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OCTOBER 12, 2006
(2006-SC-000208-D)**

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002103-MR

UNITED STRUCTURAL SYSTEMS, LTD. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 01-CI-00544

ERI FALLS, INC.; HEITMAN CAPITAL MANAGEMENT, LLC; KENNEDY-WILSON KENTUCKY MANAGEMENT, INC.; AND KENNEDY WILSON PROPERTIES, LTD. — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: United Structural Systems, Ltd. (United Structural) appeals from a summary judgment of the Fayette

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Circuit Court that awarded the sum of $44,452.30 to the appellees on their claims for indemnity. United Structural argues that there were genuine issues of material fact which rendered summary judgment inappropriate as a matter of law. We agree. Thus, we vacate and remand.

The appellees are: ERI Falls, Inc.; Kennedy-Wilson Kentucky Management, Inc.; Heitman Capital Management, LLC; and Kennedy Wilson Properties, Ltd. (collectively, "ERI Falls"). They either own or manage the Stoney Falls apartment complex in Lexington, Kentucky. Appellant, United Structural, is a business that repairs buildings. In the fall of 1999, ERI Falls contracted with United Structural for the replacement of two sets of stairs on each of the twenty-two buildings in the apartment complex. United Structural agreed to provide "all equipment, labor and materials" to complete the project. In addition, United Structural was required to maintain sufficient insurance to cover fully and to indemnify ERI Falls against:

> any loss due to injury or damage to person, including death, or property (including adjacent property) caused by the Contractor **or any other party** pursuant to the performance of the agreement. (Emphasis added.)

United Structural also agreed to indemnify ERI Falls under the following circumstances:

> To the extent allowable by law, the Contractor shall indemnify, defend and hold harmless [ERI Falls], and each of their respective principals, partners, directors, officers, shareholders, beneficiaries, trustees, employees, agents, successors, and assigns from any and all claims, suits and causes of action, for personal injury or property damage arising or in any way **caused by the performance of the work hereunder or any acts by the Contractor, its subcontractors, and their respective agents, servants, or employees**, or for infringement of patents or violation of patent or other intellectual property rights, including all costs, expenses, and attorneys' fees incurred by an indemnified party in defending any claim, suits or causes of action, indemnified hereunder, when they arise. (Emphasis added.)

After work began and renovations had been completed on one of the buildings in the apartment complex, ERI Falls demanded that United Structural change the design of the stairs. Although ERI Falls had previously approved the design, the owners/managers were not satisfied with the final appearance of the stairs. Several employees of ERI Falls, including its engineers, J.C. Elston and Frank Bastida, undertook the re-designing of the stairs. Their plans for the reconstruction were conveyed to United Structural by Ron Pennington, a consultant who was hired by ERI Falls in December 1999 to oversee the project.

United Structural's involvement in the project ended abruptly on March 1, 2000 -- with some measure of controversy

surrounding its departure. United Structural contends that after it had completed the newly designed stairs on ten of the buildings, ERI Falls again changed the design of the stairs. Moreover, ERI Falls demanded that United Structural should undertake the newest set of alterations to all ten of the renovated buildings at its own cost. Frustrated by the costly changes, United Structural abandoned the project on its own.

ERI Falls claims that United Structural did not voluntarily quit but that it was fired by ERI Falls for its refusal to obtain a building permit for the project. Regardless of what act or which party precipitated the termination of the agreement, ERI Falls formally notified United Structural by letter of March 13, 2000, that it no longer desired the services of United Structural for the project.

Ron Pennington, who had been hired in December 1999 to oversee the project, was then chosen to complete the remodeling of the stairs. On March 2, 2000, one day after taking over the project, Pennington learned from a building inspector that the stairs failed to comply with certain requirements of the Kentucky Building Code. Although he began to bring the stairs into compliance with the code, neither he nor ERI Falls took any measures to warn the residents of the apartment complex of any dangers involved in the construction of the stairs by United Structural.

On March 23, 2000, Edith Holland, a resident of the Stoney Falls complex, fell on the stairs and sustained an injury to her back and left wrist. She filed a lawsuit in which she named United Structural and all of the appellees as defendants. Prior to her accident, Holland had suffered a stroke -- as a result of which her left leg was braced from her foot to her knee. She claims that while ascending a flight of stairs, she was unable to grasp and hold onto the rail cap because it was too wide. Consequently, she fell backward. She contended that the excessive width of the rail deviated from the standards set by the Kentucky Building Code; that United Structural breached its duty "to construct the premises consistent with the use of residents"; and that its violation of the building code constituted negligence *per se*.

