

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

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Case No. WD 60242

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PC Contractors, Inc.

Appellant/Respondent

v.

J.E. Dunn Construction Company and

Starlight Theatre Association

Respondents/Appellants

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APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Division 13

Honorable Jay A. Daugherty, Judge

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RESPONDENT/APPELLANT STARLIGHT THEATRE ASSOCIATION'S BRIEF

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## **JURISDICTIONAL STATEMENT**

This Appeal is from a decision of the Circuit Court of Jackson County, Missouri, Division 13. The Honorable Jay A. Daugherty, Judge, sustained Motions for Summary Judgment for Respondents on the issues involving contractual indemnification arising out of a personal injury action brought by Plaintiffs Wayne and Zilma Nusbaum. The issues presented are not within the exclusive jurisdiction of the Missouri Supreme Court and, therefore, jurisdiction lies with this Court pursuant to Article V, Section 3, of the Missouri Constitution.

## STATEMENT OF FACTS

On July 11, 1996, Zilma and Wayne Nusbaum attended a show at Starlight Theatre in Swope Park, Kansas City, Missouri. Upon exiting the Theatre, Mrs. Nusbaum fell on the sidewalk and injured herself. (L.F., Vol. I, p. 2).

The initial Petition for Damages was filed solely against the City of Kansas City, Missouri on February 5, 1997, alleging that the City failed to provide reasonably safe premises. (L.F., Vol. I, pp. 1-5). On June 10, 1997, the Nusbaums filed their First Amended Petition adding Starlight Theatre Association (hereinafter referred to as Starlight) and Asphalt Plant Sales, Inc. as Defendants. (L.F., Vol. I, pp. 12-17). They alleged that Starlight was responsible for maintenance of Starlight Theatre. (L.F., Vol. I, p. 13). Starlight filed its Answer denying the various allegations. (L.F., Vol. I, pp. 27-31). Plaintiffs' Second Amended Petition added J.E. Dunn Construction Company (hereinafter referred to as Dunn) as a Defendant, alleging that Dunn knocked down a light pole, never replaced it, and damaged the manhole/sidewalk area where Mrs. Nusbaum fell (L.F., Vol. I, pp. 32-39). There were various allegations of Defendants' failure to exercise reasonable care which did not differ from the allegations of either the initial or the First Amended Petition. (L.F., Vol. I, pp. 35-39). In its Answer to the Second Amended Petition, Starlight denied it was negligent and also filed a cross-claim against Dunn for indemnification pursuant to a contract for the construction of the Starlight Theatre Shirley Bush Helzberg Garden of the Stars. (L.F., Vol. I, pp. 57-60). Starlight further alleged specific acts of negligence against Dunn (L.F., Vol. I, pp. 58-59). Dunn filed its Answer to the Second Amended Petition and to the cross-claim. (L.F., Vol. I, pp. 61-69). Dunn also filed a

Third Party Petition against PC Contractors, Inc. (hereinafter referred to as PC), alleging the negligence of PC and seeking indemnification pursuant to a contract between Dunn and PC for work at the theatre. (L.F., Vol. I, pp. 70-72). Dunn alleged that PC was required to indemnify and hold harmless Dunn for damages and claims asserted against Dunn as well as for damages and claims for which Dunn may be held responsible to Starlight. (L.F., Vol. I, pp. 72-73).

Plaintiffs then filed their Third Amended Petition on June 30, 1998 adding PC as a Defendant, alleging that Starlight was responsible for the maintenance of the theatre and further alleging that Dunn and PC, as contractor and sub-contractor, had knocked down the light pole, damaged the sidewalk, and never repaired it. (L.F., Vol. I, pp. 93-100). Paragraph No. 20 of the Petition contains the various allegations of negligence against Defendants. (L.F., Vol. I, pp. 96-97). Starlight filed its Answer, again asserting its cross-claim for indemnity against Dunn and further asserting that Dunn negligently operated its trucks and failed to keep a careful lookout during construction of the project. (L.F., Vol. I, pp. 101-109). Dunn filed its Answer to the Third Amended Petition on July 10, 1998 and its Answer to Starlight's cross-claim on July 17, 1998. (L.F., Vol. I, pp. 115-129).

