STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, Subrogee of PIONEER CONSTRUCTION COMPANY, UNION SQUARE DEVELOPMENT, INC., and PARKLAND INVESTMENTS, INC., Plaintiffs-Appellees,	UNPUBLISHED November 5, 2013
v	No. 311103 Kent Circuit Court
KOSTERS & DEVRIES, INC., Defendant-Appellant.	LC No. 09-000918-CK

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant Kosters & DeVries, Inc. appeals as of right the April 12, 2012 order overruling its objections to plaintiff National Fire Insurance Company of Hartford's writ of garnishment filed to obtain indemnification for a judgment imposed against National Fire's subrogor. For the reasons set forth in this opinion, we reverse and remand for entry of judgment in favor of defendant pursuant to MCR 2.116(I)(2).

This case arises out of an indemnity agreement between defendant, a subcontractor, and Pioneer, a general contractor. Specifically, it involves the parties' dispute over defendant's duty to indemnify National Fire as subrogee of Pioneer for injuries suffered by Matthew Edington, a former employee of defendant. In October of 2005, Pioneer entered into a subcontract with defendant pursuant to which defendant agreed to provide painting services for a condominium project in which Pioneer, Union Square Development, Inc., and Parkland Investment, Inc., were all involved. In the subcontract, defendant agreed to indemnify and hold Pioneer harmless from all claims, loses, and demands brought or recovered against Pioneer "by reason of any act or omission" of defendant or its agents or employees.

In September of 2006, Edington was injured while painting one of the condominium units. Edington filed a personal injury lawsuit against Pioneer, Union Square, and Parkland Investment. In 2009, while Edington's personal injury action was pending, National Fire, as Pioneer's insurer, filed an action against defendant alleging that the contract between Pioneer and defendant required defendant to indemnify Pioneer in Edington's personal injury action. On

July 16, 2010, the trial court entered summary disposition in favor of National Fire, finding that, under the contract between defendant and Pioneer, defendant had a duty to indemnify Pioneer upon the happening of certain events.

Shortly thereafter, Edington's personal injury action proceeded to trial and on August 13, 2010, a jury awarded damages to Edington, but reduced his recovery by 70 percent after apportioning 70 percent of his injuries to his own negligence. The jury also found that Pioneer, as the general contractor, was negligent under the common work area doctrine for its failure to guard against readily observable and avoidable dangers in a common work area, and assigned 30 percent of the fault for Edington's injuries to Pioneer. The jury also found that defendant, who was involved in Edington's action after National Fire filed a notice of non-party at fault against defendant, was not negligent in relation to Edington's injuries.

The jury awarded Edington $183,073 for past economic damages, and $96,355 for future economic damages.[1] Upon receipt of the jury's verdict in Edington's personal injury action, National Fire, as Pioneer's insurer, was obligated to pay Edington $95,900 for his injuries. On October 18, 2011, National Fire filed a request and writ for a non-periodic garnishment against defendant for $95,900, said amount representing its 30% share of the jury's award. Defendant objected to the request for the writ, arguing that its duty to indemnify was not implicated. National Fire, citing the trial court's July 16, 2010 order, which required defendant to indemnify Pioneer in certain circumstances, subsequently moved for summary disposition pursuant to MCR 2.116(C)(9). On April 12, 2012, the trial court entered an opinion and order in which it found that defendant's duty to indemnify was implicated under the July 16, 2010 order, and granted National Fire summary disposition on its request and writ for garnishment.

Defendant appeals the trial court's April 12, 2012 order as of right, arguing that, pursuant to the plain language of the July 16, 2010 order, it was not required to indemnify Pioneer for Edington's injuries. "We review de novo a trial court's decision to grant summary disposition." *LaFontaine Saline Inc v Chrysler Group, LLC*, 298 Mich App 576, 584; 828 NW2d 446 (2012). Resolution of this issue requires us to interpret the trial court's July 16, 2010 order. "Interpreting the meaning of a court order involves questions of law that we review de novo on appeal." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

Initially, we reject National Fire's argument that the issue raised by defendant in the case at bar is an impermissible collateral attack on the trial court's July 16, 2010 order. This Court does not permit collateral attacks on final orders that have not been appealed as of right. See, e.g., *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999). However, the issue raised by defendant does not collaterally attack the trial court's July 16, 2010 order. Indeed, the July 16, 2010 order established that defendant was required to indemnify Pioneer pursuant to the contract between defendant and Pioneer upon the happening of certain events. The issue raised by defendant in the case at bar is whether its duty to indemnify arose. Because defendant disputes whether its duty arose and not whether it had a duty to indemnify, we find that

[1] The trial court also awarded Edington $16,795.66 in taxable costs.

defendant does not collaterally attack the trial court's July 16, 2010 order, and that its arguments are within the scope of this appeal.