Holland also alleged that ERI Falls was aware of the problem with the stairs and that her landlord had "failed to take appropriate measures to correct the problem" or to warn her of the dangers entailed in the new construction.

ERI Falls filed a cross-claim against United Structural seeking total indemnification for any amounts awarded to Holland and for all attorneys' fees and costs incurred in defending the lawsuit. United Structural denied that it was required to indemnify ERI Falls under the contract. In the alternative, it alleged that the negligence of ERI Falls was

primary and that its alleged negligence -- if any -- was passive or secondary, thereby precluding indemnity on its part.

After all pleadings were filed, Holland's complaint was referred to mediation. In a confidential agreement not filed in the record, Holland settled her claim against all the defendants. ERI Falls Paid Holland the sum of $35,000 pursuant to the agreement. In its order of May 29, 2003, the trial court dismissed Holland's complaint but specifically reserved for later adjudication the resolution of the cross-claims for indemnity.

Based on the contractual provisions pertaining to indemnity and insurance, ERI Falls filed a motion for summary judgment on its cross-claim against United Structural. As well as relying on the contract theory, it also argued that it was entitled to indemnity under the common law. Without articulating its reasoning or reciting any grounds, the trial court entered a final order on September 9, 2004, in which it granted the motion for summary relief. In addition to the partial settlement award of $35,000 paid to Holland, the Court ordered United Structural to reimburse ERI Falls in the amount of $9,452.30 for its costs and attorneys' fees. This appeal followed.

The scope of our review of an order granting summary relief is well defined:

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . ." *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992), *citing Steelvest, supra* (citations omitted).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). In reviewing the record under this stringent standard, we are persuaded that it reveals the existence of a material issue of fact precluding an award of indemnity as a matter of law under either the contract or the common law as argued by ERI Falls.

A finding of liability to the injured party is required before indemnity can arise at common law. Clark v. Hauck Mfg. Co., 910 S.W.2d 247, 253 (Ky. 1995).

> "Indemnity" is repayment to one party, by the party who caused the loss, of such amounts the first party was compelled to pay. *Liberty Mut. Ins. Co. v. Louisville*

> *and Nashville Railroad Company*, Ky., 455 S.W.2d 537, 541 (1970).
>
> . . . .
>
> Both indemnity and contribution depend upon liability by one or both parties to the original claimant who suffered the original loss.

Poole Truck Line, Inc. v. Commonwealth, Transportation Cabinet, Dept. of Highways, 892 S.W.2d 611, 613-614 (Ky.App. 1995).

Contractual indemnity also depends upon a finding that either the indemnitor (United Structural) or the indemnitee (ERI Falls) is liable to Holland (the original injured party). In reversing an award for indemnity based upon a written contract in ARA Services, Inc. v. Pineville Community Hospital, 2 S.W.3d 104 (Ky.App. 1999), this court noted:

> Contracts are, of course, to be construed according to their terms. *Blue Diamond Coal Co. v. Robertson*, 243 Ky. 584, 49 S.W.2d 335, 336 (1932). Here, the terms of the contract are clear. ARA assumed all claims for loss or damage attributable to ARA's sole negligence, acts or failure to act. The jury determined that ARA was not negligent; hence ARA is not contractually liable to the Hospital.

In the case before us, there has been no finding establishing the **proximate cause** of Holland's fall, which is an essential element in ERI's claim for indemnity. In settling the underlying tort claim, neither ERI Falls nor United Structural admitted or addressed the issue of fault or proximate cause resulting in injuries. ERI Falls argues in its appellate brief

that Holland's injuries were caused entirely by United Structural:

> [Holland] fell down the stairs constructed by United Structural when she was unable to grasp the handrail because United Structural constructed it too wide in violation of the Kentucky Building Code.

(Appellees' brief at p. 17.) Even if one could assume that United Structural was negligent *per se* in its construction of the railing, it would nonetheless incur no liability for Holland's injuries unless and until its alleged negligence was determined to be the "proximate or contributing cause" of Holland's fall. Louisville Taxicab and Transfer Co. v. Holsclaw Transfer Co, 344 S.W.2d 828, 829 (Ky. 1961).

