[Cite as *Seifert Technologies, Inc. v. CTI Engineers, Inc.*, 2010-Ohio-5917.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
SEIFERT TECHNOLOGIES, INC.	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2010 CA 00011
	:	
	:	
CTI ENGINEERS, INC. AKA CTI ENVIRONMENTAL, INC.	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2009-CV-03569
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 29, 2010

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Appellant, CTI Engineers, Inc. aka CTI Environmental, Inc. (hereinafter "CTI"), appeals a declaratory judgment of the Stark County Common Pleas Court in favor of appellee Seifert Technologies, Inc. (hereinafter "Seifert").[1]

STATEMENT OF FACTS AND CASE

{¶2} On May 4, 1999, the City of Massillon entered into a contract with CTI for "professional engineering services during the design, construction, and start-up of the upgrade/expansion of the Massillon Regional Wastewater Treatment Plant." Joint Stipulation of Facts, Exhibit A. As a part of this agreement, Massillon and CTI agreed to arbitrate disputes arising out of the contract:

{¶3} "6.4 Dispute Resolution/Arbitration

{¶4} "In the event of a dispute in any manner relating to or arising out the Agreement, the parties shall confer, and negotiate in good faith within ten (10) days after the dispute arises to attempt to resolve the dispute. If a party fails to negotiate, or it (sic) the parties are unable to resolve the dispute themselves, then all claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. ***No arbitration, arising out of or relating to this Agreement, shall include, by consolidation, joinder, or in any other matter, any additional person not a party to this Agreement except by written consent containing a specific reference to this***

[1] Appellee BBC&M Engineering (hereinafter "BBC&M") has filed a brief addressing only appellant's second assignment of error.

Agreement and signed by CTI, [Massillon], and any other person sought to be joined. Any consent to arbitration involving an additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein. This Agreement to arbitrate and any Agreement to arbitrate with an additional person or persons duly consented to by the parties to this Agreement shall be specifically enforceable under the prevailing arbitration law."

{¶5} Joint Stipulation of Facts, Exhibit A, emphasis added.

{¶6} CTI and Seifert entered into a contract on June 15, 1999, for professional electrical engineering design services related to the Massillon project. This contract included an indemnity clause:

{¶7} "[Seifert] shall indemnify and save harmless CTI, its officers, directors and employees and their successors, heirs and representatives from any responsibility or liability in any way for losses, damages or expenses including reasonable attorney fees and defense costs arising out of the death of, injuries to, or damages to any person or damages or destruction of any property, including loss of use, arising out of or in connection with this Agreement caused by the negligence of [Seifert], its employees, or agents in the performance of services thereunder." Joint Stipulation of Facts, Exhibit B.

{¶8} CTI accepted a proposal from BBC&M on August 12, 1999, for the performance of a subsurface investigation related to the Massillon project. Said contract did not include an indemnity clause.

{¶9} On December 18, 2001, Massillon entered into a construction contract with Kokosing Construction Company, Inc. (hereinafter "Kokosing") for services related to the construction of upgrades to the wastewater treatment plant. A dispute

subsequently arose between Massillon and Kokosing wherein Kokosing claimed Massillon failed to fulfill its obligations under their contract. As a part of the resolution of this dispute, Massillon assigned to Kokosing all claims it had or now has arising out of the contract between Massillon and CTI. Because the arbitration clause contained in the contract between Massillon and CTI was expressly limited to such parties, Kokosing and CTI entered into a separate agreement to arbitrate any claims which Kokosing, standing in the place of Massillon, had against CTI.

{¶10} In August of 2009, CTI notified Seifert and BBC&M by writing that CTI and Kokosing intended to arbitrate claims asserted by Kokosing in Massillon's place. Because CTI claimed that Kokosing's claims were in part the result of work performed by Seifert and BBC&M, CTI demanded that Seifert and BBC&M participate in the arbitration and indemnify CTI for any damages. Additionally, CTI asserted that any arbitration award reached between CTI and Kokosing was binding on Seifert and BBC&M and could not be relitigated in subsequent proceedings.

{¶11} Seifert filed the instant action seeking a declaration of the rights of the parties under the CTI-Seifert contract. BBC&M intervened in the action.

