IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY, MARYLAND,	*	
Plaintiff,	*	
vs.	*	Civil No. 408239
PARSONS BRINCKERHOFF, INC., *et al.*,	*	
Defendants.	*	
* * * * * * * *		
PARSONS BRINCKERHOFF, INC.,	*	
Cross Claim Plaintiff,	*	
vs.	*	
FACCHINA CONSTRUCTION CO., INC.,	*	
Cross Claim Defendant.	*	

ORDER

Plaintiffs, Montgomery County, Maryland ("the County") and the Washington Metropolitan Area Transit Authority ("WMATA") (collectively "the Plaintiffs") allege that they have suffered injuries and damages as a result of various acts of negligence committed in the design and construction of the Silver Spring Transit Center ("the Center"). Accordingly, Plaintiffs have sued the architects who designed and supervised the construction of the Center, Parsons Brinckerhoff, Inc. ("PB"), the general contractor, Foulger-Pratt Contracting, LLC ("FPC") and the Robert B. Balter Company ("Balter"). Balter was contracted by the Plaintiffs to conduct certain inspections and material testing during the construction phase.

FPC hired Facchina Construction Company, Inc. ("Facchina") as the primary concrete subcontractor for the project. Many of the Plaintiffs' complaints relate to the concrete work. Accordingly, FPC filed a third party claim against Facchina. Following Facchina's answer to the third party complaint, PB filed a cross-claim against Facchina for indemnity. PB claims tort indemnity alleging that any negligence on PB's part, if found to exist, is passive while Facchina's is active. Facchina now moves to dismiss PB's cross-claim.

Facchina argues that a claim for indemnity could only lie if the negligence of PB was passive and the negligence of Facchina was active. Based on the facts plead in the cross-claim and the underlying amended complaint, Facchina submits there is no set of facts upon which a jury could find PB's negligence was passive while Facchina's was active. PB opposes the motion. PB argues, considering the facts in a light most favorable to them, there is at least one instance, involving their supervisory duties, where a jury could find their negligence was passive and Facchina was active. Upon consideration of the arguments presented on the motion in open court and upon reviewing the authorities cited by both parties, the Court shall dismiss PB's cross-claim against Facchina for indemnity.

In their opposition, PB argues "Maryland appellate courts have recognized a right to implied indemnity where 'the indemnitor ... performed defective work upon land or buildings as a result of which both were liable to third persons, and the indemnitee, innocently or negligently, failed to discover the defect.'" (PB's Opp'n 6.) In support of that proposition, PB cites to a number of cases, *Franklin v. Morrison*, 350 Md. 144, 157 (1998) (quoting the Restatement (Second) of Torts § 886B); *Pulte Home Corp. v. Parex,* 403 Md. 267, 382 n.1 (2008) (quoting the Restatement (Second) of Torts § 886B); *Max's of Camden Yards v. A.C. Beverage*, 172 Md. App. 139, 148 (2006). As well, PB cites to *Bd. of Trustees of Baltimore*

Co. Comm. Colleges v. RTKL Associates, 80 Md. App. 45 (1999). The latter case is also relied upon by Facchina. The Court is persuaded from a review of the authorities cited that while PB's statement is technically accurate, PB fails to note that in each instance where the Court upheld a claim for indemnity, the Court found a pre-existing legal relationship between the tortfeasors. No such relationship exists between PB and Facchina in this case.

Franklin is a motor vehicle accident case involving multiple tortfeasors. The Defendant Franklin was the operator of a Chevrolet Blazer ("Blazer") that suddenly became disabled because, after servicing the vehicle, an employee of Jiffy Lube failed to replace a plug in the differential. This allowed transmission fluid to evaporate which, in turn, caused Franklin's Blazer to seize up while traveling westbound on Route 50 in Prince George's County. Franklin brought the vehicle to a stop in the middle lane of the three westbound lanes. He and his wife abandoned the Blazer and removed themselves to the shoulder of the road. *Franklin*, 350 Md. at 147-148.

