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IN THE
COURT OF APPEALS OF INDIANA

U.S. Automatic Sprinkler Corporation,

Appellant-Defendant,

v.

Erie Insurance Exchange, Travelers Indemnity Company of Connecticut a/s/o Sycamore Springs Surgical Center, LLC, Dr. Nancy Pruett, D.D.S., and 3D Exhibits, Inc.

Appellees-Plaintiffs

March 29, 2022

Court of Appeals Case No. 21A-CT-580

Appeal from the Marion Superior Court

The Honorable David J. Dreyer, Judge

Trial Court Cause No. 49D12-1706-CT-24859

Vaidik, Judge.

Case Summary

[1] Sycamore Springs Surgery Center, L.L.C. ("Surgery Center") was a tenant in an office building, and it contracted with U.S. Automatic Sprinkler Corporation ("Automatic Sprinkler") to inspect and test the building's sprinkler system. In December 2016, Automatic Sprinkler was called to the building by the landlord—not by Surgery Center—to address a leak. Without consulting or seeking approval from Surgery Center, an Automatic Sprinkler employee made some adjustments to the sprinkler system. A few days later, the system failed and flooded the building, causing property damage to Surgery Center and other

tenants. Surgery Center's insurer, Travelers Indemnity Company of Connecticut ("Travelers"), covered Surgery Center's losses and then filed a subrogation action against Automatic Sprinkler. Automatic Sprinkler was also sued for the damage to the other tenants.

[2] Automatic Sprinkler sought summary judgment against all plaintiffs. Regarding Travelers, as subrogee of Surgery Center, Automatic Sprinkler relied on a subrogation waiver in its contract with Surgery Center. As to the other tenants, Automatic Sprinkler argued it did not have a duty because it had no contract with them and therefore was not in privity with them. The trial court denied both motions, and Automatic Sprinkler appeals.

[3] As to Travelers, we affirm. Because Automatic Sprinkler did the work at issue pursuant to a request from the landlord, not under its contract with Surgery Center, the subrogation waiver in the contract does not apply. However, regarding the other tenants, we reverse. While our Supreme Court has abolished the requirement of privity for personal-injury claims against contractors, it has not done so in the property-damage context. Therefore, Automatic Sprinkler did not have a duty to the other tenants.

Facts and Procedural History

[4] Surgery Center, Dr. Jane Chen, D.D.S., Dr. Nancy Pruett, D.D.S., and 3D Exhibits, Inc. were tenants in an office building in Indianapolis. At some point, a sprinkler system was installed in the building for the benefit of Surgery

Center. Surgery Center signed an amendment to its lease that included a provision making it responsible for the system and its maintenance and requiring it to carry adequate insurance to cover any damage caused by the system. Appellant's App. Vol. II p. 116. Consistent with these lease obligations, Surgery Center entered into a Fire Protection Inspection Agreement ("Inspection Agreement") with Automatic Sprinkler to periodically inspect and test the sprinkler system. *Id.* at 70-74. "Repairs, replacement, and emergency services" were generally excluded from the agreement but could be authorized by Surgery Center. *Id.* at 71 (Coverage ¶3); *see also id.* at 74 (addressing "Emergency Services").

[5] On November 28, 2016, Automatic Sprinkler performed a regular test of the sprinkler system and determined it was operating properly. On December 12, however, a maintenance worker for the building owner/landlord discovered a leak in the sprinkler system. Despite Surgery Center being responsible for the system, the maintenance worker contacted Automatic Sprinkler directly. An Automatic Sprinkler employee went to the building, made some adjustments to the sprinkler system, and left. There is no evidence Surgery Center was consulted about the leak or authorized the work.

[6] Within days, multiple pipes froze and burst, causing damage to all the tenants. Several parties later sued Automatic Sprinkler for negligence. Surgery Center's insurer—Travelers—and Dr. Chen's insurer—Erie Insurance Exchange ("Erie")—after covering those tenants' losses, sued Automatic Sprinkler in

subrogation.[1] And while most of Dr. Pruett's and 3D Exhibits's losses were also covered by insurance, they sued Automatic Sprinkler directly.

[7] The cases were consolidated, and Automatic Sprinkler moved for summary judgment. It filed one motion against Travelers, as subrogee of Surgery Center, arguing Travelers has no right to sue because the Inspection Agreement includes the following subrogation waiver and agreement to insure: "No insurer or other third party will have any subrogation rights against [Automatic Sprinkler]. [Surgery Center] will be responsible for maintaining all liability and property insurance." *Id.* at 71 (General Terms and Conditions ¶2). Automatic Sprinkler filed a separate motion against Erie (as subrogee of Dr. Chen), Dr. Pruett, and 3D Exhibits, whom Automatic Sprinkler refers to as the "Non-Contract Tenants" because they were not parties to the Inspection Agreement. Automatic Sprinkler argued that, because of this lack of contractual privity, it had no duty to the Non-Contract Tenants. The trial court denied both motions, and Automatic Sprinkler sought and received permission to bring this interlocutory appeal.

[1] Subrogation is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." *Subrogation*, Black's Law Dictionary (10th ed. 2014).

Discussion and Decision

[8] Automatic Sprinkler contends the trial court erred by denying its motions for summary judgment. We review such motions de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

I. Travelers

[9] Automatic Sprinkler contends it is entitled to summary judgment against Travelers, as subrogee of Surgery Center, because of the subrogation waiver and agreement to insure in the Inspection Agreement. It argues this provision evinces a "clear intent to transfer the risk of loss to Surgery Center's insurer." Appellant's Br. p. 21. It cites *Board of Commissioners of County of Jefferson v. Teton Corp.*, where our Supreme Court explained that a subrogation waiver and agreement to insure "work in tandem to ensure that the parties resolve damages disputes through insurance claims, not lawsuits." 30 N.E.3d 711, 714 (Ind. 2015).

[10] Travelers's response is simple. It contends the Inspection Agreement, including the provision relied on by Automatic Sprinkler, is inapplicable because the December 12 work was done not under the Inspection Agreement but rather pursuant to a separate request by the landlord.

[11] For purposes of summary judgment, Automatic Sprinkler doesn't dispute it did the December 12 work at the request of the landlord and therefore "outside" the Inspection Agreement. *See* Appellant's Br. pp. 25, 28; Appellant's Reply Br. p. 5; *see also* Tr. p. 20. However, it contends Travelers's argument in this regard "invokes the same 'work versus non-work' distinction previously rejected by the Indiana Supreme Court in *Teton*." Appellant's Br. p. 19. Automatic Sprinkler did not make this *Teton* "work versus non-work" argument during the summary-judgment proceedings in the trial court and therefore waived it for purposes of appeal. *See Shenmei Yuan v. Wells Fargo Bank, N.A.*, 162 N.E.3d 481, 488 (Ind. Ct. App. 2020). Waiver notwithstanding, the distinction Travelers makes here—between work done under a contract and work done outside a contract—is not the distinction the Supreme Court rejected in *Teton*.

[12] *Teton* involved a contract between Jefferson County and Teton Corporation for the repair of part of the county courthouse. The contract included a subrogation waiver under which the county waived all rights "for damages caused by fire or other perils to the extent covered by property insurance . . . ." *Teton*, 30 N.E.3d at 713. During the work, a subcontractor started a fire that damaged not only "the work" (i.e., the part of the building that was being worked on under the contract) but also "non-work property" (i.e., other parts of the building that were not being worked on under the contract). *Id.* at 714. The county's property insurance covered all the damages, but the county sued Teton and others "to recover damages caused to its property outside the scope of the work[.]" *Id.* The

defendants argued the action was barred by the subrogation waiver, since those damages were "covered by property insurance."

[13] Our Supreme Court framed the issue as follows:

> [W]hether we should interpret the subrogation waiver according to either (1) the "Work versus non-Work" approach, under which the Owner waives subrogation only for losses related to "the Work" (i.e., the contracted-for construction and services); or (2) the "any insurance" approach, under which the Owner waives subrogation for all losses covered by Owner's insurance policy "applicable to the Work," regardless of whether the damage was to work or non-work property.

Id. at 713. The Court rejected the "Work versus non-Work" approach and adopted the "any insurance" approach, holding that the subrogation waiver was "based on the source and extent of the property insurance *coverage*, not the nature of the *damages* or of the *damaged property*." *Id.* at 716.

[14] In short, *Teton* held that where work done under a contract caused damages, the contract's subrogation waiver applied to all the damages, with no distinction between damage to the property being worked on ("the work") and damage to property not being worked on ("non-work property"). It did not hold that a contract's subrogation waiver applies to damages caused by work done **outside the contract**. Because the work at issue here was not done under the Inspection Agreement, *Teton* is inapplicable, as is the Inspection Agreement itself.

[15] Automatic Sprinkler also relies on *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284 (Ind. Ct. App. 1979), and *Youell v. Cincinnati Insurance Co.*, 117 N.E.3d 639

(Ind. Ct. App. 2018), cases where we held that a contract's agreement to insure precluded a subrogation action against the allegedly negligent party. Those cases are also inapplicable here because, as in *Teton*, the alleged negligence occurred within the scope of the contract at issue. *See Morches Lumber*, 388 N.E.2d at 285 (plaintiff alleged that lumber company had been negligent in its construction of a pole barn under the construction contract that contained the agreement to insure); *Youell*, 117 N.E.3d at 641 (landlord's insurer sued tenant for fire damage that occurred under the lease that contained the agreement to insure).

