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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000423-MR

CENTURY SURETY COMPANY

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOSEPH R. HUDDLESTON, SPECIAL JUDGE
ACTION NO. 02-CI-00590

CONTINENTAL CASUALTY COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Century Surety Company appeals from a declaratory judgment of the Warren Circuit Court, in which Century was held to be contractually bound to reimburse Continental Casualty Company in the amount \$155,100.38, plus attorney fees and costs incurred in the defense of a personal injury claim. We affirm.

¹Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Both parties accepted the trial court's rendition of the essential facts and procedural history of the case and therefore, we adopt it our own:

FACTS AND PROCEDURAL POSTURE

The dispositive facts in this case are not in contention. On June 6, 2000, William Brown fell and was injured while visiting the Greenwood Mall in Bowling Green. The fall occurred at an amusement ride located in the concourse of the Mall. The amusement ride was owned and operated by Robinson's Kiddie Rides, LLC.

Following Brown's injury, he and his spouse brought a personal injury and loss of consortium suit against both Robinson's Kiddie Ridges ("Robinson's") and General Growth Properties, doing business as Greenwood Mall ("the Mall"). The action (01-CI-00559) was tried and a jury returned a verdict apportioning 15% of the fault to Robinson's resulting in a Judgment totaling \$29,964.73. In addition, the Jury assigned 70% of the fault to the Mall resulting in a Judgment in the sum of \$139,835.39. the remaining fault was assigned to Brown.

Robinson's was insured by the Petitioner, Century Surety Co., and the Mall was insured by the Respondent, Continental Casualty Co. Both insurance carriers satisfied the judgment entered against their insured with interest and costs. Continental incurred attorney's fees totaling \$14,885.00 and costs totaling \$379.99.

On July 5, 1999, Robinson's and the Mall executed a License Agreement allowing for the operation of an amusement ride by Robinson's in the Mall. The terms of the License Agreement required Robinson's, the licensee, to carry commercial general

liability insurance naming the Mall, the licensor, as an additional insured. Robinson's acquired such insurance through Century.

The License Agreement entered into by Robinson's and the Mall contained an indemnification clause:

11. Starting on the date Licensee first commences the Business under this License, Licensee shall indemnify and hold Licensor, its managers, employees, agents, contractors, parents, subsidiaries and affiliates harmless from and against any and all claims, actions, liens, demands, expenses and judgments for loss, damage or injury to property or persons resulting or occurring by reason of the Licensee's construction activities under this License, or in any way connected with, the operation of the business, or otherwise arising from this License or Licensee's activities hereunder, including all costs, expenses and attorney's fees. Licensee(sic) shall also indemnify Licensor for all costs, expenses and attorney's fees incurred by Licensor to enforce this indemnity.

The Robinson's insurance policy contained an "other insurance" provision. Century's policy provided that if other valid and collectible insurance is available to the insured, then Century's policy coverage is limited as follows:

a. This insurance is excess over any other insurance whether the other insurance is stated to be primary, pro rata, contributory, excess, contingent, or on any

other basis; unless the other insurance is issued to the Named insured shown on the Declarations of this coverage Part and is written explicitly to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part;

Continental's policy also contained an "other insurance" clause. It provided that if other valid and collectible insurance is available to the insured for a loss covered by Continental's policy, then Continental's coverage is limited, in relevant part, as follows:

a. Primary Insurance

This insurance is primary except when **b.** below applies. If this insurance is primary our obligations are not affected unless any of the other insurance is also primary.

b. Excess Insurance

This insurance is excess over:

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

On April 13, 2002, Century filed a Petition for Declaration of Rights with the Warren Circuit Court pursuant to KRS 418.040. In its petition, Century stated that there was a contest as to whether the "Other Insurance" provision required

Century to indemnify Continental. Following briefing, the circuit court entered a declaratory judgment on January 30, 2004. The circuit court examined two issues: 1) whether the license agreement executed by Robinson's and the Mall provided contractual indemnity for the Mall's negligence; and 2) whether the terms of the two insurance policies established one policy as primary and the other as excess, or whether each policy provided pro rata coverage. After reviewing the terms of the insurance policies and the relevant case law, the circuit court ruled for Continental. It found that paragraph 11 of the license agreement contractually bound Robinson's to indemnify the Mall for its own negligence. In addition, the circuit court found that the provisions of the insurance policies made Century the primary insurer and Continental the excess insurer. It therefore declared that Continental was entitled to indemnity from Century. This appeal followed.

Century raises two issues on appeal. First, Century asserts that the circuit court erred in finding that the license agreement required Robinson's to indemnify the Mall for the Mall's own negligence. Second, Century argues that the circuit court erred in failing to find that the Continental policy was primary over the Century policy.