Glenn Morrison (Plaintiff) brought a claim on behalf of his wife and their two children, who had been traveling behind Franklin in a Dodge minivan. When Franklin's vehicle came to a sudden stop, Mrs. Morrison was able to bring her minivan to a stop without striking the Franklin vehicle. However, a tractor-trailer driver traveling behind her was unable to stop his vehicle before running into the back of the Morrison van. Mrs. Morrison and the two children were killed when the van was pushed into Franklin's vehicle and caught fire. The Plaintiff sued Franklin, Jiffy Lube and National Carriers, Inc. ("Carriers"), the company that owned the tractor-trailer. *Id.* at 148-149. The Plaintiff settled with Jiffy Lube and Carriers before trial. The case went to trial on the Plaintiff's claims against Franklin for negligence and Franklin's cross-claim against Jiffy Lube for indemnity. At the close of all the

evidence, the trial court effectively granted Jiffy Lube's motion for judgment on Franklin's cross-claim. Following trial, the jury rendered a verdict in favor of the Plaintiffs against Franklin for $10,756,000, which was later reduced to $6,806,000 pursuant to Maryland's statutory cap. *Id.* at 149-152. Among the issues raised on appeal was the grant of judgment against Franklin on his claim for indemnity against Jiffy Lube.

The Court of Appeals affirmed the trial court concluding that Franklin's claim for indemnity was barred because Franklin was guilty of active negligence as a matter of law. In arriving at its decision, the Court (Rodowsky, J.) traced the history of the development of tort indemnity, as opposed to contractual indemnity, from its inception to the present. Originally, no claim of indemnity between joint tortfeasors was recognized, only a claim for contribution. However, Courts began to recognize that in certain extreme cases a tortfeasor whose negligence was only passive should have a claim for indemnity against a joint tortfeasor whose negligence was active. In *Franklin*, citing with approval the Supreme Court of Alaska in *Vertechs Corp. v. Reichold Chems, Inc.*, 661 P.2d 619 (Alaska 1983), the Court observed "... the earliest applications of tort indemnity were in favor of one whose liability was exclusively vicarious ...." *Id.* at 155. According to *Franklin*, the rationale underlying this right to tort indemnity was grounded in the concept of "...restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." *Id.* (quoting the Restatement (Second) of Torts § 886 cmt. c) (internal citation omitted).

The Court opined "... no single definition or rule of law identifies all instances in which one of two persons, who are liable in tort for the same legally cognizable harm will be able to totally shift the loss to the other party." *Id.* The Court further noted, citing to *Prosser*

and Keeton on the Law of Torts, that "[i]t is extremely difficult to state any general rule or principle about when indemnity will be allowed and when it will not." *Id.* (quoting § 51, at 343-344 (5th ed. 1984) (Prosser and Keeton)). Efforts by courts to identify a standard or rule led to the use of labels such as "active/passive" or "primary secondary" negligence to describe situations where indemnity would lie. But such labels are of little assistance. Instead, the Court cited the Restatement of (Second) Torts § 886 B (2), as setting forth "... the 'established applications' of the general principle of unjust enrichment as set forth in subsection (1)." *Id.* at 156. After going through those examples, the Court of Appeals found *Franklin* fell within none of them.

In arriving at their decision, the *Franklin* Court cited with approval to the following passage from *Crouch v. Tourtelot*, 350 S.W. 2d 799 (Mo. 1961), "[i]n the case of *concurrent* or *joint* tortfeasors, **having no legal relationship to one another**, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is complete unanimity among the authorities everywhere that no right of indemnity exists on behalf of either against the other; in such a case there is only a common liability and not a primary and secondary one, even though one may have been much more negligent than the other." *Id.* at 162 (emphasis added).

The Court observed that the Plaintiff alleged Franklin was negligent for failing to move his Blazer from the center lane to the shoulder of Route 50 and/or was negligent in failing to give proper warnings to other drivers approaching from behind that his Blazer was stopped in the middle of the road. Carriers owed its own separate duty to the Morrisons. Because Franklin's negligence arose out of the operation of his automobile and the breach of his duty, not Carriers', the Court held "Franklin's negligence is also active, as a matter of

law." *Id.* at 163. Because there was no legal relationship between Franklin and National Carriers, there was only "common liability," not "primary and secondary."

