was working in collapsed on her.

Hartwell sued UCE. Her complaint specifically alleged that UCE owed her a duty and had negligently failed to provide a safe work site; failed to establish and implement a safety protocol; failed to inspect the work site for hazards, dangers, and safety code violations; failed to correct existing hazards, dangers, and safety code violations; and failed to provide shoring and other safety precautions. UCE, in turn, filed a third-party complaint against Hunt, asserting Hunt was required to indemnify UCE for any damages Hartwell might recover, pursuant to the terms of the City-Hunt contract.

The first page of the City-Hunt contract identifies Mid-States as the "ENGINEER" for the project. App. p. 339. The definitions found in the "General Conditions" portion of the City-Hunt contract states that the "Architect or Architect/ENGINEER" for the project is, "The person or other entity designated as ENGINEER by the Contract Documents." Id. at 354. The "ENGINEER" is separately defined as, "The person, firm or corporation named, employed or designated as such by the OWNER [the City] to act as such and designated to observe the Work, acting directly or through duly authorized representatives." Id. at 356. The indemnification provision of the City-Hunt contract, found in section 6.24.1, states in part:

> To the fullest extent permitted by Laws and Regulations CONTRACTOR [Hunt] shall indemnify and hold harmless OWNER and ENGINEER and their consultants, agents and employees from and against all claims, damages, losses and expenses, direct, indirect or consequential (including but not

> limited to fees and charges of engineers, architects, attorneys and other professionals and court and arbitration costs) arising out of or resulting from the performance of the Work or from the installation, existence, use, maintenance, condition, repairs, alteration, or removal of any equipment or material, provided that any such claim, damage, loss or expense is caused in whole or in part by a negligent act or omission of CONTRACTOR, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by Law or Regulation regardless of the negligence of any such party.

Id. at 389.

On July 14 and 16, 2004, Hunt and UCE filed respective cross-motions for summary judgment regarding Hunt's indemnification obligations. Before the trial court ruled on these motions, UCE was granted leave to file an amended third-party complaint, which contained four counts more specifically alleging that (1) Hunt was required to indemnify UCE for UCE's own negligence; (2) Hunt was required to indemnify UCE for Hunt's negligence; (3) Hunt breached its obligation under the City-Hunt contract to purchase insurance for UCE's benefit; and (4) Hunt committed a breach of warranty. On November 23, 2004, the trial court held a hearing on the pending summary judgment motions.

After the hearing, UCE filed a motion to strike what it contended was Hunt's reliance at the hearing on previously undesignated evidence. Hunt, in response, sought to specifically designate this evidence to the trial court. On January 7, 2005, the trial court allowed the supplemental designation of evidence by Hunt and granted summary

judgment in its favor while denying UCE's summary judgment motion and motion to strike.

Both Hunt and UCE were unsure as to whether the trial court's January 7 order was intended to dispose of all four counts of UCE's amended third-party complaint. Thus, Hunt filed a second motion for summary judgment, while UCE filed a motion for clarification of the January 7 order. On March 11, 2005, after each party designated evidence and filed briefs regarding these motions, the trial court entered an order specifying that Hunt was entitled to summary judgment as to all of the claims made in UCE's amended third-party complaint. However, the trial court declined to enter final judgment in the case while the action between Hartwell and UCE was still pending.

On October 24, 2005, the trial court dismissed the action between Hartwell and UCE with prejudice after those parties informed the court that they had reached a settlement. Thereafter, UCE initiated the present appeal with respect to the trial court's summary judgment rulings in favor of Hunt.

Analysis

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Matteson v. Citizens Ins. Co. of America, 844 N.E.2d 188, 191-92 (Ind. Ct. App. 2006). Courts must construe all facts and reasonable inferences drawn from those facts in favor of the nonmovant, relying only on those materials designated to the trial court. Matteson, 844 N.E.2d at 192. We must carefully review a grant of summary judgment to

ensure that a party was not improperly denied its day in court, but will affirm on any legal theory supported by the record if there are no genuine issues of material fact. Id.