{¶12} The case proceeded to summary judgment on a joint stipulation of facts. The Stark County Common Pleas Court first found that the indemnity contract between Seifert and CTI did not require Seifert to indemnify CTI for Kokosing's claims. The court concluded that the indemnity language could not be read to include corporations in the definition of "person," and given the ordinary usage of the word "person" coupled with its use in context with words such as "death" and "injuries," the word is limited to claims arising out of death, bodily injury, property damage and loss of property usage to human

beings only, not to corporations. The court found that there was no evidence that Kokosing's claims, which were essentially claims for damages caused by project delay, arose out of death, bodily injury, property damage or loss of property use, and the claims were outside the scope of the indemnity clause between CTI and Seifert.

{¶13} The court also found that the relationship between CTI and BBC&M is the type of relationship which would give rise to an implied contract of indemnity; however, because it has yet to be determined that BBC&M is solely at fault for the damages claimed by Kokosing, there remains a question of fact as to whether such indemnity exists.

{¶14} The court concluded that any arbitration award between Kokosing and CTI is not binding on BBC&M and Seifert. Based on the arbitration clause in the Massillon-CTI contract, Seifert and BBC&M cannot be forced to participate in the arbitration absent their consent, and a party cannot be required to submit a dispute to arbitration when the party has not agreed to submit the dispute to arbitration.

{¶15} Appellant assigns two errors on appeal:

{¶16} "I. THE TRIAL COURT ERRED BY HOLDING THAT SEIFERT DOES NOT OWE A DUTY TO INDEMNIFY CTI WITH RESPECT TO THE DAMAGES ALLEGED BY KOKOSING PURSUANT TO THE INDEMNITY PROVISION IN THE SEIFERT SUBCONTRACT.

{¶17} "II. THE TRIAL COURT ERRED BY HOLDING THAT SEIFERT IS NOT BOUND BY THE DECISION IN THE CTI/KOKOSING ARBITRATION."

{¶18} We review both of appellant's assignments of error under the same standard of review, as the claimed errors arise out of a summary judgment of the trial court.

{¶19} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ. R. 56(C) which provides in pertinent part: "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶20} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically

point to some evidence which demonstrates that the moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

I

{¶21} In its first assignment of error, CTI argues that the court erred in interpreting the word "person" in the indemnification contract to include human beings only, and not corporations.

{¶22} The Ohio Supreme Court explained the interpretation of the language in an indemnity contract in *Worth v. Aetna Cas. & Sur. Co*., 32 Ohio St.3d 238, 240-241, 513 N.E.2d 253:

{¶23} "The nature of an indemnity relationship is determined by the intent of the parties as expressed by the language used. See *Cleveland Window Glass & Door Co. v. National Surety Co.* (1928), 118 Ohio St. 414, 161 N.E. 280. All words used must be taken in their ordinary and popular sense, *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St.3d 44, 47, 29 OBR 393, 396, 505 N.E.2d 264, 267, and "[w]hen a * * * [writing] is worded in clear and precise terms; when its meaning is evident and tends to no absurd conclusion, there can be no reason for refusing to admit the meaning which * * * [it] naturally presents." *Lawler v. Burt* (1857), 7 Ohio St. 340, 350."

{¶24} In addition, indemnity agreements must be strictly construed against indemnity. *Linkowski v. General Tire & Rubber Co*. (1977), 53 Ohio App.2d 56, 62, 371 N.E.2d 553.

{¶25} While appellant cites to Black's Law Dictionary, the Ohio Civil Rules, and several Ohio statutes in support of its claim that "person" is defined to include corporations, we find that the trial court did not err in concluding that the ordinary usage of the word "person" does not include corporations. The sources relied on by appellant refer to legal usage, not "ordinary and popular" usage. *Worth*, supra. In the indemnity clause, the word "person" is in context with types of events which apply only to human beings: death and bodily injury. In addition, the parties certainly could have written the indemnification contract to include corporations. In *Columbus v. Stilson* (1993), 90 Ohio App.3d 608, 613, 630 N.E.2d 59, the indemnification provision at issue read:

{¶26} "The Engineers [Stilson] shall assume the defense of and indemnify and save harmless the City from *any claims or liabilities of any type or nature to any person, firm or corporation*, arising in any manner from the Engineers' [Stilson's] performance of the work covered by the engineering contract, and [they] shall pay any judgment obtained or growing out of said claims or liabilities or any of them." (Emphasis added).

{¶27} Not only did the language in *Stilson* expressly include corporations and firms, but the clause broadly included any type of claims rather than defining the indemnified claims to include the types of damages normally caused to human beings, such as death and bodily injury.

{¶28} The trial court did not err in concluding that, based on the express language of the indemnification agreement between CTI and Seifert, CTI was not entitled to indemnification from Seifert for Kokosing's claims against CTI.

{¶29} The first assignment of error is overruled.

II

{¶30} In its second assignment of error, CTI first argues that as an indemnitor, Seifert is bound by the results of the arbitration between CTI and Kokosing. Because this claim relies entirely upon a determination that the scope of the indemnification includes Kokosing's claims, this issue is rendered moot by our determination in assignment of error one.

{¶31} CTI also argues that CTI and Seifert are in privity of contract for purposes of res judicata, and therefore the result of the arbitration would be binding on Seifert in any future action by CTI for Seifert's negligence on the project.

{¶32} The Ohio Supreme Court explained the concept of res judicata in *O'Nesti v. DeBartolo Realty Corp*., 113 Ohio St.3d 59, 61-62, 862 N.E.2d 803, 2007-Ohio-1102:

{¶33} "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381, 653 N.E.2d 226. Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. *Grava,* 73 Ohio St.3d at 382, 653 N.E.2d 226.

{¶34} "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous

action between the same parties or their privies. *Fort Frye,* 81 Ohio St.3d at 395, 692 N.E.2d 140. Issue preclusion applies even if the causes of action differ. Id. . . .

{¶35} "For claim preclusion to apply, the parties to the subsequent suit must either be the same or in privity with the parties to the original suit. *Johnson's Island,* 69 Ohio St.2d at 244, 23 O.O.3d 243, 431 N.E.2d 672. Privity was formerly found to exist only when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceeding. *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 114, 49 O.O.2d 435, 254 N.E.2d 10, overruled in part on other grounds, *Grava,* 73 Ohio St.3d 379, 653 N.E.2d 226. An interest in the result of and active participation in the original lawsuit may also establish privity. Id. Individuals who raise identical legal claims and seek identical rather than individually tailored results may be in privity. *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958. This court has since stated that privity is a somewhat amorphous concept in the context of claim preclusion. *Kirkhart v. Keiper,* 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶ 8, citing *Brown,* 89 Ohio St.3d at 248, 730 N.E.2d 958. A "mutuality of interest, including an identity of desired result," might also support a finding of privity. *Brown* at 248, 730 N.E.2d 958. Mutuality, however, exists only if "the person taking advantage of the judgment would have been bound by it had the result been the opposite. Conversely, a stranger to the prior judgment, being not bound thereby, is not entitled to rely upon its effect under the claim of *res judicata* or collateral estoppel. *Johnson's Island,* 69 Ohio St.2d at 244, 23 O.O.3d 243, 431 N.E.2d 672."

{¶36} Appellant argues that the parties share an identity in a desired result, namely a finding that Kokosing's claims are without merit. We disagree.

{¶37} In its August 4, 2009, letter to Seifert, CTI's attorney stated in part, "[M]any of the claims being made by Kokosing are pass-through claims to Seifert. While there may be defenses to many of the claims, to the extent the claims have merit, the vast majority of them concern Seifert's work . . . Let me be clear that we are seeking not just your client's participation to assist us in mediation and/or arbitration but to be an active participant in these proceedings and contribute financially towards its resolution or to satisfy any judgment rendered. We will seek at arbitration a determination of Seifert's specific culpability and the damages resulting therefrom. We expect Seifert to pay any judgment rendered." Joint Stipulation of Facts, Exhibit H.

{¶38} It is clear that the parties do not share an identity of interest in the desired result of the arbitration. CTI has made it clear that it views many of the claims as "pass-through" claims to Seifert and that part of its strategy at the arbitration is to lay the culpability for damages at Seifert's feet rather than its own. The court did not err in failing to find that the parties are in privity and in failing to find that Seifert is bound by the arbitration decision under the doctrine of res judicata.

{¶39} The second assignment of error is overruled.

{¶40} The judgment of the Stark County Common Pleas Court is affirmed.

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES

JAE/r0722

[Cite as *Seifert Technologies, Inc. v. CTI Engineers, Inc.*, 2010-Ohio-5917.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SEIFERT TECHNOLOGIES, INC.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CTI ENGINEERS, INC. AKA CTI ENVIRONMENTAL, INC.	:	
Defendant-Appellant	:	CASE NO. 2010 CA 00011

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Strark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES