STATE OF MICHIGAN
IN THE SUPREME COURT

****

ON APPEAL FROM THE COURT OF APPEALS
KATHLEEN JANSEN, JOEL P. HOEKSTRA AND JANE E. MARKEY

KALAMAZOO COUNTY CIRCUIT COURT
GARY C. GIGUERE, JR.

MILLER-DAVIS COMPANY,

Plaintiff/Appellant,

v

AHRENS CONSTRUCTION, INC.,

Defendant/Appellee,

and

MERCHANTS BONDING COMPANY,

Defendant.

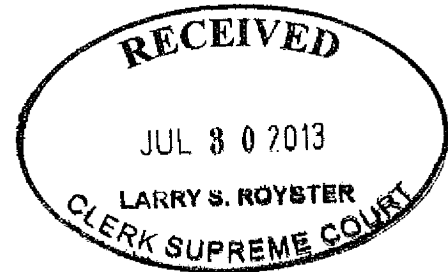
Supreme Court Case No. 145052

Court of Appeals Case No. 284037

Kalamazoo County Circuit Court
Case No. A05-000199-CK

BRIEF ON APPEAL – APPELLANT

-- ORAL ARGUMENT REQUESTED --



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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Miller-Davis Company files this Brief pursuant to MCR 7.302(A)(2) and an Order of this Court dated June 5, 2013 (Apx. 70a) granting Leave to Appeal from a March 22, 2012 Order of the Court of Appeals (Apx. 60a), which affirms in part and reverses in part the Judgment entered by the Circuit Court of Kalamazoo County on February 11, 2008 (Apx. 28a) which was based on the December 21, 2007 Opinion, Findings of Fact and Conclusions of Law. (Apx. 15a). The Order of March 22, 2012 was entered after remand following this Court's Opinion dated July 11, 2011 (Apx. 44a), which reversed an earlier August 4, 2009 Order of the Court of Appeals. (Apx. 31a). That Order previously reversed the same February 11, 2008 Circuit Court Judgment.

STATEMENT OF QUESTIONS PRESENTED AS LIMITED TO THOSE ISSUES SET FORTH IN THIS COURT'S JUNE 5, 2013 ORDER GRANTING LEAVE TO APPEAL

1. Do the indemnification clauses in the subcontract apply in this case?

Plaintiff/Appellant Answers: Yes

The Court of Appeals Answered: Yes

Defendant/Appellee Answers: No

2. If the indemnification clauses apply in this case, was the Plaintiff's action for breach of indemnity barred by the statute of limitations, MCL 600.5807(8)?

Plaintiff/Appellant Answers: No

The Court of Appeals Answered: Yes

Defendant/Appellee Answers: Yes

3. Did the Plaintiff, Miller-Davis, adequately prove that a breach of the indemnification clauses caused its damages?

Plaintiff/Appellant Answers: Yes

The Court of Appeals Answered: No

The Defendant/Appellee Answers: No

4. Did the trial court clearly err in concluding that Defendant Ahrens' performance of nonconforming work caused the natatorium moisture problem ("NMP")?

Plaintiff/Appellant Answers: No

The Court of Appeals Answered: Yes, if not directly, then by implication.

The Defendant/Appellee Answers: Did not answer this question.

INTRODUCTION

The Court's Order Granting Leave to Appeal limited briefing to three (3) issues: (1) Whether the indemnity clauses apply to this case, (2) If so, whether Plaintiff's indemnity claim is barred by the contract statute of limitations, MCL 600.5807(8), and (3) Whether Plaintiff adequately proved Defendant's performance of nonconforming work caused the natatorium moisture problem ("NMP").[1]

The indemnification clauses in the contract agreements in this case apply to the situation here because the project owner made a claim against Miller-Davis and a liability existed as defined by the explicit terms of four separate indemnification clauses. In addition, in light of the circumstances of the case, and the actions of the architect serving as the Owner's agent, common sense shows that a claim was made for correction of the nonconforming work.

The indemnification action is not time barred because the general statutes of limitation relating to contracts, MCL 600.5807(8), should be applied, and as such, the breach of contract and indemnification action was timely filed. The statute of repose, MCL 600.5839(1), does not apply to the express contractual obligations between the parties to a construction contract, the elements of the statute of repose are not present here, and the statute of repose did not bar Miller-Davis' Complaint because the parties negotiated specific contractual provisions for the accrual of actions which were not rendered meaningless by the statute. Finally, the trial court's detailed

[1] If this Court's Opinion addresses only the three (3) briefed issues without addressing the other issues raised in Plaintiff's Application for Leave to Appeal and the Court of Appeals' Second Decision is allowed to stand without correction or reversal, the result will be confusion and uncertainty in the law with the contradiction on indemnity. Miller-Davis respectfully submits it will be most unfortunate if the opportunity is lost for clarification and direction by this Court on issues of importance to this crucial segment of the State's economy.

findings of fact, following Plaintiff's presentation of evidence explaining why the nonconforming work caused the NMP, are fully supported by the record and are not "clearly erroneous."