[16] Finally, in its reply brief, Automatic Sprinkler makes arguments based on several additional provisions from the Inspection Agreement (beyond the subrogation waiver and agreement to insure). Appellant's Reply Br. pp. 10-12. It waived these arguments by failing to raise them in its opening brief. *See U.S. Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 797 n.5 (Ind. 2000) ("[A]n argument raised for the first time in a reply brief is waived."). In any event, as we just concluded, the Inspection Agreement is inapplicable because the December 12 work was not done under that agreement.

[17] For these reasons, we affirm the trial court's denial of Automatic Sprinkler's motion for summary judgment regarding Travelers.

II. Non-Contract Tenants

[18] Automatic Sprinkler argues it had no duty to the Non-Contract Tenants because it did not have a contract with them and therefore was not in "privity"

with them. Appellant's Br. pp. 30-31. It cites *Citizens Gas & Coke Utility v. American Economy Insurance Co.*, 486 N.E.2d 998 (Ind. 1985). There, a couple authorized a utility to install a water heater in their house without a drain, in violation of the plumbing code, knowing it created a risk of flooding. After another couple purchased the house and moved in, a valve on the water heater malfunctioned, resulting in property damage. The couple's insurer covered the loss and then brought a subrogation claim against the utility, alleging it had negligently installed the water heater. Our Supreme Court ordered judgment for the utility, citing the rule that "a contractor or repairman is not liable for negligent damages to third parties after acceptance of the work by an owner." *Id.* at 1000. This rule, commonly known as the "acceptance rule," is based on the lack of privity between the contractor and the third party. *Id.* The Court noted that the requirement of privity had been abolished in certain personal-injury situations. *Id.* It then explained, however, that "abolishing privity where personal injuries are concerned[] is based on humanitarian principles" and that "[n]o such humanitarian principle exists for the recovery of loss of property." *Id.* at 1001.

[19] The Non-Contract Tenants acknowledge *Citizens Gas* but argue this case is controlled by a more recent decision from our Supreme Court, *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004). In *Peters*, the plaintiff slipped and fell on a ramp attached to the front of a house he was visiting. He was injured and sued the contractor who installed the ramp. In allowing the suit to proceed, the Supreme

Court rejected the acceptance rule and adopted the "modern rule" or "foreseeability doctrine," holding:

> A rule that provides that a builder or contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and acceptance by the owner, where it was reasonably foreseeable that a third party would be injured by such work due to the contractor's negligence, is consistent with traditional principles of negligence upon which Indiana's scheme of negligence law is based.

Id. at 742. The Non-Contract Tenants contend that because it was foreseeable their property would be damaged by Automatic Sprinkler's negligence, Automatic Sprinkler owed them a duty under *Peters*.

[20] Automatic Sprinkler responds that the *Peters* Court's rejection of the acceptance rule and the privity requirement was limited to the personal-injury context and has no bearing in this property-damage case. We agree. First, and most importantly for our purposes, the *Peters* Court mentioned *Citizens Gas* in its discussion of the acceptance rule but did not expressly overrule it. Second, *Peters* involved personal injury, and the Court did not explicitly address property-damage cases, whereas *Citizens Gas* was a property-damage case that specifically explained why the requirement of privity should not be abolished for such cases. Third, the *Peters* Court based its decision in part on Restatement

(Second) of Torts § 385 (1965), which concerns "physical harm" to "others."[2] *See Peters*, 804 N.E.2d at 742. And fourth, neither we nor the parties found any case where the Indiana Supreme Court (or this Court, for that matter) applied *Peters* to a property-damage claim. For these reasons, we conclude *Citizens Gas* is still binding on us in the property-damage context.

[21] The Non-Contract Tenants offer compelling arguments that would support overruling *Citizens Gas*. They assert that requiring contractual privity for a negligence claim "would essentially allow contractors such as [Automatic Sprinkler] to perform negligent work without regard to anyone but their own client." Pruett and 3D Exhibits's Br. p. 17. They contend that "requiring contractors to perform safe work and to not endanger person and property in the course of their work represents the interests of the State of Indiana at large and is consistent with long standing law." *Id.* at 18. But we cannot overrule *Citizens Gas*, a decision by our Supreme Court. And under that decision, Automatic Sprinkler did not have a duty to the Non-Contract Tenants because it was not in privity with them. Therefore, we reverse the trial court's denial of Automatic Sprinkler's motion for summary judgment as to the Non-Contract Tenants.

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[2] Restatement (Second) of Torts § 385 provides: "One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others."

[22] Affirmed in part and reversed in part.

Najam, J., and Weissmann, J., concur.