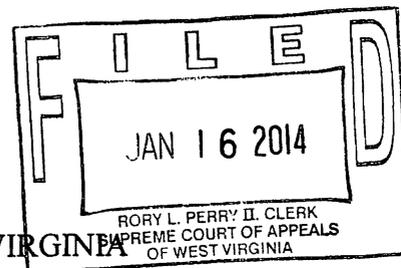


No. 13-0812



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCHOOLHOUSE LIMITED LIABILITY COMPANY,
a West Virginia Limited Liability Company,

Defendant below, Petitioner herein,

v.

(Civil Action No. 12-C-33®)

CREEKSIDE OWNERS ASSOCIATION,
a West Virginia not-for-profit homeowners association,
individually and on behalf of two or more unit owners,

Plaintiff below, Respondent herein,

and

WIL-KEN, INC., a West Virginia corporation;
BUILDERS GROUP, INC., a West Virginia corporation;
BG MILLWORK, INC., a West Virginia corporation;
SMITH BACKHOE AND DOZER SERVICE, LLC,
a West Virginia limited liability company; R.E.H., INC.,
a West Virginia corporation; DAVIS ELECTRICAL SERVICE, INC.
a West Virginia corporation; COOPER ASPHALT, INC., a
West Virginia corporation; RELIABLE ROOFING COMPANY,
a West Virginia corporation; D'JERICO, LLC,
a West Virginia limited liability company;
OLD SPRUCE REALTY AT SNOWSHOE, LLC,
a/k/a ReMax Old Spruce Properties, a West Virginia limited
liability company,

Defendants below, Respondents herein.

FROM THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA
THE HONORABLE JAMES A. ROWE

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STATEMENT OF THE CASE

The parties appear to be in agreement as to the facts of the case. Further, both parties appear to agree that the Complaint is largely the controlling document. However, as set forth on page 2 of the Respondents' Brief, the Respondents disagree with Schoolhouse's interpretation of the Complaint. Obviously, the Complaint speaks for itself, but Schoolhouse reiterates its reading and interpretation of the Complaint as set forth in its Brief in Support of Petition for Appeal on Behalf of Schoolhouse Limited Liability Company. See Brief in Support of Petition for Appeal on Behalf of Schoolhouse Limited Liability Company pp. 1-4 (hereinafter "Brief in Support").

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary in this case because the dispositive issues have been authoritatively decided previously, and the facts and legal arguments are adequately presented in this brief and the record on appeal. Oral argument would not significantly aid the decisional process.

STANDARD OF REVIEW

A circuit court order granting a motion to dismiss a complaint is reviewed under a *de novo* standard. Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995).

ARGUMENT

The Respondents' Response is based mainly upon their interpretation of the Complaint and the claims against Schoolhouse. Resp'ts Brief 1-2. Specifically, the Respondents rely upon the fact that certain claims were asserted against Schoolhouse alone and the titles of such claims. Id. The problem with this argument is that claims asserted against Schoolhouse are not necessarily

independent claims, but can be (and are) claims derived from the actions of the Settling Defendants. Further, the title of the claim standing alone does not determine what type of claim is being asserted. The actual allegations contained within the claims determine the grounds upon which liability may be found and upon whose fault such liability arises.

The common law regarding implied indemnity is clear — a good faith settlement does not extinguish a claim for implied indemnity when the indemnitee is faultless. Syl. Pt. 4, Harvest Capital v. W. Va. Dept. of Energy, 211 W. Va. 34, 560 S.E.2d 509 (2002); Woodrum v. Johnson, 210 W. Va. 762, 559 S.E.2d 908 (2001); Syl. Pt. 7, Hager v. Marshall, 202 W. Va. 577, 505 S.E.2d 640 (1998); Syl. Pts. 5-6, Dunn v. Kanawha County Bd. of Educ., 194 W. Va. 40, 459 S.E.2d 151 (1995); Syl. Pt. 2, Hill v. Joseph T. Ryerson & Son, Inc., 165 W. Va. 22, 268 S.E.2d 296 (1980). Here, without the Settling Defendants' actions in the selection of materials and the design and construction of the condominium complex, Schoolhouse would have no liability in this suit. An examination of the allegations of the Amended Complaint reveals that all of the alleged liability of Schoolhouse stems directly from the actions of the Settling Defendants and not any independent actions of Schoolhouse. Without the claims for defective construction (termed negligence in the Amended Complaint), the causes of action asserted against Schoolhouse would not have arisen because Schoolhouse could not have breached any duties, made any misrepresentations, or "conspired" to sell allegedly poorly-designed and poorly-constructed units and common areas.