"It is a well established that construction and interpretation of a written instrument are questions of law for

the court We review questions of law *de novo* and, thus, without deference to the interpretation afforded by the circuit court."²

In its brief, Century cites to several foreign jurisdictions to support its argument that the trial court erred in its ruling. However, the trial court relied upon Fosson v. Ashland Oil & Refining Co.,³ which is still good law in Kentucky. Pursuant to SCR 1.030(8)(a), we are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court. Recognizing this dilemma, Century, in its reply brief, suggest that "the law enunciated in Fosson should be refined to reflect current standards."⁴

(Emphasis added). Despite its argument to the contrary and the foreign cases cited by Century,³ we are not at liberty to refine Fosson or follow other jurisdictions while there is controlling and binding case law from Kentucky's highest court. As such, we have reviewed the order of the Warren Circuit Court and find that its reliance on Fosson and its analysis of the law to be on point and thus, we adopt the circuit court's order, in relevant part, as follows:

I. Contractual Indemnity

The Supreme Court of Kentucky continues to recognize the ability of individuals to

² Cinelli v. Ward, 997 S.W.2d 474, 476. (Ky.App. 1999). (Citations omitted.)

³ 309 S.W.2d 176 (Ky. 1957).

⁴ Century's reply brief, p. 3.

contractually assume the obligation to indemnify another. Crime Fighters Patrol v. Hiles, Ky., 740 S.W.2d 936, 938 (1986). Intercargo Insurance Co. v. B. W. Farrell, Inc., Ky. App., 89 S.W.3d 422, 426 (2002), defined a contract of indemnity as, "an obligation or duty requiring a promisor to make good any loss or damage which another has incurred while acting at the request or for the benefit of the promisor." The Court went on to say that an indemnity contract creates a direct, primary liability between the promisor and the promisee. Id. However, there can be no indemnity without liability. ARA Services, Inc., v. Pineville Community Hospital, Ky. App., 2 S.W.3d 104, 106 (1999).

In Fosson v. Ashland Oil & Refining Co., Ky., 309 S.W.2d 176 (1957), Kentucky's highest court was asked to decide whether an indemnification clause in a construction contract operated to indemnify the indemnitee's own negligence. The Court concluded that parties to such a contract could so agree where it is not improbable that a party would undertake to indemnify the other. However, the Court further said that if there is a doubt as to the meaning of the indemnity clause, the construction should be in opposition to the contention that the contract was meant to indemnify the indemnitee's own negligence. Id. at 178.

The construction contract involved in Fosson v. Ashland Oil & Refining Co., 309 S.W.2d 176 (1957), also contained a provision requiring that the contractor, the indemnitor, obtain liability insurance satisfactory to the owner, the indemnitee. The Fosson court held that the broad language contained in the contract, and the fact that the parties had agreed that the indemnitor would carry general liability insurance subject to the satisfaction of the indemnitee manifested an the intent that the contract was intended to apply to liability

arising from the acts or omissions of the indemnitee.

In the case at bar, Robinson's and the Mall executed a License agreement that contained an explicit indemnification clause not unlike the clause involved in Fosson supra. Moreover, the License Agreement required that Robinson's obtain general commercial liability insurance naming the Mall as an additional insured. Thus, it is apparent that the parties to the License Agreement intended that Robinson's, the indemnitor, would be obligated to indemnify the Mall, the indemnitee, even for liability resulting from the acts or omissions of the Mall, including attorney's fees and costs. Therefore, Continental Casualty Co. is entitled to reimbursement from Century Surety Co. for the sums paid, including fees and costs, on behalf of the Mall.

II. Other Insurance Clause

Even if the indemnity clause contained in the License Agreement did not entitle Continental Casualty to reimbursement for sums paid on behalf of its insured it is entitled to reimbursement pursuant to the express provisions of the insurance policies. Century Surety's policy states that its policy is excess over any other primary insurance unless the other insurance is issued to the named insured and is written explicitly to apply in excess of Century's coverage.

Continental Casualty's policy provides that it is primary insurance unless there exists other valid collectible primary insurance that includes the insured as an additional insured. In such a situation, Continental's policy provides that it shall be designate as excess insurance.

When these two insurance clauses are read in conjunction they establish Century

Surety's policy as the primary insurance. The Mall is an additional named insured on Century's policy, and Continental's policy applies as excess insurance in such a situation. Therefore, the Court further concludes that pursuant to the terms of the two insurance policies Continental Casualty Co. is entitled to reimbursement from Century Surety Co. for the sums paid on behalf of its insured, the Mall, including attorney's fees and costs.

For the foregoing reasons, the declaratory judgment entered by the Warren Circuit Court is affirmed.

ALL CONCUR.

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