This same principle is expressly recognized in the language of the Restatement (Second) of Torts § 886B. The first paragraph which sets forth the general principle of indemnity states "[i]f two persons are liable in tort to a third person for the same harm and **one of them discharges the liability of both**, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of liability." (emphasis added). Subsection (2) merely describes examples of the indemnity described in subsection (1). Unless there is some legal relationship between the tortfeasors, the acts of one will not discharge the liability of the other.

Pulte v. Parex, 403 Md. 367 (2008), also relied on by PB, offers no support for their argument. PB cites to note (1) on page 382, which is simply the Restatement (Second) of Torts § 886B discussed earlier. In *Pulte*, the Court found that a claim for indemnity did not lie because the party seeking indemnity was engaged in active negligence. 403 Md. at 389. As well, although not discussed, it appears there were legal relationships between and among the tortfeasors in that case.

Max's of Camden Yards v. A.C. Beverage, 172 Md. App. 139 (2006), is another case cited by PB. In that case, unlike here, a legal relationship existed between the tortfeasors. A patron, Chad Burger ("Burger"), became ill after consuming beer at Max's of Camden Yards, LLC ("Max's"). Pursuant to a contract, A.C. Beverage, Inc. ("A.C. Beverage") was responsible for inspecting and cleaning the beer lines at Max's. Burger brought suit against both. Prior to trial, A.C. Beverage settled the claim and obtained a release of both defendants. Max's then sued A.C. Beverage for indemnification seeking the costs of defending Burger's

suit and related damages. The Court found no indemnity claim would lie because, among other reasons, Burger alleged active negligence against Max's.

Both parties cite to *Board v. RTKL Associates*, 80 Md. App. 45 (1989). While *RTKL* may on its facts seem to support PB's argument, the support is illusory. RTKL was an architectural firm that negligently designed and/or supervised the installation of the roof on a physical education complex building for the Baltimore County Community Colleges ("BCCC"). After the roof partially collapsed, BCCC brought suit against RTKL, Carl H. Gonnsen & Sons ("Gonnsen"), the general contractor for the project, and James H. Carr, Inc. ("Carr"), a sub-contractor who obtained and inspected specially designed roof trusses for the construction. RTKL filed cross-claims for contribution and tort indemnity against Gonnsen and Carr. The indemnity claim was based on an active/passive theory.

While the Court of Special Appeals opined that RTKL could conceivably have a claim for indemnity against Gonnsen and Carr, the rationale for arriving at that conclusion provides no support for PB. In discussing indemnity, the Court stated:

> The right of contribution, which a wrongdoer may have from another culpable party, arises from the duty each of the wrongdoers owes to the injured party. The right to indemnity, however, arises from the obligations between the wrongdoers.
>
> Indemnity requires that, where one of the wrongdoers is primarily liable, that wrongdoer must bear the whole loss. The joint tortfeasors must have had some sort of **relationship prior to the tort** which justified the claim for indemnity.
>
> *RTKL*, 80 Md. at 55-56 (internal citations omitted) (emphasis added).

The Court cites to a number of cases for this proposition: *Council of Co-Owners v. Whiting Turner*, 308 Md. 18 (1986), where the developer sought indemnity from an independent contractor employed by the developer; *Crockett v. Crothers*, 264 Md. 222

(1972), where there was a contract that provided for indemnification; *Orient Overseas Lines v. Globemaster*, 33 Md. App. 372 (1976), where it held that a ship owner was permitted to seek indemnification from a stevedore and terminal operator who were deemed agents of the ship owner. In each case, there was a legal relationship between the joint tortfeasors. In holding a claim by RTKL for indemnity against Gonnsen and/or Carr could possibly exist, the Court necessarily assumed but did not discuss the existence of a legal relationship between the tortfeasors.

In this case, there is no legal relationship between PB and Facchina. Each owes a separate duty to the Plaintiff. Facchina cannot discharge the duty owed by PB to the Plaintiff. Accordingly, any negligence on the part of PB would be active and not passive. While it may be theoretically possible that the negligence of PB, if any, could be found to be minor as compared to that of Facchina, the difference in degree of negligence would not support a claim for indemnity. Accordingly, the Defendant's motion is granted.

IT IS SO ORDERED this 22nd day of March, 2016.

Michael D. Mason

MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, Maryland