IN THE SUPREME COURT OF THE STATE OF OREGON

ECLECTIC INVESTMENT, LLC,
Plaintiff,

v.

RICHARD PATTERSON, et al.,
Defendant.

S062247

Court of Appeals No. A150458

Jackson County Circuit Court
No. 070197L3

JACKSON COUNTY,
Cross-Claim Plaintiff-Appellant,
Petitioner on Review.

v.

BYRON MCALLISTER, JR.,
dba Greater Crater Construction Co.,
Cross-Claim Defendant-
Respondent, Respondent
on Review.

RESPONDENT'S BRIEF ON THE MERITS

Review of the Court of Appeals Decision on Appeal
from the Judgment of the Circuit Court of Jackson County,
Honorable Daniel L. Harris, Judge

Date of Decision:	February 26, 2014
Author of Opinion:	Schuman, S.J.
Joining in Opinion:	Duncan, P.J. and Wollheim, J.

Names and addresses of counsel are on the next page.

Filed: September 2014

James A. Wallan, 861029
Hornecker Cowling LLP
717 Murphy Road
Medford, OR 97504
jaw@roguelaw.com
541 779-8900
Attorney for Respondent on Review
McAllister

Michael Jewett, P.C. 780501
353 Ridge Road
Ashland, OR 97520
mikejewett@gmail.com
541 482-2241
Attorney for Petitioner on Review
Jackson County

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

QUESTIONS PRESENTED FOR APPEAL

Did the trial court correctly find that Jackson County was not entitled to indemnity from McAllister?

The court correctly found that based upon the quality of the parties' conduct, Jackson County was not entitled to indemnity for defense costs.

PROPOSED RULE OF LAW

In an indemnity action, whether one party should indemnify another for defense costs requires an equitable distribution of fault. That distribution requires the finder of fact to consider the quality of each party's conduct as opposed to determining solely whether one party was passively negligent. To the extent that *Astoria v. Astoria & Columbia River R. Co.*, 67 Or 538, 136 P 645 (1913) requires that decision to be made on the basis of active/passive negligence, it should be overruled.

NATURE OF THE PROCEEDINGS, RELIEF SOUGHT AND TRIAL COURT JUDGMENT

Respondent Byron McAllister, Jr., dba Greater Crater Construction Company accepts Petitioner's statement as to the nature of the action. McAllister asks this Court to affirm the judgment of the trial court.

SUMMARY OF FACTS

Respondent accepts Petitioner's summary of the facts.

SUMMARY OF ARGUMENT

The rule of *Astoria v. Astoria & Columbia River R. Co.*, 67 Or 538, 136 P 645 (1913) should be overruled to the extent that it requires a finding in support of indemnity in circumstances in which one tort feasor may be considered to be only a "passive" participant. This Court should adopt a rule which focuses on the quality of the conduct of the parties as defined in *Maurmann v. Del Morrow Construction, Inc.*, 182 Or App 171, 48 P3d, 185 (2002).

Respondent submits both the trial court and the Court of Appeals ruled correctly in holding that it is the quality of a party's conduct, not whether that party was "actively or passively" negligent, which determines whether one party should indemnify the other for defense costs.

ARGUMENT

As it has from the beginning, Jackson County rests its argument on *Astoria v. Astoria & Columbia River R. Co.*, 67 Or 538, 136 P 645 (1913) for the proposition that any tort feasor who is determined to be passively negligent is entitled to indemnity from a co-defendant who is found to be actively negligent. McAllister submits that while the *Astoria* case is similar in its facts, it is, nonetheless, distinguishable. In that case, the city granted the defendant railroad permission to construct a railroad crossing at an

intersection within the city limits and the ordinance which granted permission for the construction contained certain specifications concerning the design of the crossing. *Id.* at 539-540. That is where the factual similarity between *Astoria* and this case ends.

There is nothing in the opinion in *Astoria* which suggests that other than passing the ordinance approving the crossing, the city had any affirmative obligation to perform any sort of inspection of the railroad's work during or at the conclusion of construction, nor was there any indication that the city was aware of the conditions at the crossing prior to the time the pedestrian was injured. In this case, it is undisputed that the county was aware of the conditions on the subject property as it had inspected McAllister's work on at least two occasions prior to issuing final approval of the excavation. ER. 9, ¶¶ 3, 5. McAllister submits those facts are sufficient to distinguish this case from *Astoria*, rendering the "active versus passive" rule of that case inapplicable.

The county further asserts that because the *Astoria* case has been cited with approval in a number of subsequent cases, the active versus passive rule on indemnity announced in the case is not subject to further review. It is noteworthy that the majority of the cases cited by the county which follow the ruling in *Astoria* pre-date 1960 and were decided before the advent of

modern building codes which were created to protect the life, health, and safety of the public, which are likely far more stringent than those which existed at that time, and certainly more restrictive than any such codes which may have existed in 1913.

The more recent decisions of the Court of Appeals analyzing common law indemnity claims have placed the focus where it belongs: on the quality of the conduct as opposed to whether it was active or passive. Even the county acknowledges, as has this Court, that the active/passive and primary/secondary analysis is not always helpful in determining whether a party is entitled to indemnity. Petitioner's brief at 8; *Fulton Ins. v. White Motor Corp.*, 261 Or 206, 211, 493 P2d 138 (1972). McAllister submits the Court of Appeals' decision in *Maurmann v. Del Morrow Construction, Inc.*, 182 Or App 171, 48 P3d 185 (2002) provides a better analysis in determining a party's entitlement to indemnity. *Maurmann* involved a cross claim between two defendants engaged in the construction of a subdivision. Although the primary issue in *Maurmann* was whether the jury's apportionment of fault was conclusive as to the indemnity claim, the opinion includes language which is instructive in analyzing this claim. In deciding whether common law indemnity would lie, the court noted indemnity is available in situations in which either the relationship between the parties or

the *quality* of their conduct supported a claim that one defendant should reimburse the other for defense costs. The court noted:

> Thus, in general, common-law indemnity is available where, 'in justice,' either the relationship of the parties or the quality of their respective conduct warrants that one of them should bear the full responsibility for joint liability to an injured party. *Id.* at 178.

In addressing the legal relationship of the parties, the Court of Appeals referred to this Court's opinion in *General Ins. Co. v. P.S. Lord,* 258 Or 332, 482 P2d 709 (1971), in which the Court addressed both the nature of the defendants' relationship and their conduct. There, this Court stated:

> A party held responsible by reason of his vicarious liability for the negligence of another, such as a servant or independent contractor, can recover indemnity from the servant or independent contractor . . .. On the other end of the scale, if a bus drove negligently and was hit by a truck driven negligently, and a bus passenger was injured, neither the truck nor the bus operator could secure indemnity from the other. *Id.* at 336-337. (Internal citation omitted).

In the present case, the relationship between the county and McAllister did not create any sort of vicarious liability or other relationship which supports the county's indemnity claim. As a result, it is necessary to

focus on the *quality* of each party's conduct, as this Court did in *General Ins. Co.*, to determine whether the county is entitled to indemnity.

The county criticizes the Court of Appeals' decision in this case as it follows earlier indemnity cases which focused less on the active/passive analysis and relied more upon equitable considerations, including the quality of conduct. One such case is *Scott v. Francis,* 100 Or App 392, 786 P2d 1269, modified on recons 104 Or App 39, 789 P2d 1111 (1990), vac'd 311 Or 151, 806 P2d 129, adopted as modified, 107 Or App 766, 811 P2d 927 (1991), aff'd, 314 Or 329, 838 P2d 596 (1992). In *Scott*, the Court of Appeals noted that indemnity involves the equitable distribution of fault and that in making that determination, there is no hard and fast rule in deciding such cases. *Scott*, 100 Or App at 396. While the county is critical of the *Scott* opinion, it fails to acknowledge this Court affirmed the Court of Appeals' opinion which was based, at least in part, upon a weighing of the equities.