The relevant facts here are undisputed. The issue before us is one of construction of a written contract, which is a question of law particularly appropriate for resolution by summary judgment. See Orthodontic Affiliates, P.C. v. Long, 841 N.E.2d 219, 222 (Ind. Ct. App. 2006). If the terms of a written contract are ambiguous, it is the responsibility of the trier of fact to ascertain whether it is necessary to find facts in order to construe the contract. See id. When summary judgment is granted based upon the construction of a written contract, the trial court has either determined as a matter of law that the contract is not ambiguous or uncertain, or that any ambiguity can be resolved without the aid of a factual determination. Id.

Before addressing the substance of the parties' arguments regarding construction of the City-Hunt contract, we first address UCE's contention that the trial court improperly allowed Hunt to make an untimely supplementation to its designation of evidence. Indiana Trial Rule 56(C) requires specific designation of evidentiary material, but how a party chooses to specifically designate material is not mandated. See Ling v. Stillwell, 732 N.E.2d 1270, 1276 (Ind. Ct. App. 2000), trans. denied. "[A]s long as the trial court is apprised of the specific material upon which the parties rely in support of or in opposition to a motion for summary judgment, then the material may be considered." Id. (quoting National Bd. of Exam'rs for Osteopathic Physicians and Surgeons, Inc. v. American Osteopathic Ass'n, 645 N.E.2d 608, 615 (Ind. Ct. App. 1994)). Additionally, it is within the trial court's discretion to allow an untimely designation of materials where

such material merely supplements evidence that previously was timely designated. See Tom-Wat, Inc. v. Fink, 741 N.E.2d 343, 347 (Ind. 2001).

When Hunt originally filed its motion for summary judgment on July 14, 2004, it only specifically designated the "General Conditions" portion of its contract with the City, as well as a few other items, in support of its motion. It did not specifically designate the first page of the contract, which was part of the "Agreement" section of the City-Hunt contract and which named Mid-States as the project "ENGINEER" on its first page. Nor did it argue in its brief in support of summary judgment that UCE was not the "ENGINEER" referred to in the City-Hunt contract. It was at the November 23, 2004 summary judgment hearing that Hunt first argued that UCE was not the "ENGINEER." Thereafter, the trial court granted Hunt permission to supplement its designation of materials to include the first page of the City-Hunt contract.

We cannot say the trial court abused its discretion in allowing the supplementation. First of all, UCE in support of its own motion for summary judgment did designate the "Agreement" section of the City-Hunt contract, including the very first page of the contract naming Mid-States as "ENGINEER" for the project. Clearly, this part of the City-Hunt contract was properly before the trial court at the time of the November 23, 2004 hearing and it seems illogical that Hunt could not point to a part of that properly-designated document during the hearing. Second, to the extent UCE claims it was unfairly surprised by Hunt's reliance on an argument it had not made before that hearing, such concern was rendered moot when UCE was given an opportunity to fully brief the issue of whether it or Mid-States was the project "ENGINEER" before the trial

court ruled on Hunt's second motion for summary judgment/UCE's motion for clarification following the trial court's first summary judgment ruling on January 7, 2005. Under the circumstances, we cannot say the trial court abused its discretion in permitting Hunt to supplement its designation of evidence to officially include, in support of its own motions for summary judgment, the "Agreement" section of the City-Hunt contract.

Turning to the merits of this case, we first address Hunt's argument that UCE is not the "ENGINEER" it was required to indemnify under the terms of the City-Hunt contract. UCE, as a non-party to the City-Hunt contract, is seeking third-party beneficiary status under it. To enforce a contract by virtue of being a third-party beneficiary, the third-party beneficiary must show: (1) a clear intent by the actual parties to the contract to benefit the third party; (2) a duty imposed on one of the contracting parties in favor of the third party; and (3) performance of the contract terms is necessary to render the third party a direct benefit intended by the parties to the contract. Luhnow v. Horn, 760 N.E.2d 621, 628 (Ind. Ct. App. 2001). The intent to benefit the third party is the controlling factor and may be shown by specifically naming the third party or by other evidence. Id.

It is undisputed that the indemnification provision in the City-Hunt contract was intended in part to benefit third parties, including the "ENGINEER" that provision references. What is not so clear is who the "ENGINEER" was. When interpreting a contract, our goal is to give effect to the intent of the parties as expressed within the four corners of the document. Simon Prop. Group, L.P. v. Michigan Sporting Goods Distrib., Inc., 837 N.E.2d 1058, 1070 (Ind. Ct. App. 2005), trans. denied. We may not construe

unambiguous language and we may not add provisions to a contract that were not placed there by the parties. Id. "Rather, we determine the meaning of a contract from an examination of all of its provisions, without giving special emphasis to any word, phrase or paragraph." Id.

Contract language is ambiguous only if reasonable people could come to different conclusions about its meaning; the parties' disagreement about a term's meaning does not by itself make the term ambiguous. Id. Where a written instrument is ambiguous, all relevant extrinsic evidence may properly be considered in resolving the ambiguity. University of S. Indiana Found. v. Baker, 843 N.E.2d 528, 535 (Ind. 2006).[1] "Extrinsic evidence is evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement." CWE Concrete Constr., Inc. v. First Nat'l Bank, 814 N.E.2d 720, 724 (Ind. Ct. App. 2004), trans. denied.

Arguably, the City-Hunt contract, on its face, is not ambiguous as to the identity of the "ENGINEER." The first page of the contract expressly names Mid-States as the "ENGINEER." Regardless, UCE contends it is the "ENGINEER" for several reasons. For example, the definition of "ENGINEER" found in the "General Conditions" portion of the City-Hunt contract defines the word as, "The person, firm or corporation named, employed or designated as such by the OWNER to act as such and designated to observe

[1] Baker discarded the distinction Indiana courts previously had made between "latent" and "patent" ambiguities in written instruments, whereby extrinsic evidence could be used to resolve "latent" but not "patent" ambiguities. See Baker, 843 N.E.2d at 534-35. Additionally, although Baker dealt specifically with construction of a trust, we see no reason why its rejection of "latent"/"patent" distinctions would not apply with equal force to contracts.

the Work, acting directly or through duly authorized representatives." App. p. 356. Portions of the City-Hunt contract also describe the "ENGINEER" as the City's on-the-scene observer of the construction work and describe the duties of the "ENGINEER" in that way. There is no dispute here that UCE, not Mid-States, was the entity that observed and inspected Hunt's work on behalf of the City; in other words, UCE was the proejct's "inspection engineer." Mid-States' involvement in the project was to prepare the designs, plans, and contract documents for the project upon which Hunt bid; it was not directly involved in the construction itself but was the "design engineer."

We believe UCE's argument that it, not Mid-States, is the "ENGINEER" entitled to indemnification under the City-Hunt contract is sufficient to make that word ambiguous, at least as it appears in the indemnification provision. Within the City-Hunt contract, we note that, in addition to the separate definition of "ENGINEER," there is a separate definition for "Architect or Architect/ENGINEER," which is defined as, "The person or other entity designated as ENGINEER by the Contract Documents." Id. at 354. The only entity expressly designated as "ENGINEER" by the City-Hunt contract is Mid-States.

Additionally, Section 1.1 of the "Agreement" portion of the City-Hunt contract states in part:

> This Agreement consists of the following Contract Documents all of which are as fully a part of this Agreement as if set out verbatim herein or attached hereto and the same do in all particulars become the Agreement between the parties hereto in all matters and things set forth herein and described:

.1 This Agreement;

.2 All Addenda issued prior to receipt of Bids, whether or not receipt thereof has been acknowledged by CONTRACTOR in its Bid;

.3 Special Conditions

.4 General Conditions . . . .

Id. at 340.

Section 1.2 of the "Agreement" goes on to state:

> In resolving conflicts, errors, discrepancies and disputes concerning the nature, character, scope or extent of Work to be performed or furnished by the CONTRACTOR, or other rights and obligations of the OWNER and CONTRACTOR, arising from or prescribed by one or more of the Contract Documents, the following rules shall govern:
>
> .1 A requirement occurring in one Contract Document is as binding as though occurring in all Contract Documents;
>
> .2 Calculated dimensions shall govern over scaled dimensions;
>
> .3 The Contract Documents shall be given precedence in the order listed in Paragraph 1.1 above; and
>
> .4 In documents of equal priority, if any such conflict, error, discrepancy or dispute cannot be resolved or reconciled by application of the rules stated in Subparagraphs 1.2.1 through 1.2.3, then the provision expressing the greater quantity, quality, or scope of work, or imposing the greater obligation upon the CONTRACTOR or affording the greater right or remedy to the OWNER shall govern, without regard to the party who drafted such provision.

