STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Ray and Bette Kesling
d/b/a Lakeview Plaza Strip Mall,
Third-Party Plaintiffs Below, Petitioners

vs) **No. 11-0672** (Putnam County 09-C-536)

Sonshine, LLC d/b/a Goin' Postal,
Third-Party Defendant Below, Respondent

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Putnam County, wherein Petitioners Ray and Bette Kesling d/b/a Lakeview Plaza Strip Mall's motion for summary judgment was denied and the circuit court granted Respondent Sonshine, LLC d/b/a Goin' Postal's motion for summary judgment. This appeal was timely perfected by Petitioners' counsel Michael Markins, with Petitioners Kesling d/b/a Lakeview Plaza Strip Mall's appendix and supplemental appendix accompanying the petition. Respondent Sonshine, LLC d/b/a Goin' Postal, by its counsel Kevin Davis, filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

1. Facts

The plaintiff below, Debra Stover, formerly worked for Respondent Sonshine, LLC at its business, Goin' Postal, located at the Lakeview Plaza Strip Mall. Petitioners Ray and Bette Kesling d/b/a Lakeview Plaza Strip Mall, own this strip mall and lease suites of this strip mall to different tenants, including Respondent Sonshine, LLC. This case was initiated by Debra Stover after she slipped and fell on the snow-covered sidewalk at the Lakeview Plaza Strip Mall on January 24, 2008. That morning, Ms. Stover had arrived to work her shift at Goin' Postal. During her shift, she was sent outside to collect mail. While doing so, Ms. Stover decided to take a break and go to her car to smoke a cigarette and give her husband a call. When Ms. Stover left her car to return to work, she slipped and fell on the sidewalk at the corner of another business in the plaza and injured her ankle. At all times during these events, she remained on her work shift for Goin' Postal. From her injuries,

the plaintiff sought, and received, Workers' Compensation benefits. In addition, she filed suit against Petitioners Kesling, alleging negligent maintenance of the subject premises in allowing ice and snow to accumulate. Subsequently, Petitioners Kesling filed a third-party complaint against Respondent Sonshine, LLC d/b/a Goin' Postal. Ms. Stover and the petitioners settled their claims separately and thereafter, Petitioners Kesling and Respondent Sonshine, LLC filed cross-motions for summary judgment against each other. Petitioners Kesling argued that Respondent Sonshine, LLC owed indemnity to them, pursuant to their Lease Agreement. The indemnity clause, as provided in Paragraph Seven of the Lease Agreement, reads, in part:

> The Tenant shall indemnify and save harmless the Landlord from any and all liability, penalties, damages, expenses and judgments by reason of any injury or claim of injury to person or property, of any nature and howsoever caused, arising out of the use, occupation and control of the demised premises, including those resulting from any work in connection with any alterations or changes.

Subsequently at issue was whether where the plaintiff fell was considered part of Respondent Sonshine, LLC's "demised premises" to trigger the indemnity clause. Respondent Sonshine, LLC argued that its "demised premises" only included the four walls of its Suite Number Two that it leased from the petitioners and therefore, the sidewalk where the plaintiff had her injury was not part of the demised premises and did not trigger the indemnity clause. In support, Respondent Sonshine raised that the second introductory paragraph of the Lease Agreement reads, in part: "Landlord hereby leases to Tenant and Tenant hereby leases from Landlord Suite #2 [Number Two] @ [at] Lakeview Plaza together with the right to use in common with others having the right to use parking facilities, subject to the future right of the Landlord to designate parking spaces." It argued that although the Lease Agreement was silent as to other common areas, it clearly did not convey to the respondent areas outside of its leased space. Specifically, the second part of Paragraph Four reads:

> Landlord has not conveyed to Tenant any rights in or to the outer side of the outside walls of the building of which the demised premises form a part, and Tenant shall not display or erect any lettering, signs, advertisements, awnings, or other projections, or do any boring, or cutting, or stringing of wires in or on the demised premises, or in or on the building of which they form a part, or make any alterations, decorations, additions, or improvements in or to the demised premises or in or to the building of which they form a part, without prior written consent of the Landlord, and then at Tenant's sole expense.

The respondent further argued that the parties were fully aware that the petitioners were responsible for maintaining all of the areas on the premises for the use and enjoyment of all the tenants of the strip mall. In particular, the petitioners contracted with a Charlie Johnson to take care of snow and ice removal. Mr. Johnson, in turn, hired outside contractors to take care of such maintenance. After the circuit court held a hearing on these motions, it issued a written ruling granting summary judgment to Respondent Sonshine, LLC, finding that because the sidewalk where Ms. Stover

sustained her injury was a common area and not of the demised premises, the indemnification clause did not apply. It is from this order that the petitioners appeal.

2. Discussion

"We have held that '[a] circuit court's entry of summary judgment is reviewed *de novo.'* Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)." *Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 244, 557 S.E.2d 294, 298 (2001). "'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syl. Pt. 1, *Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 557 S.E.2d 294 (2001).

Petitioners Kesling argue two assignments of error. The petitioners first argue that the circuit court erroneously relied on the Keslings' duty to maintain common areas and as such, it erred in construing the language of the parties' agreement, rather than applying the language of the agreement. They argue that the terms of the Lease Agreement are clear and the Keslings' responsibility and/or control over the common areas is irrelevant to the terms of the indemnity agreement. In support, they cite holdings this Court has made pertaining to contractual language and indemnity agreements. "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969) (citing *Borderland Coal Co. v. Norfolk & W. Ry. Co.*, 87 W.Va. 339, 104 S.E.2d 624 (1920)). They further argue that "'[c]ontracts of indemnity against one's own negligence do not contravene public policy and are valid in West Virginia.' *Borderland Coal Co. V. Norfolk & W. Ry. Co.*, 87 W.Va. 339, 104 S.E.2d 624 [1920]." *Sellers v. Owens-Illinois Glass Co.*, 156 W.Va. 87, 92, 191 S.E.2d 166, 169 (1972). It is clear from the agreement that Respondent Sonshine, LLC is to indemnify the petitioners for any injury "arising out of the use, occupation and control of the demised premises," regardless of fault or responsibility. The plaintiff's injury arose from her work for the respondent because she was injured while she was walking back to its business location after completing an assigned work task and an authorized work break. But for the plaintiff's status as an employee of the respondent, she would not have been on the property and would not have been injured. In addition, the petitioners also argue that the indemnity clause is triggered because the respondent exercised some degree of control over the common areas. In support, the petitioners cite to *Andrick v. The Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992). In that case, this Court held, at Syllabus Point Three, as follows:

> Where the operator of a business obtains the right for its customers to park in an adjoining lot owned by another and invites them to do so, the operator has a duty of reasonable care to protect its invitees from defective or dangerous conditions existing in the parking area which the operator knows or reasonably should know exist.

The petitioners argue that the instant case is similar to *Andrick* because it invited individuals to use the parking lot in furtherance of its interests. Accordingly, the petitioners argue that because the

circuit court based its decision instead on which party had the responsibility to maintain the common area, it construed the agreement rather than applied its language, and because Respondent Sonshine, LLC exercised some control over the common areas, the circuit court erred in granting the respondent summary judgment.

Respondent Sonshine, LLC responds, arguing that the circuit court relied upon well-established case law pertaining to contracts of indemnity. In determining the rights and liabilities of the parties, the Court's primary purpose is to ascertain and give effect to the intentions of the parties. *Dawson v. Norfolk & W. Ry. Co.*, 197 W.Va. 10, 17, 475 S.E.2d 10, 17 (1996) (citing *VanKirk v. Constr. Co.*, 195 W.Va. 714, 720, 466 S.E.2d 782, 788 (1995)). Rules governing the interpretation and validity of contracts generally apply to contracts of indemnity. *Sellers v. Owens-Illinois Glass Co.*, 156 W.Va. 87, 92, 191 S.E.2d 166, 169 (1972). It is clear in the instant case that the parties intended for the respondent to be responsible for incidents occurring within its premises and only its premises. Further, both parties were fully aware that the petitioners would maintain all common areas for the use and enjoyment of all tenants, indicated by the petitioners hiring Mr. Johnson as the landlord and manager to take care of the premises for the tenants. Mr. Johnson also hired outside contractors to take care of snow and ice removal.

The Court finds that at issue is not the degree of control, if any, either party exercised over the plaintiff when she had her injury or over the physical area where she had her injury. Rather simply, the crux of the matter here is what the language of the indemnification clause reads and intends. The case here involves an express indemnity contract. Accordingly, an analysis of "control" under *Andrick v. The Town of Buckhannon*, *supra*, is unnecessary. The Court has held as follows:

> There are two basic types of indemnity: express indemnity, based on a written agreement, and implied indemnity, arising out of the relationship between the parties. One of the fundamental distinctions between express indemnity and implied indemnity is that an express indemnity agreement can provide the person having the benefit of the agreement, the indemnitee, indemnification even though the indemnitee is at fault. Such result is allowed because express indemnity agreements are based on contract principles. Courts have enforced indemnity contract rights so long as they are not unlawful.

VanKirk v. Green Constr. Co., 195 W.Va. 714, 721, 466 S.E.2d 782, 789 n.12 (1995) (quoting Syllabus Point 1, *Valloric v. Dravo Corp.*, 178 W.Va. 14, 357 S.E.2d 207 (1987)). The Court finds that the circuit court did not err in applying the indemnity language of the parties' Lease Agreement and agrees that the parties' Lease Agreement clearly provides that Respondent Sonshine, LLC's "demised premises" does not extend past the walls of its leased Suite Number Two. In finding such, the Court turns to language provided in Paragraph Four and in Paragraph Two. Paragraph Four's specifications of what the respondent may or may not do to the "demised premises" itself and the "*building* of which the demised premises form a part" indicate that the two are separate. If the parties intended for the "demised premises" to include the building of which it is a part, this delineation in the agreement would not have been necessary. Paragraph Two of the parties' Lease

Agreement confirms that the demised premises only contains Suite Number Two. Paragraph Two of the agreement reads: "Tenant shall use and occupy the demised premises for a [p]ostal [p]ackaging [b]usiness and no other purpose." To agree with the petitioners that the "demised premises" includes the property and areas outside of Goin' Postal would preclude other businesses from using these areas because according to Paragraph Two, the demised premises can be used for "no other purpose" than for a postal packaging business. Accordingly, the areas that lay outside of Goin' Postal's four walls are all common areas for the Plaza's tenants and their tenants' employees and patrons or, they are, at least, not areas included in the respondent's "demised premises."

