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# IN THE COURT OF APPEALS OF INDIANA

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| CHARLES RUSSELL ADAMS, NANCY ANN ADAMS, and THE STRONGBOW TURKEY INN, | ) | |
| Appellants-Plaintiffs, | ) | |
| vs. | ) | No. 64A05-0707-CV-390 |
| CHESTER, INC., d/b/a CHESTER, INC. CONSTRUCTION SERVICES, and d/b/a CHESTER ARCHITECTURAL SERVICES, LLC; and G. WILLIAM WALKER CONSTRUCTION COMPANY, d/b/a WALKER CONSTUCTION, | ) | |
| Appellees-Defendants. | ) | |

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0411-CT-9870

**November 9, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellants-Plaintiffs Charles Russell Adams, Nancy Ann Adams, and the Strongbow Turkey Inn (collectively, "the Strongbow") appeal from the trial court's grant of partial summary judgment in favor of Appellee-Defendant Chester, Inc. ("Chester"). We affirm.

## FACTS

In 1994, the Strongbow contracted with Chester for Chester to design and build an addition to its banquet facility in Valparaiso. Chester was to perform all design and supervision functions and provide all labor, tools, equipment, and material. On September 13, 2001, Velda Johnson, while attending a conference at the Strongbow, fell while climbing stairs leading to the addition to the banquet facility. Johnson and her husband sued the Strongbow for negligence in failing to warn of unsafe conditions and in failing to ensure her safety. The Strongbow requested that Chester indemnify it, but Chester refused, and the Strongbow eventually settled the Johnsons' suit for $95,000.00.

On October 26, 2004, the Strongbow sued Chester, alleging breach of contract and that it had a right to indemnification from Chester. On December 13, 2004, Chester filed a third-party complaint against Walker Construction, claiming that Chester had a right of indemnification for any amount it may be found liable to the Strongbow. On February 7, 2006, Chester filed a motion for partial summary judgment as against the Strongbow, contending that no genuine issue of material fact existed regarding the Strongbow's claim of a right to indemnity.

## DISCUSSION AND DECISION

### *Standard of Review*

When reviewing the grant or denial of a summary judgment motion, we apply the same standard as the trial court. *Merchants Nat. Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000). Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id.* To prevail on a motion for summary judgment in a negligence case, a defendant must demonstrate that the undisputed material facts negate at least one element of the plaintiff's claim. *Id.* Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. *Id.* The party appealing the summary judgment bears the burden of persuading us the trial court erred. *Id.*

### Grant of Partial Summary Judgment

Strongbow contends that the trial court erred in granting partial summary judgment to Chester in that a genuine issue of material fact exists with respect to its claim that it has an implied right of indemnification. Rights of indemnification can arise in three contexts: (1) express contractual obligation, (2) statutory obligation, or (3) common law implied indemnity. *Sears, Roebuck, & Co. v. Boyd*, 562 N.E.2d 458, 461, 461 n.2 (Ind. Ct. App. 1990). It is undisputed that Chester has neither a statutory nor contractual obligation to

indemnify the Strongbow.[1] Therefore, if a right to indemnity exists, it is implied. As a general rule, implied indemnity is created by a relationship between the parties, such as employee-employer or principal-agent. *Id*. (citing *McLish v. Niagara Machine & Tool Works*, 266 F. Supp. 987, 989 (S.D. Ind. 1967)). Here, the Strongbow specifically alleges that a genuine issue of material facts exists as to whether it has a principal-agent relationship with Chester.

"An agency relationship is one that results from a 'manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *Turner v. Bd. of Aviation Comm'rs*, 743 N.E.2d 1153, 1163 (Ind. Ct. App. 2001) (citing *Lewis v. Davis*, 410 N.E.2d 1363, 1366 (Ind. Ct. App. 1980)). "It arises from the consent of the parties in the form of a contractual agreement, but it is not necessary that the contract or the authority of the agent to act be in writing." *Id*. "It is necessary that the agent be subject to the control of the principal with respect to the details of the work." *Id*.

The Strongbow acknowledges that no traditional principal-agent relationship exists (or ever existed) between it and Chester but argues, "In this contract, the control is the end result of completed stairs which is implicit within the contract." Appellant's Br. p. 14. We, however, are not inclined to infer the Strongbow's control, for purposes of establishing an agency, from a contract that, *inter alia*, provides that "[d]uring the term of the agreement, the CONTRACTOR [*i.e.*, Chester] shall have *complete control* of the job site and … all

[1] Although it is apparently not uncommon for construction contracts to contain such indemnification clauses, the contract between the Strongbow and Chester contains no such provisions.

subcontractor's scheduling." Appellant's App. p. 79 (emphasis added). With the Strongbow having failed to establish that a genuine issue of material fact exists with regard to a relationship that would give rise to an implied right of indemnity, we affirm the trial court's grant of partial summary judgment in favor of Chester.

The Strongbow relies on *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004), a case in which the Indiana Supreme Court abandoned the "acceptance rule" as an "outmoded relic." *Id*. at 737. The acceptance rule held that "contractors do not owe a duty of care to third parties after the owner has accepted the work." *Id*. at 738 (citation omitted). *Peters*, however, is a pure negligence case and does not even mention indemnity, much less stand for the proposition that an owner may always seek indemnification from a contactor. To the extent that *Peters* would have helped the Strongbow, it would have been in the original tort action brought by the Johnsons, and that ship has sailed.[2]

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.

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[2] Indeed, this appears to have been the case. Chester was, in fact, also a defendant in the Johnsons' original tort suit and apparently reached a separate settlement with them. It seems likely, or, at the very least, distinctly possible, that the Strongbow would have had to lay out a much greater sum to the Johnsons to settle their tort claim had Chester not been involved, as it would not have been under the old rule.