Id. at 341. Under these provisions, the specific identification of Mid-States as the "ENGINEER" in the "Agreement" portion of the City-Hunt contract takes precedence over any more general description of the "ENGINEER" that appears in the "General Conditions" portion of the contract with respect to resolving any "discrepancies" concerning the "rights and obligations" of Hunt. In sum, UCE was not the "ENGINEER."

Regardless of our conclusion that UCE was not the "ENGINEER" as referred to in the City-Hunt contract, however, we still readily conclude that UCE is entitled to indemnification from Hunt under the plain and obvious terms of that contract. The indemnification clause applies not only to the project "OWNER" (i.e. the City) and "ENGINEER" (i.e. Mid-States), it also applies to those parties' "consultants, agents and employees . . . ." App. p. 389. Even if UCE technically was not the project "ENGINEER," there is no doubt here that it was, at the very least, a "consultant" for the City on the project. The word "consulting" is part of UCE's name. "Consultant" is not defined by the City-Hunt contract, but the City-UCE contract states in part, "[UCE] shall serve as [the City's] professional representative in the construction inspection phase of the Project, and with respect to all services provided by [UCE] hereunder, and [sic] will give consultation and advice to [the City] during the performance of such services." Id. at 242-43 (emphasis added). A "consultant" is defined in plain English as, "One that gives expert or professional advice." American Heritage College Dictionary 299 (3rd ed.

2000). UCE clearly meets this definition and, therefore, it is entitled to indemnification from Hunt under the City-Hunt contract.[2]

This brings us to a second reason the trial court granted summary judgment to Hunt, and that is an exception to the indemnity provision that the court held applied to the type of claims Hartwell lodged against UCE. Specifically, section 6.24.3 of the City-Hunt contract states, "The [indemnification] obligations of [Hunt] under this Section shall not extend to the liability of ENGINEER, ENGINEER's consultants, agents or employees arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, design or specifications." App. p. 390. Hunt essentially contends that Hartwell's claims against UCE were based on faulty "opinions" or "reports" it gave concerning the safety of the job site and, therefore, Hunt is not required to indemnify UCE pursuant to section 6.24.3. However, we already have concluded, per Hunt's arguments, that UCE was not the project "ENGINEER" referred to in the City-Hunt contract. Because of that conclusion, it also is clear that the exception to the indemnification provision found in section 6.24.3 cannot apply to UCE because it only refers to the project "ENGINEER" and its agents, consultants, or employees. UCE cannot both be the "ENGINEER" and not be the "ENGINEER" within the confines of a single contract. Mid-States was the "ENGINEER."

[2] Although UCE has not argued that it was entitled to indemnification as a project "consultant," we will not ignore the plain language of the indemnification clause and its import in this case. Additionally, it is conceivable that UCE might have been the City's "agent" with respect to this project. We need not analyze whether that was the case, given that UCE clearly was the City's "consultant."

Next, we address whether section 6.24.1 of the City-Hunt contract was clearly worded such that Hunt is required to indemnify UCE for UCE's own negligence. Public policy in Indiana does not prohibit a party from contracting to indemnify another for the other's own negligence. GKN Co. v. Starnes Trucking, Inc., 798 N.E.2d 548, 552 (Ind. Ct. App. 2003). This may only be done, however, if the contracting party knowingly and willingly agrees to such indemnification. Id. "Such provisions are strictly construed and will not be held to provide indemnification unless it is so stated in clear and unequivocal terms." Id. Indemnification clauses are disfavored because to obligate one party for the negligence of another is a harsh burden that a party would not lightly accept. Id.

We employ a two-step analysis to determine whether a party has knowingly and willingly accepted this burden. Id. First, the indemnification clause must expressly state in clear and unequivocal terms that negligence is an area of application where the indemnitor (Hunt) has agreed to indemnify the indemnitee (UCE). See id. "The second step determines to whom the indemnification clause applies." Id. The clause must state in clear and unequivocal terms that it applies to indemnification of the indemnitee by the indemnitor for the indemnitee's own negligence. Id.

In GKN, we considered an indemnification clause worded nearly identically to the clause in this case:

> [Starnes] shall indemnify and hold harmless the Owner, the Architect Engineer, and [GKN] and their agents and employees from and against all claims, damages, causes of action, losses and expenses, including attorney's fees, arising out of or resulting from the performance of the work, provided that such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to

> injury to or destruction of tangible property (other than the work itself) including the loss of use resulting therefrom; and (2) is caused in whole or in part by any negligent act or omission of [Starnes] or any of his subcontractor's [sic], anyone directly or indirectly employed by any of them or for anyone for whose acts any of them may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

Id. at 550. We first held that this provision clearly applied to negligence claims. Id. at 553. There also is no dispute in this case that the City-Hunt contract's indemnity provision applies generally to negligence claims.

The more difficult question in GKN was whether the indemnity provision required Starnes to indemnify GKN for claims based on GKN's own negligence. We noted that the indemnification clause stated that Starnes would indemnify GKN for bodily injury damages based on claims "caused in whole or in part by any negligent act or omission of [Starnes] or any of his subcontractor's [sic], anyone directly or indirectly employed by any of them or for anyone for whose acts any of them may be liable, regardless of whether it is caused in part by a party indemnified hereunder." Id. Based on this language, we held that although Starnes would not be required to indemnify GKN for an injury that was the fault of GKN alone, it was required to indemnify GKN for GKN's own negligence if Starnes was at least partially at fault for the injury. Id. at 554. We stated, "it is clear that the indemnification clause states that Starnes's liability for indemnification to GKN will not be negated merely because GKN is partly at fault. Id. at 553.

In deciding GKN, we also discussed our opinion in Hagerman Construction Company v. Long Electric Company, 741 N.E.2d 390 (Ind. Ct. App. 2000), trans. denied. The indemnification clause in Hagerman provided in part that a subcontractor would indemnify the general contractor for claims arising from the subcontractor's work, "but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." Hagerman, 741 N.E.2d at 392. We held in Hagerman that this provision did not "expressly state, in clear and unequivocal terms, that it applies to indemnify Hagerman for its own negligence." Id. at 393. In GKN, we concluded that the indemnity provision in Hagerman was distinguishable from the Starnes-GKN indemnity provision because the phrase, "but only to the extent," limited the subcontractor's obligation to indemnify the general contractor solely to damages caused by the negligence of the subcontractor, not of the general contractor. GKN, 798 N.E.2d at 554-55. There was no similar language in the Starnes-GKN provision. Id.

Hunt fails to cite or analyze GKN in its brief and instead relies solely upon Hagerman. We conclude that for all relevant purposes, the indemnity provision in section 6.24.1 of the City-Hunt contract is indistinguishable from the indemnity provision we considered in GKN. Section 6.24.1 requires Hunt to indemnify UCE:

> from and against all claims, damages, losses and expenses, direct, indirect or consequential . . . arising out of or resulting from the performance of the Work provided that any such claim, damage, loss or expense is caused in whole or in part by a negligent act or omission of CONTRACTOR, any

> Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder . . . .

App. p. 389. As in GKN, this requires that an injury must be at least partially caused by Hunt's negligence before indemnification may be required. There is no disputed issue of material fact here that the collapse of the trench, causing injury to Hartwell, was at least partially Hunt's fault.[3] As in GKN, the indemnification clause is not negated merely because UCE might additionally have been at fault. See GKN, 798 N.E.2d at 553. Instead, because of Hunt's partial fault for Hartwell's injury, it is required to indemnify UCE for UCE's own negligence as an additional cause of the injury. See id. at 554. The trial court erred in concluding otherwise.