The construction contract between Starlight and Dunn was a standard form American Institute of Architects (AIA) agreement. (L.F., Vol. IV, pp. 487-496). It incorporated by reference AIA Document A201, General Conditions of the Contract for Construction. (Supp. L.F., pp. 1-24).<sup>1</sup> The indemnification clause upon which Starlight's cross-claim was based is

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<sup>1</sup>In the legal file received by Respondent/Appellant, the odd-numbered pages of the general conditions were copied, however, the even-numbered pages were not.

contained within AIA Document A201 and states in pertinent part:

### 3.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect-s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys= fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in party by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18. (Supp. L.F., p. 10).

Dunn & PC entered into a contract with a similarly worded indemnification clause.

(L.F., Vol. V, pp. 607-630).

Starlight and Dunn subsequently filed Motions for Summary Judgment. (L.F., Vol. II, pp. 229-259; Vol. III, pp. 260-433). In Plaintiffs= Suggestions in Opposition, they asserted, among other things, that Starlight had a responsibility for the downed and missing light pole and that Dunn had a similar obligation. (L.F., Vol. III, p. 289; Vol. III, pp. 423-424).

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Respondent/Appellant has filed a Supplemental Legal File with the complete document, AIA A201, contained therein.

Starlight's Motion for Summary Judgment in the underlying action was denied on July 7, 1999. (L.F., Vol. III, pp. 434-435). Dunn's Motion for Summary Judgment was also denied except as to the vicarious liability/*respondeat superior* theories which Plaintiffs agreed they were not pursuing. (L.F., Vol. III, pp. 434-435).

Chronologically, the next event in the case was an exchange of letters between Dunn and PC regarding Dunn's demand for indemnification. (L.F., Vol. V, p. 635; Vol. VI, pp. 740-742). On July 9, 1999, PC advised Dunn that it had settled plaintiffs' claims against it as well as any derivative claims against Starlight or Dunn for PC's negligence. (L.F., Vol. VI, pp. 740-742). Starlight was not included on the correspondence. (L.F., Vol. VI, pp. 740-742). On July 10, 1999, Dunn and the plaintiffs reached agreement as to settlement for \$5,000.00. (L.F., Vol. VI, pp. 761-764). Their Stipulation for Dismissal was not filed with the Court until September 20, 1999. (L.F., Vol. III, pp. 442-445). Plaintiffs then settled with the City. (L.F., Vol. III, pp. 436-437).

On July 13, 1999, the Court ordered that the indemnity claims be severed from the underlying suit. (L.F., Vol. III, pp. 438-439). Plaintiffs and Starlight agreed to settle for \$45,000.00, filing their Stipulation for Dismissal on August 2, 1999 (L.F., Vol. III, pp. 440-441).

At that point, the remaining issues were the two indemnity actions, with Starlight asserting its claim as to Dunn and Dunn asserting its claim against PC. (L.F., Vol. III, pp. 442-445). On September 23, 1999, Starlight demanded that Dunn indemnify it pursuant to Art. 3.18.1 of their contract. (L.F., Vol. V, p. 538). Starlight moved for Summary Judgment against

Dunn on July 28, 2000. (L.F., Vol. III, pp 446-448; Vol. IV, pp. 449-532). The Motion was based on the indemnification clause in the contract between the two.

Dunn's response asserted its indemnity rights against PC and the pass-through of any of its responsibility to Starlight, to PC. (L.F., Vol. IV, pp. 533-535). Dunn then filed its own Motion for Summary Judgment asserting indemnification against PC. (L.F., Vol. V, pp. 536-676). PC's response to Dunn's Motion for Summary Judgment argued that Dunn was attempting to be indemnified for its own negligence. (L.F., Vol. VI, pp. 677-748).

On November 1, 2000, the trial court granted Starlight's Motion for Summary Judgment as well as the Motion for Summary Judgment of Dunn. (L.F., Vol. VII, pp. 919-921). After the Motions for Summary Judgment were granted, the parties then briefed the issue of damages due under the indemnity agreements. (L.F., Vol. VI, pp. 749-844; Vol. VII, pp. 845-910).<sup>2</sup> Starlight requested judgment in the amount of \$70,505.27, representing its \$45,000.00 settlement with Plaintiffs and attorneys' fees and expenses for defending the underlying personal injury claim as well as for pursuing the indemnification claim. (L.F., Vol. VII, pp. 845-910). Starlight also requested pre-judgment interest be allowed. (L.F., Vol. VII, pp. 845-910). PC argued in opposition that neither Starlight nor Dunn were entitled to attorneys' fees in pursuing the indemnification action. PC also argued that pre-judgment interest was not allowable. (L.F., Vol. VI, pp. 839-944). On April 11, 2001, the Circuit Court entered its Order

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<sup>2</sup>Appellant states that Starlight's Brief in Support of Its Request for Damages was not filed with the Trial Court, however, this is incorrect. The Brief was filed with the Court on November 30, 2000. Starlight has included the file-stamped copy of the cover page of its Brief in Support of Its Request for Damages in the Supplemental Legal File filed with the Court.

finding that Starlight was entitled to \$68,994.77, plus 9% post-judgment interest from Dunn and further finding that Dunn was entitled to \$95,194.77 plus 9% post-judgment interest from PC. (L.F., Vol. VII, pp. 919-921). There was no explanation by the Court as to how it arrived at the damage figures.

The Trial Court's judgment disposing of all matters was ultimately entered on June 14, 2001. (L.F., Vol. VII, pp. 919-922).

Timely appeals were filed by PC as to the issue of indemnity and by Starlight and Dunn as to the issue of attorneys' fees for pursuing the indemnification action and as to the issue of pre-judgment interest.

POINTS RELIED ON

**I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF DUNN AND AGAINST PC CONTRACTORS, INC. AND, SIMILARLY, IN FAVOR OF STARLIGHT AS AGAINST DUNN, BECAUSE THE INDEMNIFICATION CLAUSES ARE CLEAR AND UNEQUIVOCAL IN THAT THEY REQUIRE INDEMNIFICATION REGARDLESS OF ANY NEGLIGENCE ON THE PART OF THE INDEMNITEES.**

Buchanan v. Rentenbach Constructors, 922 S.W.2d 467 (Mo. App. E.D. 1996)

Waterwiese v. K.B.A. Construction Managers, Inc., 820 S.W.2d 579 (Mo. App. E.D. 1991)

Kansas City Power & Light Company v. Federal Construction Corp., 351 S.W.2d 741 (Mo. 1961)

ITT Commercial Finance Corp. V. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

RJF International Corp. V. B.F. Goodrich, 880 S.W.2d 366 (Mo. App. E.D. 1994)

Lake Center Boatworks, Inc. V. Martin, 804 S.W.2d 842 (Mo. App. E.D. 1991)

Denny's Inc. V. Avesta Enterprises, Inc., 884 S.W.2d 281 (Mo. App. W.D. 1994)

Chehval v. St. John's Mercy Medical Center, 958 S.W.2d 36 (Mo. App. E.D. 1997)

Dillard v. Shaughnessy, Fickle, et al., 884 S.W.2d 722 (Mo. App. W.D. 1994)

Baker v. Guzon, 950 S.W.2d 635 (Mo. App. E.D. 1997)

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. Banc 1993)

**II. THE TRIAL COURT ERRED IN NOT ALLOWING STARLIGHT'S RECOVERY OF ATTORNEYS' FEES FOR PROSECUTING ITS INDEMNIFICATION CLAIM BECAUSE THE TERMS OF THE INDEMNIFICATION AGREEMENT ARE CLEAR IN THAT THE LANGUAGE OF THE AGREEMENT IS BROAD ENOUGH TO INCLUDE SUCH FEES.**

ITT Commercial Finance Corp. V. Mid-America Marine Supply Corp., 854 S.W.2d 371

(Mo. banc 1993)

RJF International Corp. V. B.F. Goodrich, 880 S.W.2d 366 (Mo. App. E.D. 1994)

Missouri Pacific Railroad Co. V. Rental Storage & Transit Co., 524 S.W.2d 898 (Mo. App. 1975)

**III. THE TRIAL COURT ERRED IN NOT AWARDING PRE-JUDGMENT INTEREST ON STARLIGHT-S DAMAGES BECAUSE ' 408.020 ALLOWS SUCH INTEREST IN THAT THERE IS A WRITTEN CONTRACT AND THE DAMAGES WERE READILY ASCERTAINABLE.**

ITT Commercial Finance Corp. V. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Dierker Assocs. D.C., P.C. v. Gillis, 859 S.W.2d 737 (Mo. App. E.D. 1993)

St. John's Bank & Trust Co. V. Intag, Inc., 938 S.W.2d 627 (Mo. App. E.D. 1997)

' 408.020, RSMo.

## ARGUMENT

**I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF DUNN AND AGAINST PC CONTRACTORS, INC. AND, SIMILARLY, IN FAVOR OF STARLIGHT AS AGAINST DUNN, BECAUSE THE INDEMNIFICATION CLAUSES ARE CLEAR AND UNEQUIVOCAL IN THAT THEY REQUIRE INDEMNIFICATION REGARDLESS OF ANY NEGLIGENCE ON THE PART OF THE INDEMNITEES.**

Summary judgment was granted in favor of Starlight on its indemnification claim against Dunn and, similarly, in Dunn's favor on its indemnification claim against PC. Essentially, the judgment resulted in a pass-through of liability, pursuant to the indemnification agreements, to PC as PC was held responsible for the damages of Dunn and for any damages of Dunn which were awarded in favor of Starlight.

This court reviews a summary judgment decision *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The record is reviewed in a light most favorable to the party against whom summary judgment was entered. *Id.* Summary judgment is appropriate to dispense with claims interpreting the terms of an indemnification agreement. RJF International Corp. v. B.F. Goodrich, 880 S.W.2d 366 (Mo. App. E.D. 1994).

Rules applicable to the construction of contracts apply generally to indemnity agreements. Chehval v. St. John's Mercy Medical Center, 958 S.W.2d 36, 37 (Mo. App. E.D. 1997). When a contract uses plain and unequivocal language, it must be enforced as written. *Id.*, at 39. To ascertain the intent of the parties to an unambiguous contract, the language used is given its natural, ordinary and common sense meaning, and the entire contract is considered,

including its object, nature and purpose. *Id.*, at 39. An ambiguity does not exist merely because the parties dispute the meaning of the contract. Rather, a contract is ambiguous when the terms are susceptible of more than one meaning so that reasonable persons may fairly and honestly differ in their construction of the contract. *Id.*

A contract of indemnity is construed to cover all losses, damages or liabilities which it reasonably appears to have been intended by the parties to cover. Lake Center Boatworks, Inc. v. Martin, 804 S.W.2d 842, 845 (Mo. App. E.D. 1991). Generally, when liability has accrued on a contract of indemnity, the indemnitor is responsible to the indemnitee to the full extent of the loss suffered. *Id.*; See also, Denny's, Inc. v. Avesta Enterprises, Inc., 884 S.W.2d 281, 288 (Mo. App. W.D. 1994).

The law is clear in Missouri that where the parties stand on substantially equal footing, one may also legally agree to indemnify the other against the results of the indemnitee's own negligence. Kansas City Power & Light Company v. Federal Construction Corp., 351 S.W.2d 741, 745 (Mo. 1961). While a contract of indemnity will not be construed as to indemnify one against loss or damage resulting from the indemnitee's own negligent act unless such intention is expressed in clear and unequivocal terms, no special wording is required for such language. *See* Chehval, 958 S.W.2d at 39.

The indemnity agreement between Starlight and Dunn contained such clear and unequivocal language:

### 3.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law, the Contractor shall

indemnify and hold harmless the Owner, Architect, Architects-consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys= fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. ... (Supp. L.F., p. 10).

In Buchanan v. Rentenbach Constructors, 922 S.W.2d 467 (Mo. App. E.D. 1996), the Court of Appeals, Eastern District, found that an identically worded indemnity agreement did contain clear and unequivocal language which obligated a sub-contractor to indemnify the contractor for claims asserted based on the contractor=s own negligence. The court stated: ~~A~~the indemnification provision specifically states K & K shall indemnify the contractor for any claims or damages ~~regardless of whether it is caused in part by a party indemnified-~~ *Id.* at 470.

Similarly, the Court in Waterwiese v. K.B.A. Construction Managers, Inc., 820 S.W.2d 579 (Mo. App. E.D. 1991), upheld an indemnification agreement whereby the indemnitor agreed to indemnify the contractor, (K.B.A.) ~~A~~irrespective of any claims that the negligence of K.B.A. contributed to the injury. ~~A~~irrespective of was held to mean ~~A~~regardless of K.B.A.=s own negligence.

Appellant relies on Dillard v. Shaughnessy, Fickle, et al., 884 S.W.2d 722 (Mo. App.

W.D. 1994) which was decided by this Court two years prior to the Eastern District's interpretation of the indemnification clause in Buchanan. In addition, Dillard interpreted the agreement pursuant to Kansas law. The other cases cited by appellant also apply law from jurisdictions other than Missouri.

The parties here are sophisticated business entities with Dunn and PC being engaged in the construction business. All are on equal footing and all know the ramifications of an indemnity agreement. The only common sense meaning to be given to this agreement is the one found by the Missouri Court of Appeals, Eastern District in Buchanan. To hold otherwise would render the last phrase "Regardless of whether or not such claim...is caused in part by a party indemnified hereunder" totally meaningless.

The settlement reached between Starlight and plaintiffs was not based on Starlight's negligence alone. PC argues that because it reached agreement to settle with plaintiffs on July 9, 1999, and because the Release plaintiffs signed included Dunn and Starlight, any subsequent settlement agreement between plaintiffs and Starlight must certainly be for the sole negligence of Starlight.

The record contains nothing to suggest that PC communicated its settlement with plaintiffs to Starlight nor does it show that Starlight was somehow included in any negotiations between PC and plaintiffs. Starlight settled with plaintiffs and a Stipulation for Dismissal was filed August 2, 1999. (L.F., Vol. III, pp. 440-441). The Stipulation for Dismissal as to PC was not filed until September 20, 1999. (L.F., Vol. III, pp. 442-445).

In analyzing the specific allegations in plaintiffs' Third Amended Petition, there are no

independent acts of Starlight which were the sole cause of plaintiffs' damages. Plaintiffs alleged that Starlight had responsibility for the maintenance of the theatre and certain surrounding areas in Swope Park (L.F., Vol. I, p. 94). This is the only allegation directed solely to Starlight. The other allegations in the petition are directed against Dunn and/or PC or Defendants in general. For example, plaintiffs allege that Defendants knocked down the light pole near where plaintiff fell, damaged the manhole and damaged the sidewalk area where plaintiff fell. (L.F., Vol. I, pp. 95-96). The actual acts which resulted in plaintiffs' injuries were due to PC's negligence. PC admitted its employee tipped over a dump truck which knocked down the light pole adjacent to the manhole over which plaintiff tripped. (L.F., Vol. V, p. 539; Vol. VI, p. 678). PC further admitted that the dump truck tipped over because it was on uneven ground and that its employee should have been aware that since the truck was on uneven ground, the possibility existed that it would tip over (L.F., Vol. V, p. 539; Vol. VI, p. 678).

These essential acts of negligence were the cause of plaintiff's injuries. But for the acts of PC, plaintiff would not have been injured. See, Baker v. Guzon, 950 S.W.2d 635, 643 (Mo. App. E.D. 1997); Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 862-63 (Mo. banc 1993). Plaintiffs' allegations against Dunn and Starlight, essentially, failure to repair and failure to maintain, standing alone, do not constitute actionable negligence. Starlight would have no liability but for PC's actions.

Based on these facts, it is not reasonable to conclude that Starlight entered into a \$45,000.00 settlement with plaintiffs solely because of its own negligence. These facts fit

squarely within what the parties contemplated in the indemnification agreements. One party (Dunn/PC) agrees to indemnify the other (Starlight/Dunn) for its own acts of negligence as well as those acts of negligence of the indemnified party.

This Court should affirm the decision of the trial court allowing Starlight's indemnification claim against Dunn and Dunn's indemnification claim against PC.

**II. THE TRIAL COURT ERRED IN NOT ALLOWING STARLIGHT'S RECOVERY OF ATTORNEYS' FEES FOR PROSECUTING ITS INDEMNIFICATION CLAIM BECAUSE THE TERMS OF THE INDEMNIFICATION AGREEMENT ARE CLEAR IN THAT THE LANGUAGE OF THE AGREEMENT IS BROAD ENOUGH TO INCLUDE SUCH FEES.**

After having summary judgment granted in its favor on the indemnification claim, Starlight then filed a brief in support of its request for damages under the agreement. Dunn did the same. (L.F., Vol. VI, pp. 749-838; Vol VII, pp. 845-910). The trial court entered judgment on June 14, 2001, awarding damages to Starlight and against Dunn in the amount of \$68,994.77, and, to Dunn against PC in the amount of \$95,194.77 which represented the \$68,994.77 Dunn was to pay to Starlight plus Dunn's own attorneys' fees, expenses and settlement amount with plaintiffs. (L.F., Vol. VII, pp. 927-931). Starlight timely filed a cross appeal from the trial court's decision.

The award of attorneys' fees and expenses stems from the granting of Starlight's Motion for Summary Judgment on the indemnification issue. This Court's review is *de novo*. ITT Commercial Finance Corp. V. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

Starlight had requested damages in the amount of \$70,505.27, which represented the settlement with plaintiffs of \$45,000.00 and attorneys' fees and expenses of \$25,505.27. (L.F., Vol. VII, pp. 845-910). Starlight requested that its attorneys' fees and expenses be awarded not only for defending the underlying personal injury action, but also for pursuing its indemnity claim against Dunn.

The trial court did not award the entire amount of attorneys' fees sought by Starlight.

Although not so stated in the judgment, it is clear that the trial court awarded attorneys=fees and expenses only for Starlight=s defense of the underlying claim brought by Mr. and Mrs. Nusbaum. This can be discerned from a review of PC=s Suggestions in Opposition to Dunn=s request for damages. PC argued that Dunn and Starlight should not be awarded fees for pursuing the indemnity action and set forth the amount of fees it believed both had incurred in prosecuting the indemnity portion of the case. That precise amount (\$8,849.90) is the amount by which the trial court reduced Dunn=s request for fees and expenses. (L.F., Vol. VI, pp. 839-844; Vol. VII, pp. 927-931). It is reasonable to conclude that the trial court did the same with regard to the damages requested by Starlight. PC argued that Starlight=s attorney fee damages should be reduced by \$2,330.59; the trial court actually reduced Starlight=s request by \$1,510.50, an amount close to the amount suggested by PC (L.F., Vol. VI, pp. 839-844).

The broadly worded indemnity provision in Starlight=s contract with Dunn allows it to recover the fees and expenses incurred in prosecuting the indemnity claim. The provision states in pertinent part:

A...[t]he Contractor shall indemnify and hold harmless the Owner, ...from and against claims, damages, losses and expenses, including but not limited to attorneys= fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property...@

This indemnity provision is similar to that in RJF International Corp. v. B.F. Goodrich, 880 S.W.2d 366 (Mo. App. E.D. 1994). In that case, the Court of Appeals allowed the recovery of fees incurred in pursuing the indemnity claim as well as the fees and expenses incurred in

defending the indemnity award on appeal. 880 S.W.2d at 371-372.

PC relies upon Missouri Pacific Railroad Co. v. Rental Storage & Transit Co., 524 S.W.2d 898 (Mo. App. 1975) which did not allow the recovery of fees and expenses in prosecuting an indemnity claim. The Missouri Pacific case cites a decision of the Federal District Court in Virginia and does not rely on any Missouri authority. The Court ignored the broad language of the indemnification agreement. RJF International did not cite nor discuss the Missouri Pacific case.

Starlight respectfully submits that the RJF International decision applies a better reasoned analysis and should be followed, allowing Starlight to recover \$25,505.27, the expenses and fees incurred in defending the action brought by Plaintiffs as well as prosecuting the indemnification claim against Dunn. Additionally, Starlight requests that its attorneys=fees and expenses on appeal be allowed pursuant to RJF International.

**III. THE TRIAL COURT ERRED IN NOT AWARDING PRE-JUDGMENT INTEREST ON STARLIGHT'S DAMAGES BECAUSE ' 408.020 ALLOWS SUCH INTEREST IN THAT THERE IS A WRITTEN CONTRACT AND THE DAMAGES WERE READILY ASCERTAINABLE.**

The Trial Court awarded post-judgment interest on Starlight's claim against Dunn for indemnification but did not award pre-judgment interest as Starlight had requested. (L.F., Vol. VII, pp. 927-931). Starlight timely filed its cross-appeal on this issue.

As with Point II, the issues surrounding the award of interest on Starlight's damages stem from the granting of Starlight's Motion for Summary Judgment on the indemnification claim against Dunn. This Court's review is *de novo*. ITT Commercial Finance Corp. V. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

Section 408.020, RSMo. states:

Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owners knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

Pre-judgment interest is awarded, pursuant to ' 408.020, RSMo. whenever the amount due is liquidated or, if not strictly liquidated, readily ascertainable by reference to recognized standards@ Dierker Assocs., D.C., P.C. v. Gillis, 859 S.W.2d 737, 746 (Mo. App. E.D. 1993); St. John's Bank & Trust Co. v. Intag, Inc., 938 S.W.2d 627, 630 (Mo. App. E.D. 1997).

Starlight filed its cross claim for indemnity on July 7, 1998 and is entitled to pre-judgment interest as of that date as the indemnification agreement is a written contract between the parties. (L.F., Vol. I, Pp. 101-109). The amount due may not have been liquidated at that point but it could certainly be readily ascertainable and Dunn was on notice of Starlight=s intent to invoke its indemnification agreement.

In the alternative, Starlight would be entitled to pre-judgment interest from September 23, 1999, the date on which Starlight made written demand of Dunn to indemnify it for the \$45,000.00 settlement with Plaintiff and for attorneys= fees and expenses. (L.F., Vol. V, p. 641).

**CONCLUSION**

Based on the foregoing points and authorities, Starlight respectfully requests that this Court uphold the judgment of the Trial Court finding Dunn responsible to Starlight pursuant to the indemnification agreement between the two and finding PC similarly responsible to Dunn. Starlight further requests that this Court reverse the judgment of the Trial Court as it relates to attorneys= fees and allow Starlight to recover attorneys= fees for the defense of the underlying claim as well as for prosecution of the indemnity claim, including this appeal. Finally, Starlight requests this Court reverse the judgment of the Trial Court and allow pre-judgment interest of nine percent pursuant to ' 408.020, RSMo.

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

The undersigned hereby certifies that the foregoing brief was 5,177 words, typed in 13 point font, Times New Roman, utilizing WordPerfect 6.1. The brief complies with page length requirements of Rule 84.06 (b).

Pursuant to 84.06 (g), the floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a Norton Antivirus program. According to that program, the disk is virus free.

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I hereby certify that two copies of respondent's brief and a copy of the virus scanned disc has been mailed, postage pre-paid, this \_\_\_\_ Day of \_\_\_\_\_, 2002, to the following:

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