STATEMENT OF FACTS

A. The Parties and the Project: Miller-Davis was an "at-risk" Construction Manager for a project ("Project") at the Sherman Lake YMCA ("Owner"), which included the construction of a Recreation Building containing a Natatorium ("Natatorium") with an indoor swimming pool. (Apx. 213a, 214a).

B. Ahrens' Work: Ahrens was a contractor/subcontractor ("Subcontractor") to the Owner and Miller-Davis on the Project. (Apx. 346a). Its work included the installation of a special "Timber Deck" roof system ("Roof System") for the Natatorium.

Ahrens' contract incorporated by reference the applicable Project Plans and Specifications, the American Institute of Architects ("AIA") A201 General Conditions of the Contract 1987 Edition "General Conditions," the Project Manual, and a separate written Guarantee of Ahrens' Work. (Apx. 252a-276a, 277a-304a, 390a-441a).

Under the Subcontract, Ahrens agreed, in part, to install all products in accordance with the manufacturer's instructions and recommendations and the requirements of the plans and specifications. Ahrens agreed to indemnify Miller-Davis from and against liabilities, claims, damages, losses, actions, and expenses arising out of performance of the subcontract. The specific terms of the four different indemnity clauses are set forth and discussed more fully in the argument. (Apx. 346a – 353a). The General Conditions (Apx. 371a – 398a) were [explicitly] incorporated into Ahrens' contract by reference and required, among other things, that Ahrens agreed: (a) to perform work in accordance with the contract documents (Section 3.2.2); (b) to

correct work that "fails to conform to the requirements of the Contract Documents whether observed before or after "Substantial Completion," (Section 12.2.1); (c) to bear the cost of correcting nonconforming work (Section 12.2.1), (Apx. 391); (d) to correct at its expense after notice of any work "found to be not in accordance with the Contract Documents" within: (i) one year after the date of Substantial Completion, (ii) after commencement of warranties established under the agreement, or (iii) by the terms of an applicable warranty period required by the Contract Documents (Section 12.2.2), (Apx. 391a - 392a); (Section 4.3.5), (Apx. 382a); (e) obligation to correct nonconforming work was triggered by notice "after discovery of the condition," (Section 12.2.2); (f) that Ahrens' obligation to correct nonconforming work survived "acceptance of the Work under the Contract and termination of the Contract," (Section 12.2.2), (Apx. 391a-392a); (g) after notice, Miller-Davis had the right to correct Ahrens' nonconforming work at Ahrens' expense, (Section 12.2.4 and 12.2.5), (Apx. 392a); (h) obligation to correct nonconforming work extended beyond the one year period after Substantial Completion with respect to portions of the work "first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work," (Section 12.2.2), (Apx. 391a-392a); (i) warranties would "...commence on the date of Substantial Completion ...unless otherwise provided in the Certificate of Substantial Completion (Section 9.8.2), (Apx. 388a); (j) that the warranty period would be a "rolling" period or automatically extended as corrective work was performed (Section 12.2.2), (Apx. 391a-392a); and (k) a cause of action for breach accrues *on the last to occur* of (i) the date of Substantial Completion, (ii) failure to act pursuant to any warranty and correct defective work, or (iii) failure to perform any other duty or obligation owing under the Contract Documents. (Section 13.7.1), (Apx. 393a).

C. Substantial Completion of the Project and Final Payment: Ahrens ceased work on the Roof System February 18, 1999, but continued to perform work on the Project through April, 1999. Ahrens' final pay request was dated May 28, 1999, not on April 26, 1999, as stated by the Court of Appeals. (Apx. 41a). A Temporary Certificate of Substantial Completion was issued on June 11, 1999, a Certificate of Substantial Completion was issued on June 25, 1999, (Apx. 417a) and a Certificate of Occupancy issued on August 2, 1999. (Apx. 481a). Ahrens' written Guarantee states: *The guarantee period shall commence on the Date of Substantial Completion, which is established as June 11, 1999.* Ahrens received final payment on February 17, 2000, not "the day after April 26, 1999," as the Court of Appeals stated. (Apx. 157a¶13).