The county believes it should be indemnified because it merely issued final approval of excavation work performed by McAllister and did nothing further. The county then refers to the trial court's Limited Judgment which quoted a provision of the Restatement (second) of Torts § 886B which, in summary, provides that indemnity is appropriate where one party created a

dangerous condition on land which, in turn, created liability for both the indemnitor and indemnitee in situations in which "the indemnitee innocently or negligently failed to discover the defect." (Limited Judgment at App-9). Apparently, the county believes that its issuance of the final approval in this case was nothing more than "innocently or negligently" failing to discover the condition of the slope as constructed by McAllister. Once again, the facts are to the contrary. As the Court of Appeals noted, the county was aware of the excavation before issuing its final approval as it had inspected the site twice, noted minor erosion and inadequate topsoil compaction and, not withstanding this knowledge, issued a final permit after the prior inspections. *Eclectic Investment, LLC v. Patterson*, 261 Or App 457, 323 P3d 473 (2014). Rather than establishing the county was innocent or merely negligent, that evidence supports a finding that the county was aware of, and ignored, the alleged defects in the construction of the slope on Eclectic's property. Given the nature of the county's obligation to Eclectic in performing the inspections, from a qualitative standpoint, the county's negligence was of the same nature as that of McAllister.

Because it is the nature of the county's obligation to inspect which is at the core of this case, McAllister believes the rule in *Brennen v. City of Eugene,* 285 Or 401, 591 P2d 719 (1979) is key. The Court of Appeals cited

Brennen in noting that the county, through its inspector, was obligated to perform the inspection and issuing final approval in a manner as to avoid creating a foreseeable risk of harm to the land owner. *Eclectic*, 261 Or App. at 464. The county attempts to distinguish *Brennen* because it was not an indemnity case, but rather a direct action in which the plaintiff sought to recover damages from the *City of Eugene* for negligently issuing a license to a cab driver. *Brennen* at 403. McAllister submits the analysis as to the obligation owed by the licensing authority to the plaintiff in *Brennen* is the same analysis which should be applied to the issuance of the excavation permit and final approval of the excavation work in this case. Specifically, in this case, the county had an affirmative obligation, in both inspecting and issuing its final approval of McAllister's work and to do so in such a fashion as to avoid creating a foreseeable risk of harm to Eclectic.

What the county asks this Court to do is announce a rule which provides that when issuing building permits, a municipality *always* acts passively and, therefore can rarely, if ever, be liable for injuries which may later occur due to poor construction. Stated differently, the county seeks a rule which creates a new form of immunity. McAllister submits matters of municipal immunity from tort claims is appropriate for the legislature.

Also of significance is the fact that McAllister played no role whatsoever in naming the county as a party to this litigation. This is not a situation in which Eclectic chose to sue only McAllister and McAllister, in turn, filed a third-party complaint against the county. Rather, Eclectic named McAllister and Jackson County as co-defendants, alleging independent theories of negligence against each. The complaint is void of any allegation that because of the relationship between Jackson County and McAllister, there was any sort of vicarious liability. As noted above, absent such allegations or proof, indemnity should not lie.

CONCLUSION

The Court of Appeals' decision focusing on the quality of the parties' conduct, which includes a determination as to whether one party should, in equity, reimburse another for defense costs, is the appropriate rule to apply to this case. The result sought by Jackson County, which is, in effect, a new form of municipal immunity, simply should not apply in today's modern society.

This Court should affirm the decision of the trial court and Court of Appeals.

Respectfully submitted, September 18, 2014.

HORNECKER COWLING LLP

James A. Wallan, OSB No. 861029
Of Attorneys for Respondent
Byron McAllister, dba Greater Crater Construction Co.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,006 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

HORNECKER COWLING LLP

_____

JAMES A. WALLAN, OSB No. 861029
Of Attorneys for Respondent Byron McAllister, dba Greater Crater Construction Co.

CERTIFICATE OF SERVICE

I certify that on the 18th day of September, 2014, I served two (2) true copies of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** on:

Michael Jewett, P.C. 780501
353 Ridge Road
Ashland, OR 97520
mikejewett@gmail.com
541 482-2241
Attorney for Petitioner on Review
Jackson County

by United States Postal Service.

HORNECKER COWLING LLP

JAMES A. WALLAN, OSB No. 861029
Of Attorneys for Respondent Byron McAllister,
dba Greater Crater Construction Co.

CERTIFICATE OF FILING

I certify that on the 18th day of September, 2014, I filed the original of this **RESPONDENT'S BRIEF ON THE MERITS** with the State Court efiling system:

HORNECKER COWLING LLP

JAMES A. WALLAN, OSB No. 861029
Of Attorneys for Respondent Byron McAllister,
dba Greater Crater Construction Co.