Next, we find that pursuant to the plain language of the trial court's July 16, 2010 order,[2] defendant's duty to indemnify Pioneer did not arise in Edington's personal injury action. Pursuant to the July 16, 2010 order, defendant's duty to indemnify arises as follows:

> Defendant must indemnify Plaintiff *for any liability imposed upon Pioneer Construction Company*, Union Square Development, Inc., and/or Parkland Investment, Inc., *whether by way of settlement or judgment, which arises from acts or omissions of Kosters & DeVries, Inc., its agents, or its employees* in the matter of *Edington v Pioneer Construction, et al*, Case No: 08-01429-NO. [(Emphasis added).]

The order provides that defendant's duty to indemnify arises "for any liability imposed upon Pioneer," in Edington's lawsuit, "whether by way of settlement or judgment," that arises out of the acts or omission of defendant, its agents, or employees. Here, it is undisputed that liability was imposed upon Pioneer and that the liability arose out of a settlement or judgment in Edington's personal injury action. The only issue is whether that liability "ar[ose] from acts or omission of [defendant], its agents, or its employees . . . ."

We find that liability in Edington's personal injury action did not arise from the actions of defendant, defendant's agents, or its employees. Rather, liability was imposed upon Pioneer for its *own* acts or omissions. Indeed, the jury in Edington's action imposed liability upon Pioneer under the common work area doctrine for its failure to maintain a safe common work area. The common work area doctrine provides that a general contractor may be liable where "(1) the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area." *Latham v Barton Malow Co*, 480 Mich 105, 109; 746 NW2d 868 (2008). Thus, the only liability imposed in Edington's action was on Pioneer for Pioneer's own breach of its duty to take reasonable steps to guard against readily observable and avoidable dangers.

In reaching this conclusion, we reject National Fire's argument that because Edington was found to be 70 percent negligent in his personal injury action, thereby reducing his recovery, that liability arose against Pioneer because of the acts of defendant's employee, thereby implicating defendant's duty to indemnify. Although Edington was found to be 70 percent

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[2] National Fire argues that the scope of Pioneer's duty to indemnify should be governed by the parties' contract, not the trial court's July 16, 2010 order. Because National Fire stipulated to the language employed in the trial court's July 16, 2010 order, which described the scope of defendant's duty to indemnify, we find that any attempt by National Fire to challenge the scope of defendant's duty to indemnify as set forth in the July 16, 2010 order is an impermissible collateral attack on the order. See *Kosch*, 233 Mich App at 353. Thus, the trial court's July 16, 2010 order controls as to the scope of defendant's duty to indemnify.

responsible for his own injury, liability did not *arise* from his negligence. Rather, liability arose out of Pioneer's breach of the duty owed to those who were in the common work area. Edington's cause of action was not based on his own negligence or omission; rather, it was premised solely on defendant's breach of its duty to maintain a safe common work area. Edington's own negligence only operated to reduce the amount of damages he received. Indeed, comparative negligence operates to allocate and assign fault. See *Taylor v Kent Radiology*, 286 Mich App 490, 515-516; 780 NW2d 900 (2009). Furthermore, in a negligence action, "before a plaintiff's fault can be compared with that of the defendant, it obviously must first be determined that the defendant was negligent." *Vandonkelaar v Kid's Kourt, LLC*, 290 Mich App 187, 194; 800 NW2d 760 (2010) (quotation omitted). Therefore, before the jury in Edington's case could assign fault to Edington, it first had to determine that Pioneer was negligent. See *id.* Accordingly, the liability imposed upon Pioneer in Edington's case did not *arise* from Edington's negligence; instead, it arose from Pioneer's own negligence in failing to maintain a safe common work area. Edington's negligence only served to diminish the damages that had already been established because of Pioneer's failure to maintain a safe work environment under the common work area doctrine, and under the plain language of the trial court's order, defendant's duty to indemnify did not arise.

Furthermore, to the extent there was liability on the part of Pioneer's employee, that liability was reduced by the jury finding Edington 70% at fault for his injury. Thus, National Fire's liability was reduced by the amount of negligence on the part of Pioneer's employee, thereby making National Fire liable only for its *own* negligence. The trial court's decision to the contrary was erroneous. Accordingly, we reverse and remand for entry of summary disposition in favor of defendant pursuant to MCR 2.116(I)(2).

Reversed and remanded for proceedings consistent with this opinion. No costs are awarded to either party. MCR 7.219.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello