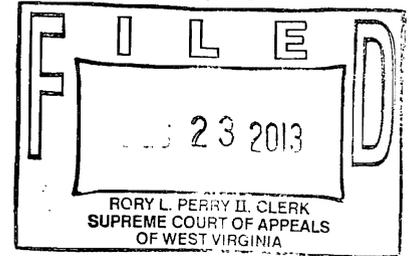


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-0812



SCHOOLHOUSE LIMITED LIABILITY COMPANY, a West Virginia limited liability company,
Defendant Below, Petitioner

v.)

CREEKSIDE OWNERS ASSOCIATION, a West Virginia not-for-profit homeowners association, individually and on behalf of two (2) or more unit owners,
Plaintiff Below, Respondent

Appeal from a final order of
the Circuit Court of
Pocahontas County
(12-C-33(R))

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 ASHPALT, INC., a West Virginia corporation; RELIABLE ROOFING COMPANY, a West Virginia corporation; D'JERICO, LLC, a West Virginia limited liability company; and OLD SPRUCE REALTY AT SNOWSHOE, LLC, a/k/a ReMax Old Spruce Properties, a West Virginia limited liability company,
Defendants Below, Respondents.

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STATEMENT OF THE CASE

The Statement of the Case as set forth by Schoolhouse, LLC (“Schoolhouse”) is largely accurate. On May 10, 2013, the Plaintiff below/Respondent, Creekside Owners Association, and the Defendants below/Respondents, Wil-Ken, Inc.; Builders Group, Inc.; BG Millwork, Inc.; Smith Backhoe and Dozer Service, LLC; R.E.H., Inc.; Davis Electrical Service, Inc.; Cooper Asphalt, Inc.; Reliable Roofing Company; D’Jerico LLC; and Old Spruce Realty at Snowshoe, LLC, a/k/a ReMax Old Spruce Properties (hereafter referred to jointly as “Settling Parties” or “Settling Defendants” when appropriate) entered into a comprehensive settlement agreement, seeking to end litigation among them. Under the terms of the agreement, subject to certain conditions and limitations detailed in full within the agreement, the settling parties agreed, in pertinent part, that (1) the Settling Defendants or their insurers will pay to the Plaintiff the sum of \$600,000.00; (2) the Settling Defendants will be dismissed from the above captioned civil action, with prejudice, with each party bearing its own costs and attorneys’ fees; (3) all cross-claims among the Settling Defendants shall be dismissed, with prejudice, with each party bearing its own costs and attorneys’ fees; and (4) the parties stipulate that this is a good faith settlement. (A.R. 119-128.)

The non-settling Defendants, Schoolhouse, LLC; Elkins Builders Supply Co., LLC; Minighini Construction, LLC; Southern States Marlinton Cooperative, Inc.; Randy King d/b/a Mountainartisan Masonry; and BK Construction, were not parties to the agreement. (A.R. 106.) Minighini Construction, LLC, and BK Construction had not noticed an appearance, and Elkins Builders Supply Co., LLC, was voluntarily dismissed by Plaintiff. (A.R. 106.) Schoolhouse, LLC; Mountainartisan Masonry; and Southern States Marlinton Cooperative, Inc., participated in the voluntary mediation but did not settle. (A.R. 106.)

The inaccuracies in Schoolhouse's Statement of the Case, however, are determinative of the issue on appeal with this Court. Schoolhouse's interpretation of the Plaintiff's claims as being wholly derivative of the allegations made against the Settling Defendants is self-serving and has not been given careful consideration. Contrary to Schoolhouse's assertions, the Amended Complaint is clear on its face that several Counts are asserted solely against Schoolhouse. (A.R. 9-12) Specifically, the Plaintiff labeled the following Counts as follows:

COUNT I (Breach of Contract against Schoolhouse). (A.R. 9-10 at ¶¶ 70-74.)

COUNT II (Breach of Implied Warranty of Quality against Schoolhouse). (A.R. 10-11 at ¶¶ 75-79.)

COUNT IV (Negligent Development against Schoolhouse). (A.R. 11-12 at ¶¶ 85-89.)

Furthermore, additional claims were made against Schoolhouse that were clearly separate and independent from similar claims made against a Settling Defendant. For example, the following Counts are clear on their face as being inclusive of Schoolhouse and a Settling Defendant, but the allegations are mutually exclusive between Schoolhouse and the Settling Defendant:

COUNT III (Breach of Express Warranty against Schoolhouse and Spruce). (A.R. 11 at ¶¶ 80-84.)

COUNT IX (Fraud and Misrepresentation against Schoolhouse and Spruce). (A.R. 15-16 at ¶¶ 110-118.)