With this understanding, the Court turns to the indemnification clause at issue. The clause specifies that the tenant shall indemnify the landlord from any claims of injury, howsoever caused, that arise "out of the use, occupation and control of the *demised premises*, including those resulting from any work in connection with any alterations or changes." The clause does not contain a provision that the tenant shall also indemnify the landlord from any claims of injury that arise out of the *building* of which the demised premises form a part. Nor does the clause refer to claims that arise from actions that occur outside of the demised premises's physical area, but in connection to the tenant's work. Deposition testimony in the appendix provides that the plaintiff's injury occurred on the sidewalk at the corner of the strip mall, beside another business. It did not occur inside the premises of Goin' Postal, nor did the plaintiff's injury arise out of her use, occupation, or control of Goin' Postal's physical area. Likewise, the plaintiff did not slip and fall from any work in connection with any alteration or changes to Goin' Postal's demised premises. Accordingly, the plaintiff's injury did not occur in relation to the specified demised premises of the indemnification clause. The circuit court did not err in applying the Lease Agreement's language. With regard to the circuit court's reasoning of the petitioners' responsibility to maintain the snow and ice removal, the Court finds no error because the circuit court also based its ruling on an analysis of the boundaries of the respondent's "demised premises" and whether the plaintiff's injury occurred on such to activate the indemnification clause.

Petitioners' second argument is that the circuit court erred in concluding that the common areas were not part of the demised premises. In support, they raise that "demise" is defined in Black's Law Dictionary as the "conveyance of an estate." As such, the demised premises contains what the petitioners actually convey to an entity in a lease. The respondent conceded that the use of the parking lot and other common areas was conveyed to them by the petitioners in their Lease Agreement. They note that the lease clearly stated that "Suite #2 [Number Two] @ [at] Lakeview Plaza together with the right to use parking facilities, subject to the future right of landlord to designate parking spaces." Accordingly, the petitioners argue that the circuit court erred in finding that the location in which the plaintiff's injuries occurred was not within the demised premises.

Respondent Sonshine, LLC responds, arguing that the circuit court properly determined that the plaintiff's accident did not occur on the demised premises and as such, the plaintiff's accident, and her subsequent settlement with the petitioners, did not trigger the indemnification provision of the parties' Lease Agreement. The Lease Agreement does not extend to all of the properties situated at Lakeview Plaza, but rather, the respondent is responsible for indemnification for issues arising

from the demised premises, i.e., Suite Number Two, including any claims from the use, occupation, and control of this area. The plaintiff's accident did not occur on the demised premises but rather, on property not included in the parties' Lease Agreement. Further, the respondent did not have control or responsibility for the area of the plaintiff's accident. Accordingly, the indemnification clause was inapplicable to the respondent here and summary judgment was proper.

As discussed, the crux of the issues on this appeal is not what degree of control either of the parties had over the plaintiff or over the area where the plaintiff had her injury, but rather, what intentions the language of the parties' Lease Agreement communicate and as such, what indemnification obligations are required of the respondent to the petitioners in this case. The petitioners themselves assert that the definition of "demise" is the "conveyance of an estate." As specified in Paragraph Four, the petitioners have "*not* conveyed to [the respondent] any rights in or to the outer side of the outside walls of the building of which the demised premises form a part . . . ." Again, the demised premises and the building of which they form a part are made separate and distinct from each other. The only instances for which the respondent is responsible for indemnity would be those that arise from injuries or other claims that occurred within the four walls of Suite Number Two or from any work related to alterations or changes made to this area. Petitioners note that the second introductory paragraph of the Lease Agreement conveys the parking lot, and other common areas, to the respondent. However, the petitioners omitted a portion of the sentence they quoted: The sentence of this paragraph in its entirety reads, "Landlord hereby leases to Tenant and Tenant hereby leases from Landlord Suite #2 [Number Two] [at] Lakeview Plaza *together with the right to use in common with others having the right to use parking facilities*, subject to the future right of the Landlord to designate parking spaces." The Court agrees with the respondent that the Lease Agreement's specification of the parking lot demonstrates an example of a common area permissible for use, rather than providing another part of the respondent's conveyed "demised premises." No other common areas are specified. However, the "demised premises" specifically exclude the "in[side] or . . . the outer side of the outside walls of the building of which the demised premises form a part," as reiterated several times in Paragraph Four. Therefore, the Court finds that the circuit court did not err in concluding that the plaintiff injured herself in a common area and that common areas were not a part of the demised premises of the indemnification clause.

3. Conclusion

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:
Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:
Justice Margaret L. Workman