The issue of causation is generally referred to a jury for resolution. See, Lewis v. B & R Corporation, 56 S.W.3d 432, 438 (Ky.App. 2001); Pathways, Inc. v. Hammons, 113 S.W.3d 85 (Ky. 2003). Although causation may at times be determined as a matter of law, the record before us is not sufficient to sustain a legal determination that the width of the railing was a substantial factor in causing Holland's accident. Accordingly, the summary judgment awarding indemnity was premature and inappropriate, and this matter must be remanded for a determination of the questions of fact pertaining to the causation of the accident.

Although we are remanding for further proceedings, we will address ERI Falls's arguments that it is entitled to indemnity regardless of whether it be found to be jointly or partially liable for causing Holland's fall. ERI Falls contends that United Structural made a sweeping promise to indemnify it -- even for the negligence of ERI Falls. Thus, ERI Falls believes that it is entitled to indemnity regardless of the issue of fault.

The proper interpretation of a written agreement is a question of law. Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992). The primary rule to be applied in ascertaining the intent of contracting parties is that "all words and phrases in the contract are to be given their ordinary meanings." Fay E. Sams Money Purchase Pension Plan v. Jansen, 3 S.W.3d 753, 757 (Ky.App. 1999), citing O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891 (Ky. 1966). If the contract is plain and unambiguous, the intent of the parties "must be gathered from the four corners of [the written] instrument." Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000).

ERI Falls correctly observes that the indemnity and insurance terms of the contract are identical in all relevant aspects to those in Fosson v. Ashland Oil & Refining Company, 309 S.W.2d 176 (Ky. 1958). In that case, our highest court

analyzed the language employed in the indemnity provision of the contract as well as its insurance provisions. It held that the contractor was required to indemnify the owner for damages arising from the wrongful death of an employee -- even though the damages were caused by the owner's own negligence. Id., at 177-178.

However, the facts in this case are significantly distinguishable from those in Fosson. Unlike the injury in Fosson, Holland's accident occurred **after** the contract between ERI Falls and United Structural had been terminated. Her complaint against ERI Falls alleged a breach of duties owed to her **after** ERI Falls had replaced United Structural with another contractor. We can find no language in the contract which can be interpreted as obligating United Structural to indemnify ERI Falls indefinitely (or for acts of negligence committed by ERI Falls) **after** United Structural was no longer on the premises or involved in the project. Thus, if on remand it is determined that a superseding act of negligence by ERI Falls caused Holland's injuries, ERI Falls will not be entitled to indemnity under the contract.

Finally, ERI Falls argues that it is entitled to indemnity under our common law. Our adoption of the doctrine of comparative fault has not altered Kentucky tort law with respect to claims for indemnity.

> [A]pportionment of liability arose from statutory provisions permitting contribution and several liability among joint tortfeasors in pari delicto. It has no application to the common law right of a constructively or secondarily liable party to total indemnity from the primarily liable party with **whom he/she is <u>not</u> in pari delicto**. (Emphasis added.)

<u>Degener v. Hall Contracting Corp.</u>, 27 S.W.3d 775, 780 (Ky. 2000).

There is evidence from which a jury could determine that the parties may have been in *pari delicto* with respect to the deviation of the railings from the required measurement of the building code. Specifically, the record contains evidence from which a jury could determine that ERI Falls was responsible for the flaws in the design of the stairs constructed by United Structural. Contrary to the emphatic declaration of ERI Falls that its only involvement related to the aesthetics of the project, John Lockhart, an employee of United Structural, testified as follows:

> Mr. Pennington was a consultant who said, "Build [the stairs] this way, **exactly this way**," and those were his words, "and you will get paid; if you do not, you will not get paid." (Emphasis added.)

A finding of such responsibility on the part of ERI Falls would preclude a claim for indemnity based on traditional common law principles as it would be deemed to have been in *pari delicto*

with United Structural. As noted by Degener, apportionment of liability will supersede and preclude indemnity if there is a finding that the parties acted in *pari delicto*. Degener, supra, at 780; see also, Brown Hotel Co. v. Pittsburgh Fuel Co., 311 Ky. 396, 224 S.W.2d 165 (1949).

The judgment of the Fayette Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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