[Cite as *Lamb v. Summit Mall*, 2002-Ohio-1646.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JAMES LAMB, et al.

Appellees

v.

SUMMIT MALL, et al.

Appellees

and

RETAIL PLANNING AND
CONSTRUCTION, INC.

Fourth-Party Appellant

v.

CORPORATE MECHANICAL

Fourth-Party Appellee

C.A. No. 20777

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 1998 08 3178

DECISION AND JOURNAL ENTRY

Dated: April 10, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam.

{¶1} Fourth Party Plaintiff-Appellant Retail Planning & Construction ("Appellant") has appealed a judgment of the Summit County Court of Common Pleas that granted summary judgment in favor of Fourth Party Defendant-Appellee Corporate Mechanical ("Appellee"). This Court affirms.

I

{¶2} On September 4, 1997, James Lamb, an employee of Appellee, was injured after falling off of an exterior ladder while installing an air conditioner on the roof of Summit Mall at The Children's Place store. Prior to the accident, Appellant and Appellee had entered into a subcontract under which Appellee would perform the heating and cooling work for The Children's Place construction project. Following the accident, Lamb filed a personal injury suit against Summit Mall and The Children's Place. The Children's Place responded by naming Appellant, the general contractor of the construction project, as a third-party defendant. Lamb later amended his complaint to include Appellant.

{¶3} On December 17, 1998, Appellant filed a fourth party complaint naming Appellee a fourth party defendant. Appellant asserted that Appellee breached its subcontract by failing to fulfill the defend, indemnify, and hold harmless clauses of the subcontract. [1]

[1] Appellant has asserted that Appellee had a duty to defend under the subcontract. Such a clause was not included in the subcontract and therefore will not be addressed by this Court.

{¶4} On September 30, 1999, Lamb voluntarily dismissed his complaint against The Children's Place. Pursuant to Civ.R. 56(B), the remaining defendants, Summit Mall and Appellant, filed motions for summary judgment against Lamb. On February 17, 2001, the trial court granted both motions for summary judgment, finding that no genuine issues of material fact existed. Lamb appealed, and the decision was affirmed by this Court. *Lamb v. Summit Mall* (Jan. 17, 2001), Summit App. No. 20011, unreported. The Ohio Supreme Court declined jurisdiction to hear Lamb's case. *Lamb v. Summit Mall* (2001), 91 Ohio St.3d 1529. After the Ohio Supreme Court declined jurisdiction, Appellee filed a summary judgment motion. The trial court granted the motion, holding that the indemnity claim was moot because summary judgment had been rendered against Lamb. Appellant has appealed the decision, asserting one assignment of error.

II

{¶5} Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment in made, that conclusion is adverse to that party. *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589. An appellate court reviews a lower court's entry of summary judgment *de novo*, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491.

Assignment of Error

{¶6} The trial court erred in entering its August 31, 2001, Order on Motion for Summary Judgment, which had been filed by [Appellee] and ruling that [Appellant's] claim for indemnity against [Appellee] pursuant to the subcontract agreement between said parties was moot, since [Lamb's] claims had been dismissed.

{¶7} Appellant has argued that the trial court erred by finding the indemnity issue moot and granting summary judgment in favor of Appellee. Appellant has asserted that questions of fact remain regarding the subcontract. This Court disagrees.

{¶8} This Court affirms the trial court's decision that Appellant's claim was rendered moot when summary judgment was entered against Lamb. A review of the fourth party complaint reveals that the indemnification Appellant requested was connected to Appellant's alleged liability. Therefore, when Appellant was found not liable, indemnification became moot. Further, under Civ.R. 14, any part of the claim which was not made moot by the granting of summary judgment in favor of the defendants is now moot because it was not properly asserted by third (or fourth) party practice. Accordingly, Appellant's sole assignment of error is overruled.

III

{¶9} Appellant's sole assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

WILLIAM R. BAIRD
FOR THE COURT

BAIRD, P. J.

CARR, J.
CONCURS

WHITMORE, J. CONCURS IN JUDGMENT ONLY SAYING:

{¶10} I disagree with the majority's reasoning that the complaint is moot and that joinder was not appropriate under Civ.R. 14. I decline to reach the Civ.R. 14 question because it was not raised by the parties below. As long as the fourth party defendant did not move to strike the fourth party complaint under Civ.R. 14, then the contract claim is not moot and should have been determined by the trial court. I would therefore reach the merits of the appeal and affirm the decision below.