Because Hunt is required to indemnify UCE for UCE's own negligence, we need not address UCE's alternative theories against Hunt. Specifically, UCE argued before the trial court that Hunt was required to indemnify it for any damages it might have to pay that were caused solely by Hunt's negligence. On appeal, UCE asked that we address this issue "only in the alternative in the event that this Court determines that UCE is not entitled to indemnification for its own negligence . . . ." Appellant's Br. p. 30. Thus, we

[3] Frank Burg, a safety engineer hired by Hartwell as an expert witness, testified in a designated deposition regarding the poor construction of the trench in violation of OSHA standards and UCE's responsibility for failing to ensure that the trench was safe. He also testified, however, that Hunt bore some of the responsibility for the trench's safety, and acknowledged that only Hunt was cited by OSHA for the collapse. There is no designated evidence that contradicts Burg's testimony.

will not address the issue.[4] UCE also sought recovery from Hunt on the theories that Hunt breached the City-Hunt contract by not purchasing liability insurance that would have covered UCE for this incident and by not ensuring the safety of the worksite as purportedly required by the contract. It would appear the damages recoverable by UCE under such theories are completely parallel to those it should recover under the indemnification clause—i.e., the damages to Hartwell caused by UCE's negligence, plus attorney fees and costs associated with defending the action. We need not address UCE's breach of contract claims.

We have concluded that, as a matter of law, Hunt must indemnify UCE for UCE's own negligence in association with Hartwell's injuries and damages. No issue of material fact exists on the question of whether Hunt was at least partially at fault for Hartwell's injuries. We therefore reverse the trial court's grant of summary judgment in Hunt's favor. UCE is entitled to partial summary judgment to the extent that the indemnification clause in the City-Hunt contract requires Hunt to indemnify UCE. However, remand is necessary to determine the monetary extent of indemnification to which UCE is entitled. We also observe that the settlement between UCE and Hartwell is not binding on Hunt with respect to the monetary extent of Hunt's indemnification obligation. See GKN, 798 N.E.2d at 555-56 (holding that agreed judgment reached between indemnitee and injured party was not binding on indemnitor).

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[4] In any event, under comparative fault principles UCE should not be held liable for any portion of damages caused by Hunt's negligence.

Conclusion

We reverse the entry of summary judgment in favor of Hunt. We direct the entry of partial summary judgment in favor of UCE, reflecting that it is entitled to indemnification from Hunt for UCE's negligence in causing Hartwell's injuries and damages. We remand for further proceedings consistent with this opinion to determine the extent of Hunt's indemnification obligation.

Reversed and remanded.

ROBB, J., concurs.

SULLIVAN, J., concurs with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

MICHELLE HARTWELL, Appellant-Plaintiff, vs. UNITED CONSULTING ENGINEERS, INC., Appellee-Defendant,	)	No. 49A02-0511-CV-1089
UNITED CONSULTING ENGINEERS, INC., Appellant, (Third-Party Plaintiff), vs. HUNT PAVING COMPANY, INC., Appellee, (Third-Party Defendant).	)	

SULLIVAN, Judge, concurring

I concur, but in doing so, I respectfully disagree with the majority's construction of GKN Co. v. Starnes Trucking, Inc., 798 N.E.2d 548 (Ind. Ct. App. 2003) and as that case interprets Hagerman Construction Co. v. Long Electric Co., 741 N.E.2d 390 (Ind. Ct. App. 2000), trans. denied.

This court's decision in GKN states that the provision in Hagerman is crucially different from the provision in GKN because the latter provision requires indemnification by the subcontractor (Starnes) even "when GKN [the contractor] is partly at fault." 798 N.E.2d at 555. Such critical distinction would not exist unless the GKN court construed the Hagerman provision to require indemnification only where the subcontractor or others employed by or contracted by the subcontractor were negligent. Such construction would impose the obligation of indemnification only if the contractor were not negligent even in part.

I disagree with such interpretation. In Hagerman, indemnification was required even if the contractor itself was negligent in part, so long as the subcontractor was negligent, at least in part. Thus, if the damage were caused in part by the negligence of the subcontractor and in part by the general contractor, there would be indemnification. To this extent, then, I disagree with the majority's view that in Hagerman, the subcontractor's obligation to indemnify was limited "solely to damages caused by the negligence of the subcontractor, not of the general contractor." Slip op. at 16 (emphasis supplied). The majority's analysis would appear to absolve the subcontractor from indemnification even where the subcontractor and the contractor were both negligent. This result would ignore the "in whole or in part" language with respect to the subcontractor's negligence.

The actual basis, in my opinion, for distinguishing Hagerman is that in that case the subcontractor was not negligent at all, i.e. not "in whole or in part." In GKN, Starnes, the subcontractor, was at least negligent in part. So too, in the case before us.

Subject to this qualification, I concur.