

RENDERED: JULY 27, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-002074-MR

JOSEPH D. GREENWELL

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 08-CI-00043

LOWE'S HOME CENTERS, INC.;  
MIKE MONTGOMERY, D/B/A  
M & M ELECTRIC, INC.;  
JAMES R. VANNOY & SONS  
CONSTRUCTION CO., INC.;  
THE ALLEN COMPANY; AND  
AMY BARLOW, BY AND THROUGH  
HER LEGAL GUARDIANS, DARRELL  
BARLOW AND JANET BARLOW

APPELLEES

OPINION  
AFFIRMING

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BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Joseph D. Greenwell brings this appeal from an October 26, 2010, Order of the Boyle Circuit Court dismissing his third-party indemnity claim against Lowe's Home Centers, Inc. (Lowe's). We affirm.

The facts that led to Greenwell filing a third-party complaint against Lowe's are as follows. On October, 28, 2006, Greenwell's vehicle struck a vehicle driven by Amy Barlow in Danville, Kentucky. Barlow suffered serious injuries as a result of the collision. Barlow subsequently filed a complaint in the Boyle Circuit Court against Greenwell. Therein, Barlow alleged that Greenwell ran a red light causing the collision between their vehicles. The collision occurred at an intersection that provided access to Lowe's parking lot.<sup>1</sup>

On January 22, 2008, Barlow filed a complaint against Greenwell asserting that his negligence caused her injuries. Some eighteen months later, Greenwell filed his third-party complaint against Lowe's. Therein, Greenwell alleged that Lowe's negligently or intentionally constructed, supervised, or approved the installation of the traffic light and that such negligence caused Barlow's injury. Greenwell demanded indemnification and/or reimbursement for any judgment Barlow obtained against Greenwell, apportionment and/or contribution, and attorney's fees. Lowe's subsequently filed a third-party complaint against M & M Electric, Inc. (M & M). Thereafter, M& M filed third-

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<sup>1</sup> It appears that Lowe's Home Centers, Inc., was responsible for constructing the intersection and installing the traffic light when the store was originally constructed. Palmer Engineering was apparently hired by Lowe's to design the intersection and the traffic light for Lowe's. Thereafter, a contractor and subcontractors were hired to carry out that plan.

party complaints against James R. Vannoy & Sons Construction Company, Inc., and The Allen Company, Inc.

Lowe's subsequently filed a motion for summary judgment on the indemnity claim only. In support thereof, Lowe's argued that Greenwell was not entitled to indemnity from Lowe's as Greenwell was the active tortfeasor responsible for the injuries Barlow sustained. The circuit court agreed and granted Lowe's motion. The order entered on October 26, 2010, stated, in relevant part:

IT IS HEREBY ORDERED that Lowe's Home Centers, Inc.'s motion for summary judgment on Joseph D. Greenwell's third-party indemnity claim against Lowe's Home Centers, Inc. is granted. Greenwell's third-party indemnity claim is hereby dismissed in its entirety with prejudice. As a result, the indemnity claims against Mike Montgomery d/b/a M & M Electric, Inc., Vannoy & Sons Construction, Inc. and The Allen Company are also dismissed in their entirety with prejudice.

This appeal follows.

Greenwell contends that the circuit court erred by dismissing his third-party indemnity claim against Lowe's. Specifically, Greenwell contends that Lowe's negligently installed the traffic light by failing to install a tether thereupon and that the wind caused the signal heads on the traffic device to swing, resulting in the obstruction of the traffic light from his view at the time of the accident. Under these facts, Greenwell maintains that Lowe's was the active tortfeasor, and he was the passive tortfeasor. Thus, Greenwell claims entitlement to indemnity from Lowe's.

Indemnity is a firmly entrenched principle in our common law and “is available to one exposed to liability because of the wrongful act of another with whom he/she is not in pari delicto [in equal fault].” *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Ky. 2000). Indemnity is an equitable principle and is based upon the theory “that where one party, whose fault is passive or secondary, incurs liability because of another party, whose fault is active or primary, the passive party should be allowed to recover from the active party for the liability paid.” 1 *Comparative Negligence Manual* § 9:14 (3d ed. 2012). In Kentucky, common law indemnity has been recognized under two “classes of cases”:

The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases: (1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury.

*Degener*, 27 S.W.3d at 780 (quoting *Louisville Ry. Co. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W.2d 36, 39 (1934)).

In this appeal, Greenwell asserts he is entitled to indemnity under the second class as “both parties have been in fault ... and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury.”

*See Degener*, 27 S.W.3d at 780. Greenwell asserts that both he and Lowe’s are at

fault or were negligent in causing Barlow's injury but that Lowe's negligence is the primary cause of the injury. Consequently, Greenwell alleges that the circuit court improperly rendered summary judgment dismissing his claim of indemnity against Lowe's. For the foregoing reasons, we are compelled to disagree.

We begin by reviewing the summary judgment standard. Summary judgment is proper where there exists no material issue of fact and where movant is entitled to judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the non-moving party. *See Steelvest*, 807 S.W.2d 476.

In this case, if we view the facts most favorable to Greenwell, it appears that Lowe's contracted with others to construct the traffic light. Despite plans providing for a tether wire on the traffic light, no tether was fixed to the traffic light. On the day of the accident, there was evidence the wind was blowing the traffic light back and forth. Greenwell testified that he never saw the traffic light before the accident. The accident occurred at a four-way intersection which was heavily traveled. Immediately before the accident, Greenwell admitted to seeing the intersection and the traffic in the intersection but asserts he did not see Barlow's vehicle before he hit it. Greenwell's brother, a passenger in the vehicle, spotted the traffic light and Barlow's vehicle seconds before the accident.

Viewing the facts most favorable to Greenwell, the absence of a tether on the traffic light may have been a contributing cause of the accident, and Lowe's

may have been negligent in so constructing the traffic light. If so, both Lowe's and Greenwell could be considered tortfeasors *in pari delicto* or active tortfeasors. *See City of Louisville v. Louisville Ry. Co.*, 156 Ky. 141, 160 S.W. 771 (1913).

However, under no scenario of provable facts would Greenwell's purported negligence be degraded to passive thus entitling him to indemnity. *See id.*

Accordingly, we are of the opinion that the circuit court properly rendered summary judgment dismissing Greenwell's indemnity claim against Lowe's.

Greenwell also raises claims of error relating to apportionment and contribution. The October 26, 2010, Order of the circuit court presently on appeal to this Court only adjudicated the single claims of indemnity between the respective parties. CR 54.02(1). Greenwell's claim of apportionment and contribution remain before the circuit court and cannot be properly addressed by this Court. Thus, we decline to review any claims as to either apportionment or contribution.

For the foregoing reasons the Order of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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