A. The claims contained in Counts I, II, and IV of the Complaint are subject to implied indemnity because all claims could have arisen solely as a result of fault on the part of the Settling Defendants due to the Settling Defendants' defective design, construction, or materials.

The Respondents first rely upon the labeling by the Plaintiffs of Counts I, II, and IV of the Complaint in their assertion that such claims are not subject to implied indemnity. Resp'ts Brief 2. Regardless of labeling, all of those claims rely upon some type of defect in the construction of the common elements, limited common elements, or the condominium units.

Count I asserts repeatedly that “[t]he common elements, limited common elements, and condominium units . . . were not suitable for residential and recreational use in and around Snowshoe, West Virginia.” A.R. 9-10. The Settling Defendants, in some combination thereof, were responsible for providing Schoolhouse and, by extension, the Plaintiffs, with portions of the complex that were suitable for residential and recreational use. At its heart, Count I is asserting that the Plaintiffs were not provided with a properly constructed complex and such claims are necessarily based upon a defect in construction and/or design. Therefore, any liability related to a defect in construction could (for purposes of a motion to dismiss) be traced back to the fault of one or more of the Settling Defendants.

Count II includes even more specific claims of defective workmanship that could be traced back to the Settling Defendants. See A.R. 10-11. The Plaintiffs in Count II assert that the complex was “not free from defective materials, constructed in accordance with applicable law, according to sound engineering and construction standards and in a workmanlike manner.” A.R. 10, ¶ 76-77. These claims relate to the alleged defective design and construction and low-quality building materials. Schoolhouse did not participate in providing such defective design and construction or low-quality building materials; the Settling Defendants did. Therefore, once again, the Settling Defendants’ alleged fault is the basis for Count II.

Count IV relies upon Schoolhouse's duty to ensure "that the common elements, limited common elements, and condominium units were suitable for the ordinary uses of real estate of the type contracted for and that the improvements were free from defective materials, constructed in accordance with applicable law, according to sound engineering and construction standards in a workmanlike manner." A.R. 11, ¶ 87. In short, the Plaintiffs are asserting that Schoolhouse owed them a duty to provide them with a properly constructed complex and ensure that the complex was free from defective design, construction, and materials. Any failure to provide a properly constructed complex or the provision of a complex that had defective design, construction, and materials would have come as a result of actions (or inactions) by one or more of the Settling Defendants. Schoolhouse could not have acted negligently unless the Settling Defendants provided them with a product that did not meet the expectations of the Plaintiffs, or, for that matter, Schoolhouse. Therefore, once again, the claims in Count IV relate back to the conduct of the Settling Defendants and bring their fault into play and subject to Schoolhouse's claim for implied indemnification.

B. The claims contained in Counts III, IX, and X of the Complaint are subject to implied indemnity because all of those claims rely upon underlying allegations of defective design, construction, or materials, thus invoking the sole fault of the Settling Defendants.

The Respondents next rely upon the assertion that the allegations contained in Counts III, IX, and X "are mutually exclusive between Schoolhouse and the Settling Defendant." Resp'ts Brief 2. As with Counts I, II, and IV, the claims in those counts do not arise without some fault on the part of one or more of the Settling Defendants.

Count III of the Complaint relies upon Schoolhouse's breach of an alleged express warranty that the common elements, limited common elements, and condominium units were luxury or

premium properties. A.R. 11. Such allegation focuses on the quality of the complex and whether it was “luxurious” or “premium.” *Id.* The focus on quality once again brings the issue of defective design, construction, and materials into the forefront. If Schoolhouse failed to deliver a “luxury” or “premium” product, such failure could have solely been a result caused by the fault of one or more of the Settling Defendants.

Count IX of the Complaint relies upon the same alleged representations of “luxury” and “premium” properties. A.R. 15. At the same time, such claims are combined with the assertion that “the common elements, limited common elements, and condominium units were poorly designed and constructed.” A.R. 15, ¶ 115. The same types of assertions are contained in Count X, except the alleged misrepresentations of “luxury” and “premium” were merely negligent. A.R. 16. In both Counts, no evidence has been produced to establish that Schoolhouse knew or should have known of the alleged defective design and construction. At the same time, such alleged fraud or misrepresentations could not have occurred but for the alleged defective design, construction, or materials. That raises the issue of the Settling Defendants’ actions and their fault in relation to the alleged defects.

C. Pursuant to Rule 12(b)(6), Schoolhouse’s cross-claim raises sufficient allegations against the Settling Defendants to withstand a motion to dismiss.

In reviewing a motion to dismiss, a trial court must appraise the sufficiency of a cause of action under a Rule 12(b)(6) motion to determine whether it is beyond doubt that the complainant can prove no set of facts in support of the claim that would entitle the complainant to relief. Syl. Pt. 3, Chapman v. Kane Transfer Co., 160 W. Va. 530, 236 S.E.2d 207 (1977). To the extent a court considers matters outside the pleadings in ruling on a motion to dismiss, such motion may be

converted to a Rule 56 motion for summary judgment. *Id.* Of course, with a Rule 56 motion for summary judgment, the trial court must determine whether there are any genuine issues of material fact. W. Va. R. Civ. P., R. 56(b). If so, the questions of fact must be presented to a jury for resolution.

Taking Schoolhouse's cross-claim, on its face, it is clear that Schoolhouse has alleged enough to overcome the Rule 12(b)(6) standard because Schoolhouse denies any and all wrongdoing and alleges that, if it is liable, any damages were the result of the negligence or wrongful conduct of other parties. A.R. 41. As explained *supra* in sections A and B, such allegation is entirely reasonable given that all of the claims against Schoolhouse fail if there is no defective design, construction, or materials provided or performed by one or more of the Settling Defendants. Further, any liability on the part of Schoolhouse to the Plaintiffs could have arisen based solely upon the fault of one or more of the Settling Defendants.

Of course, the design and construction of the complex involved many entities, including the Settling Defendants. It is possible that one or more of the Settling Defendants performed their duties without fault and provided their portion of the complex to Schoolhouse and thus the Plaintiffs in a condition that was suitable for residential and recreational use. But that is an issue for summary judgment: to determine if there is actually a question of fact regarding whether certain of the Settling Defendants performed their duties without fault.

At the same time, the Respondents have asserted that Schoolhouse alone is liable and responsible for the allegations contained in several of the counts. Resp'ts Brief 1-2. Once again, Schoolhouse has denied any and all wrongdoing and asserted that any liability arose as a result of the actions of others. That satisfies the Rule 12(b)(6) standard. If the Plaintiff or Settling

Defendants had wished to overcome this standard and convert the motion into a Rule 56 motion, they would have needed to prove that there is no genuine issue of material fact that Schoolhouse has independent liability for the damages alleged. Simply put, the Plaintiff and Settling Defendants cannot prove there is no genuine issue simply on averments alone. Finally, although there are certain causes of action solely asserted against Schoolhouse, the sole basis of those causes of action is the Settling Defendants' misconduct and negligence, not that of Schoolhouse.

The Circuit Court's ruling gave the Plaintiff the benefit of the Rule 12(b)(6) standard without also affording Schoolhouse the benefit of that same standard. This is reversible error. Schoolhouse has asserted a cause of action for implied indemnity that is based on theories that it is not at fault, and any fault it may have is solely the result of others' actions. Schoolhouse is entitled to the benefit of the Rule 12(b)(6) standard and the Rule 56 standard. The Plaintiff and Settling Defendants have not met their burdens under either standard. Thus, Schoolhouse is entitled to continue pursuing its claims of implied indemnity against the Settling Defendants and present evidence in support of its allegations that the Settling Defendants are entirely at fault for the Plaintiff's alleged damages.

D. The Circuit Court's Order does not dismiss any claims that Schoolhouse has against the Settling Defendants.

In their response, the Respondents set forth language from the Circuit Court's dismissal order. 3. Such language does not create a dismissal of Schoolhouse's claims against the Settling Defendants. First and foremost, Schoolhouse and the Settling Defendants have not entered into any agreement resolving Schoolhouse's cross-claims. Second, Schoolhouse's claims of implied indemnity are separate and apart from the Plaintiffs' claims as they rely upon the Settling Defendants' sole cause of any liability attributed to Schoolhouse.

It appears to Schoolhouse that the Respondents are asserting that any of the claims made by the Plaintiffs against the Settling Defendants related to defective design, construction, or materials have been dismissed. If that is the interpretation of the settlement agreement and dismissal order, then Schoolhouse asserts that all claims against it are necessarily dismissed. This is because, as explained *supra*, all claims against it arise from defective design, construction, or materials. Such claims are all derivative of the actions of the Settling Defendants. Therefore, if all claims against the Settling Defendants are dismissed, including all derivative claims, then all claims against Schoolhouse are also dismissed.

The Settling Defendants have argued that the Plaintiffs have asserted independent claims against Schoolhouse and Schoolhouse disagrees with that assertion. Schoolhouse admits that it has not settled and the Plaintiffs still have claims against it, although it disagrees with such claims. The Plaintiffs can either assert such claims and Schoolhouse can assert claims for implied indemnity against the Settling Defendants, or in the alternative, all claims can be dismissed against Schoolhouse as a result of the settlement. To allow the claims to move forward against Schoolhouse and deprive it of implied indemnity when all such claims are derivative and arise from the actions of the Settling Defendants would change the law of implied indemnity and, therefore, such result should be avoided.

CONCLUSION

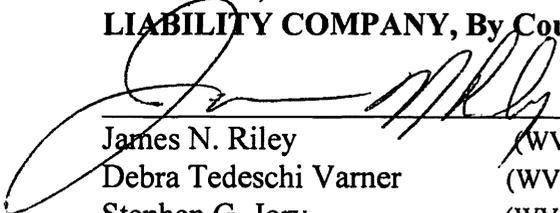
The Circuit Court of Pocahontas County, West Virginia, in dismissing Schoolhouse's claims for implied indemnification against the Settling Defendants, took as true the Plaintiff's allegations and proffer of independent negligence and liability on the part of Schoolhouse, without affording Schoolhouse the same benefit. In determining whether to dismiss Schoolhouse's claims, the benefit

of the doubt and the broad Rule 12(b)(6) and 56 standards should have been provided to Schoolhouse instead. Extinguishing Schoolhouse's ability to prove it is without fault and seek implied indemnification is contrary to the common law and is reversible error.

WHEREFORE, based upon all the foregoing reasons, the Petitioner, Schoolhouse Limited Liability Company, respectfully requests this Honorable Court enter an Order granting its Petition for Appeal and enter an Order reversing the circuit court's decision dismissing its cross-claims for indemnification against the Settling Defendants.

Respectfully submitted this 15th day of January, 2013.

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a/k/a ReMax Old Spruce Properties, a West Virginia limited
liability company,

Defendants below, Respondents herein.

FROM THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA
THE HONORABLE JAMES A. ROWE

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2014, I served the foregoing ***“REPLY TO RESPONDENTS’ BRIEF”*** upon counsel of record, by depositing true copies in the U.S. Mail, postage pre-paid as listed below:

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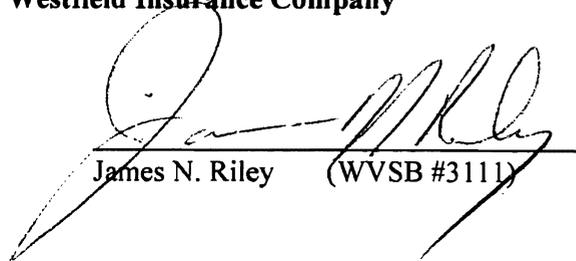
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