COUNT X (Negligent Misrepresentation against Schoolhouse and Spruce). (A.R. 16 at ¶¶ 119-125.)

Additionally, in its Reply to Schoolhouse's Response to the Joint Motion giving rise to this appeal, the Plaintiff reiterated its contentions that Schoolhouse performed actions and made decisions that subject it to liability that is entirely independent of and unrelated to the negligence

claims raised against the Settling Defendants. (A.R. 93-101.)

Finally, the Plaintiff has stipulated, and the Circuit Court has ordered, that “all claims for vicarious liability for work performed by or products supplied by the Settling Defendants that have been or could have been made by the Plaintiff against any Defendant in this case are hereby **DISMISSED WITH PREJUDICE.**” (A.R. 134-135 (emphasis in original).)

SUMMARY OF ARGUMENT

This case presents separate, independent causes of action against Schoolhouse. Many of the Plaintiff’s claims are based upon Schoolhouse’s own actions and are not derivative of the actions of the Settling Defendants. Schoolhouse’s appeal appears to rely upon the argument that the claims against it in this case are solely derivative of work performed by others and that, as a result, its implied indemnity cross-claims against the Settling Defendants survive the good faith settlement. Schoolhouse’s argument must fail because the Plaintiff has asserted claims against Schoolhouse that are entirely independent of any claims related to work performed by the Settling Defendants. Schoolhouse’s argument also must fail because all claims for vicarious liability have been dismissed, and the non-settling Defendants, including Schoolhouse, are no longer subject to such vicarious liability.

Therefore, because the Plaintiff has clearly made allegations against Schoolhouse that are distinct from separate allegations against the Settling Defendants, and because of the dismissal of all vicarious liability claims against Schoolhouse relating to the work of the Settling Defendants, Schoolhouse cannot succeed on its implied indemnity claim. As a result, the Circuit Court made no error in finding that Schoolhouse’s potential liability, if any, must necessarily be predicated upon its own fault, and this Court should affirm the decision below.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents concur with the Petitioner that oral argument under W. Va. Rev. R.A.P. 18(a) is not necessary.

ARGUMENT

Standard of Review

This Court reviews an order granting a motion to dismiss a complaint 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); *Richardson v. Kennedy*, 197 W. Va. 326, 331, 475 S.E.2d 418, 423 (1996).

The Settlement Agreement Extinguishes Cross-Claims for Implied Indemnity.

The executed agreement extinguishes cross-claims pled by non-settling Defendants for indemnification (and/or contribution)¹ because the claims pled by the Plaintiff are based, not on a theory of product liability or strict liability, but rather, on each Defendant's independent fault. This Court has explained that “[i]mplied indemnity is based upon principles of equity and restitution and one must be without fault to obtain implied indemnity.” *Hager v. Marshall*, 202 W. Va. 577, 585, 505 S.E.2d 640, 648 (1998) (citing Syl. Pt. 2, *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 585 288 S.E.2d 511 (1982)); *see also Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 268 S.E.2d 296 (1980).

In *Hager*, this Court determined that a good faith settlement between a plaintiff and manufacturing defendant responsible for a defective product will not extinguish the right of a non-settling defendant to seek implied indemnification when the liability of the non-settling defendant is predicated not on its own independent fault or negligence, but on a theory of strict liability. *Hager*, 202 W. Va. at 585, 505 S.E.2d at 648. This Court further reiterated that, in

¹ Schoolhouse appears to have limited its issue on appeal to the dismissal of its implied indemnity claim.

multi-party civil actions, as in this case, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault. *See* Syl. Pt. 7, *Hager*, 202 W. Va. 577, 505 S.E.2d 640. However, a good faith settlement between parties in a multi-party product liability lawsuit will not extinguish the right of a non-settling defendant to seek implied indemnification when its liability is based upon strict liability and not independent fault. *See Dunn v. Kanawha County Bd. Of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995) (product liability case with strict liability implications). The United States District Court for the Southern District of West Virginia, in applying *Dunn*, specifically addressed this distinction by clarifying that

Dunn is emphatic in its holding that implied indemnification is a remedy available only to non-settling parties against settling parties when the non-settling parties are subject to strict liability. Thus, . . . , the non-settling defendants, may pursue an implied indemnity claim against [the settling defendants] only if the non-settling defendants' potential liability to [the settling defendants] arose from a theory of strict liability.

CSX Transp. Inc. v. PKV Ltd. P'ship, 906 F. Supp. 339, 341 (S.D. W. Va. 1995).