{¶11} As an employer in compliance with Ohio workers' compensation laws, Appellee is entitled to certain immunities.[2] Under R.C. 4123.74:

> **{¶12}** Employers who comply with [R.C. 4123.35] shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, *** occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter.

{¶13} The statutory and constitutional immunity granted to complying employers is crucial to the workers' compensation system. *Kendall v. U.S. Dismantling Co.* (1985), 20 Ohio St.3d 61, 65; See, also, *Best v. Energized Substation Service* (Aug. 17, 1994), Lorain App. No. 93CA005737, unreported, at 9. The legislature specifically granted workers' compensation immunity in exchange for the relinquishment by

[2] The dispute over whether Pennsylvania or Ohio law applies is irrelevant because the pertinent provisions of the workers' compensation laws in Ohio and Pennsylvania are similar. See 77 Pa. Stat. 481(b); *Bester v. Essex Crane Rental Corp.* (1993), 422 Pa. Super 178, 619 A.2d 304 (holding that Pennsylvania law requires express and specific waivers of workers' compensation immunity before a third party can receive

employers of all their common law defenses to claims resulting from work-related injuries. *Id.* "As a result, the general rule is that a complying employer's immunity protects that employer from indemnification actions instituted by third parties who may be held liable for an employee's workplace injury." *Best* at 13, citing *Davis v. Consolidated Rail Corp.* (1981), 2 Ohio App.3d 475, 477. Furthermore, "before this immunity may be considered to have been waived [by an indemnification clause], the waiver must be express, and must refer specifically to this particular immunity." *Kendall*, 20 Ohio St.3d at 65. A general indemnity agreement with a third party which does not specifically express the employer's intent to waive his worker's compensation immunity under R.C. 4123.74 is ineffective for that purpose. *Id.*

{¶14} This case involves indemnification for defense fees and costs against Lamb's personal injury suit. Therefore, the issue is whether the immunity granted by R.C. 4123.74 extends to legal fees and costs that arise from an employee's injury for which the complying employer is immune from liability. In *Best*, this Court found that the Supreme Court implicitly recognized that an indemnity agreement for legal fees and costs resulting from work-related injuries is subject to the immunity granted a complying employer in R.C. 4123.74-that is, the immunity granted by R.C. 4123.74 extends to legal fees and costs. *Best* at 10.

{¶15} As previously discussed, a complying employer's waiver of worker's compensation immunity must be express and must refer specifically to workers' compensation immunity or to R.C. 4123.74. See *Kendall*, 20 Ohio St.3d at 65; *Best* at

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indemnification); see, also, *Shumosky v. Lutheran Welfare Serv.* (Pa.Super 2001), 784 A.2d 196.

10-11. The subcontract between Appellant and Appellee, dated August 5, 1997, and signed by both parties, contains the following clauses in the insurance portion of the subcontract:

> **{¶16}** 3. Notwithstanding the carrying of insurance, Subcontractor agrees to indemnify and hold harmless Contractor and the Owner, their successors and assigns, from all claims liabilities, costs, and expenses whatsoever for injury or damage to any person or property arising out of the performance of this Subcontract, or arising or occurring by reason of the Work or the use thereof or any defect or condition thereof.
>
> **{¶17}** 4. Without limiting the generality of the foregoing, Subcontractor hereby releases Contractor and Owner from all claims and liabilities on account of, and does hereby agree to indemnify and hold harmless Contractor, Owner, their successors and assigns, from all claims, liabilities, costs and expenses whatsoever for injury or damage to any person or property arising out of the use by Subcontractor or its employees of any equipment or facilities whether the same be owned or operated by Contractor, Subcontractor or others.

{¶18} It is clear from the subcontract that the indemnification and hold harmless clauses do not contain a specific reference to, or waiver of, Appellee's workers' compensation immunity. Thus, because the subcontract does not contain the proper waiver, I would find that Appellee is not liable, as a matter of law, to indemnify Appellant for the legal fees and costs incurred in defending Lamb's personal injury claim. Accordingly, I would affirm the trial court's decision based on Appellee's failure to waive its workers' compensation immunity.

APPEARANCES:

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GEORGE W. COCHRAN, Attorney at Law, 9170 State Route 43, Streetsboro, Ohio 44241, for James Lamb, et al., Appellees.

Therefore, this Court will apply Ohio law.

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