In the present case, Schoolhouse appears to concede that the underlying settlement was made in good faith. Furthermore, the liability of the non-settling Defendants is not predicated on product liability or strict liability. The Plaintiff has pled six causes of actions against Schoolhouse that are separate from the causes of action against the Settling Defendants, and none of those six is based upon product liability or strict liability. (A.R. 9-12 at ¶¶ 70-89, A.R. 15-16 at ¶¶ 110-125.) Thus, because the settlement between the Plaintiff and the Settling Defendants was made in good faith, and because there are no claims in this case based upon product liability or strict liability, Schoolhouse's right to seek implied indemnity against the Settling Defendants is extinguished unless it is without fault. *See* Syl. Pt. 7, *Hager*, 202 W. Va.

at 577 (1998). If Schoolhouse is found liable for any of the actions alleged against it, it cannot be indemnified because Schoolhouse would not be without fault. If, however, Schoolhouse is found to be without fault, there would be nothing for the Settling Defendants to indemnify. As a result, allowing Schoolhouse to maintain its implied indemnity claims would serve no purpose other than to prejudice the Settling Defendants that have already bought their peace from this case.

Schoolhouse ignores the Plaintiff's allegations that Schoolhouse, as a condominium developer and declarant, breached its own separate duties. (A.R. 9-12 at ¶¶ 70-89, A.R. 15-16 at ¶¶ 110-125.) In fact, Schoolhouse admitted in its Answer that it is the developer and the declarant of the Creekside Villas. (A.R. 27 at ¶ 8, A.R. 2 at ¶ 8.) As the developer and declarant of the property at issue, Schoolhouse, as a matter of law, may be held legally responsible for all aspects of the development of the Creekside Villas condominium complex. Since there are separately alleged causes of action against Schoolhouse based upon its own breach of duties, in addition to allegations of fraud, misrepresentation, and negligence, Schoolhouse's potential liability does not derive from the fault of the Settling Defendants. (A.R. 9-12 at ¶¶ 70-89, A.R. 15-16 at ¶¶ 110-125.) Rather, the potential liability arises from Schoolhouse's breach of its own separate duty of care and its own misrepresentations and fraud, as alleged by the Plaintiff. (*See id.*; A.R. 99.)

Finally, Schoolhouse incorrectly relies upon this Court's decision in *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450, 693 S.E.2d 815 (2010). The *Ruckdeschel* decision was predicated upon the *Harvest Capital* elements of an implied indemnity claim in West Virginia. *Ruckdeschel*, 225 W. Va. at 458, 693 S.E.2d at 823. As explained by Schoolhouse, those elements include

(1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.

Syl. Pt. 4, *Harvest Capital v. West Virginia Dept. of Energy*, 211 W. Va. 34, 560 S.E.2d 509 (2002). In *Ruckdeschel*, this Court held that, because there was no judgment against any of the defendants requiring any defendant to pay damages to the plaintiff, the facts were such that the requisite elements set forth in Syllabus Point 4 of *Harvest Capital* could not be met. *Ruckdeschel*, 225 W. Va. at 458, 693 S.E.2d at 823.

Unlike in this case, all of the defendants in *Ruckdeschel* had entered into good faith settlements with the plaintiffs and all of the plaintiffs' claims against the defendants were dismissed prior to the appeal. *Id.* The facts in *Ruckdeschel* are inapposite to the facts in this case because the Plaintiff's independent claims against Schoolhouse remain. As a result, Schoolhouse's reliance upon *Ruckdeschel* is misplaced.

The Plaintiff has asserted independent claims against Schoolhouse that are not derivative of the work performed by the Settling Defendants. The Plaintiff's Amended Complaint does not assert any claims against Schoolhouse predicated upon imputed, strict, or vicarious liability of Schoolhouse for the actions or omissions of the Settling Defendants. Even if any vicarious liability claims could have been implied from the allegations in the Amended Complaint, those claims have been dismissed with prejudice. (A.R. 134-135). Therefore, Schoolhouse's potential liability, if any, must necessarily be predicated upon its own fault due to its own actions or omissions.

CONCLUSION

As detailed above, the Circuit Court did not err in holding that the non-settling Defendants are precluded from asserting a claim for indemnity or contribution against the Settling Defendants, and the Circuit Court's order granting should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, true and accurate copies of the foregoing **Respondents' Brief** were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

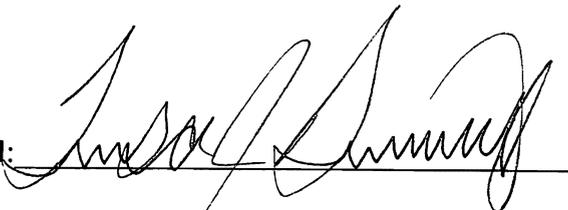
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