D. Problems with Ahrens' Work: During the first winter, and less than one year after Substantial Completion, the Owner experienced substantial and excessive condensation conditions in the Natatorium, referred to as the natatorium moisture problem ("NMP"). (Apx. 18a). The problem was so severe that at times it appeared to be "raining" in the pool area. The NMP was promptly and timely reported by Miller-Davis to Ahrens by letter dated January 28, 2000, well within the one year Guarantee period. (Apx. 419a).

During the next several winters, various unsuccessful efforts were made to solve the NMP. Ahrens returned to the Project to correct a number of problems with its nonconforming work beginning in February, 2000, and continued through at least February, 2002, and met with Miller-Davis regarding the NMP at various times, including July 1, 2002. Ahrens represented that its work was done in compliance with the contract, but it was impossible for Miller-Davis to verify this without opening the roof. Opening of the roof was considered the last resort or "nuclear option" because it involved compromising the integrity of the roof and the risk that if

the metal roof was damaged in removal it would be impossible to match the color run of the metal roof which had been installed over Ahrens' work. (Apx. 18a).

When the roof was opened on February 26, 2003, significant, multiple deficiencies were found in Ahrens' installation of the Roof System. As the Circuit Court found, the Roof System "was not installed according to the contract." (Apx. 23a). The deficiencies were pervasive and confirmed when the Roof System was later removed and reinstalled as part of the corrective work ordered by the Architect. (Apx. 335a-345a). The Architect determined Ahrens' installation was not in substantial compliance with the Contract directed removal and reinstallation of the Roof System, using to the extent possible salvageable materials, was necessary and the most reasonable and economical method for performing corrective work. ("Corrective Work") (Apx. 430a). The Owner's demand from Miller-Davis to correct the defective roof installation was relayed to Ahrens.

On June 27, 2003, Miller-Davis and Ahrens met. Ahrens received the architect's specifications for Corrective Work and the estimated quantities. Ahrens stated it would review the information and promised to provide a plan for performance of Corrective Work by July 2, 2003, but Ahrens failed to respond as agreed. (Apx. 149a).

E. Ahrens' Ultimate Default and Miller-Davis' Performance of Corrective Work: Hearing nothing further from either Ahrens or the bonding company, on July 15, 2003, Miller-Davis gave Ahrens and Merchants formal written notice of Ahrens' default, terminated Ahrens' right to complete its contract, and demanded Merchants perform under the bond. (Apx. 426a). On July 3, 2003, Merchants gave Miller-Davis notice of Merchants' waiver of the right to perform on the bond. (Apx. 24a, 428a). Upon Ahrens' and Merchants' default and demand from the Owner to avoid litigation, Miller-Davis entered into an

Agreement with the Owner for Corrective Work dated August 27, 2003, to undertake correction of Ahrens' nonconforming Work. (Apx. 429a). On December 8, 2003, an independent consultant certified that Miller-Davis satisfactorily completed the required Corrective Work. (Apx. 456a-457a).

F. The Circuit Court Action: Miller-Davis filed suit against Ahrens and Merchants on May 12, 2005. Miller-Davis' Complaint contained three (3) counts: one count for breach of contract, a second count for indemnification, and a third count against Merchants on the bond. (Apx. 71a).

After a 9-day trial the Circuit Court rendered its Opinion, Findings of Fact, and Conclusions of Law dated December 21, 2007. (Apx.15a-27a), Relevant findings of fact are summarized below:

In October 1999, the Owner reported to Miller-Davis, that there were drips coming off of the ceiling in the natatorium. The dripping was described as "almost like raining," and was thereafter referred to as the "Natatorium Moisture Problem" (NMP). No one disputes that the problem was real and significant.

From the discovery of the NMP in the fall of 1999, until February of 2003, Miller-Davis embarked on a course of action regarding the NMP, which included multiple attempts to discover the cause of the NMP, as well as the introduction of multiple corrective measures.

The Owner and Miller-Davis were reluctant to engage in a roof tear-off to investigate, and/or solve the NMP. They considered this the "nuclear option" because of the cost to conduct the tear-off, and because of the disruption that it would cause to the operations of the Owner.

In February 2003, however, a partial tear-off was conducted, and an inspection occurred. The architects and Miller-Davis deemed Ahrens' work to be defective and nonconforming.

Exhibit Seven was the Timber Deck System technical brochure that graphically describes the manner in which to install the unmodified system's various components. Exhibit Eight is a "shop drawing" which provides a detail of the system incorporating the vapor barrier.

The nonconforming installation work was widespread, and the Court indicated that it "specifically so finds these facts after a careful review of the photographs taken by Miller-Davis that were admitted during trial."

The trial court further found "[t]he photographs showing proper installation contained in Exhibit Seven bear little resemblance to the photographs depicting the Ahrens' work revealed during the corrective action stage, (Exhibit 25)." The trial court stated, "that this deficiency, along with the shoddy installation of the vapor barrier (specifically, the rips, tears and lapping issues), was the cause of the NMP." The Circuit Court rejected Ahrens' claim it ceased work and involvement on the Project at any time prior to July, 2003, specifically, noting that "From March 12, 2003 until July, 2003 the parties engaged in a series of meetings which culminated in a July 15, 2003 letter from Miller-Davis to Ahrens and Merchants demanding performance under the performance bond, declaring a contractor's default, and terminating Ahrens' right to perform under the contract." (Apx. 19a). Judgment entered on February 11, 2008, in favor of Miller-Davis and against each of the Defendants, Ahrens and Merchants, in the amount of $348,851.50. (Apx. 28a).

G. Ahrens' Appeal, Merchants' Appeal, and Miller-Davis' Cross-Appeal:

Ahrens appealed the Circuit Court's Judgment and the Court of Appeals determined that Miller-Davis' claim was barred by the statute of repose, MCL 600.5839(1). (Apx. 31a).

H. This Court's Decision: On July11, 2011, this Court reversed the judgment of the Court of Appeals, and remanded the case for further consideration. (Apx. 44a).

I. The Court of Appeals' Second Decision: The Court of Appeals' second decision dated March 22, 2012 issued affirming in part and reversing in part the Circuit Court Judgment dated February 11, 2008. (Apx. 60a).

The Court of Appeals conceded Miller-Davis' indemnification claim "was clearly brought within the six-year statute of limitations." (Apx. 60a). However, it found the indemnification clause did not apply for five (5) reasons:

1. "[N]o one brought a claim or demand against the plaintiff within the meaning of the indemnification clause." (Apx. 68a).

2. "[P]laintiff cannot use the alleged breach of this [indemnity] provision (and thus plaintiff's completion of the corrective work) as an alternative accrual date for its underlying breach of contract claim regarding defendant's alleged failure to comply with the requirements of the plans [and] specifications." (Apx. 68a).

3. "We read the indemnification clause ... to apportion ultimate liability among the contracting parties for liability to third parties" ... (Apx. 68a).

4. "[E]ven if the owner's 'demand' that the plaintiff correct the natatorium moisture problem was within the meaning of the indemnification clause,...To the extent the owner demanded plaintiff correct the natatorium moisture problem the 'demand' arose out of the owner's contract with the plaintiff, not the plaintiff's contract with defendant," (Apx. 69a).

5. "Moreover, plaintiff failed to present sufficient proof at trial that the moisture problem was caused by defendant's failure to follow plans and specifications, or faulty workmanship. There is no evidence in the record that supports the finding that defendant's

alleged defective workmanship caused the moisture problem other than an inference drawn from the fact that after the Corrective Work it was no longer present." (Apx. 69a).

STANDARD OF REVIEW

A trial judge's legal conclusions are reviewed de novo. *Hendee v Putnam Twp,* 486 Mich 55, 566; 786 2d 521 (2010); See also MCR 2.613(C). A trial judge's findings of fact are reviewed for clear error, with the reviewing court giving particular deference to the trial judge's resolution of factual issues which involve the credibility of witnesses whose testimony is in conflict. *People v Farrow,* 461 Mich 202, 208–209; 600 NW2d 634 (1999). This standard is higher than the standard for reviewing questions of law because the finder of fact often must choose between conflicting and contradictory testimony and is "in a far better position than is this Court"—or the Court of Appeals—"to determine [witnesses'] credibility." *People v Szymanski,* 321 Mich 248, 253-254; 32 NW2d 451 (1948). A factual finding is "clearly erroneous" if there is no substantial evidence to sustain it, *Beason v Beason,* 435 Mich 791, 803; 460 NW2d 207 (1990), or if, although there is some evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Department of Human Servs v Mason (In re Mason),* 486 Mich 142, 152; 782 NW2d 747 (2010).

A reviewing court oversteps its review function if it substitutes its judgment for that of the trial court and makes independent findings. *Farrow* 461 Mich *at* 209, *citing People v Burrell,* 417 Mich. 439, 448–449; 339 NW2d 403 (1983). "A trial court is in a position to judge the demeanor and credibility of witnesses." *Jones v Eastern Michigan Motorbuses*, 287 Mich 619, 643; 283 NW 710 (1939). The trial court hears the witnesses, observes their demeanor on the stand, and "is in the best position to determine their credibility and to conclude what the facts in

the case really were." *Ray v Mason Co Drain Comm'r*, 393 Mich. 294, 303; 224 NW2d 883 (1975) quoting *Martin v Arndt*, 356 Mich 128, 140; 95 NW2d 858 (1959).

This Court has repeatedly recognized the important role of the trial court in choosing between conflicting and contradictory testimony." *See People v Reese*, 491 Mich 127, 159-160; 815 NW2d 85 (2012). In *Reese,* this court stated, "[w]hen considered as a whole, it is difficult to escape the conclusion that the panel simply substituted its interpretation of the testimony for the trial courts. This is inappropriate when the standard of review requires an appellate court to accept the trial court's findings of fact unless they are *clearly erroneous.*" *Id.* citing MCR 2.613(C) and *People v Robinson* 475 Mich 1, 5; 715 NW2d 44 (2006).

ARGUMENT

I. THE INDEMNIFICATION CLAUSES IN THE SUBCONTRACT APPLY IN THIS CASE

A. Legal Principles Regarding Indemnification.

The term "indemnity" encompasses any duty to pay for another's loss or damage and is not limited to reimbursement of a third party claim.... Under a contract for indemnification, one party (the indemnitor) promises to hold another party (the indemnitee) harmless from loss or damage of some kind, and the indemnitor promises to indemnify the indemnitee against liability of the indemnitee to a third person, or against loss resulting from the liability. 41 Am Jur 2d Indemnity §30 p. 415. No shared liability for a debt is required to support indemnification. *Estate of Kriefall v Sizzler USA Franchise Inc,* 342 Wis 2d 29,54; 816 NW2d 853, 865 (2012). Indemnification is not limited to third party claims, but includes first party disputes between the indemnitor and the indemnitee. *Wal-Mart Stores Inc v Qore Inc,* 647 F 3d 237, 243-244 (2011). A "guarantee agreement" is one in which the promisor protects his or her promisee from liability

for a debt resulting from the failure of a third party to honor an obligation to that promisee – thus creating a secondary liability, while in contrast, an "indemnity contract" creates a direct, primary liability between the promisor and promisee that is original and independent of any other obligation. 41 Am Jur 2d Indemnity §30 p. 417.

B. Legal Principles of Contract Interpretation.

A court's primary task in construing a contract is to give effect to the parties' intention at the time they entered into the contract. *Quality Prods & Concepts Co v Nagel Precision Inc,* 469 Mich 362, 375; 666 NW2d 251 (2003). When interpreting a contract, a court has an obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. *Phillip v Homer (In re Smith Trust),* 480 Mich 19, 24; 745 NW2d 754 (2008). Not every case calls for contract interpretation. When the parties make an agreement that does not contravene a principle of public policy, and which contains no element of ambiguity, the court has no right by a process of interpretation, to relieve one of them from any disadvantageous terms that have been made. *State Farm Mutual Automobile Ins v Descheemaelrer,* 178 Mich App 729, 731; 444 NW2d 153 (1989). Courts must "reject the temptation to rewrite the plain and unambiguous meaning" of a contract "under the guise" of contract interpretation. *Allstate Ins Co v Tillerman,* 432 Mich 656, 666; 443 NW 2d d734 (1989). In sum, courts must enforce contract terms as they are written. *Stine v Continental Cas Co,* 419 Mich 89, 114; 349 NW2d 127 (1984).

In construing contracts, the court must give effect to every word or phrase as far as practicable and "avoid an interpretation that would render part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency Inc,* 468 Mich 459, 468; 663 NW2d 447 (2003). In ascertaining the meaning of a contract a court gives the words used in the contract the plain

and ordinary meaning that would be apparent to the reader of the instrument. *Ray v Continental Cas Co,* 473 Mich 457, 464; 703 NW2d 23 (2005). In determining the plain meaning of a word where a word is not defined in the contract, a court may look to the definition of the word given in a recognized dictionary. *Allstate Ins Co v Freeman,* 432 Mich 656; 443 NW2d 734 (1989). In *Freeman* the court referred to Blacks Law Dictionary and the American Heritage Dictionary saying that "adherence to a correct usage of the English language ... promotes a uniform, reliable, and reasonable foundation upon which...[persons] may rely when they enter into a contractual agreement. *Id.* at 699.

In a contractual indemnification action the threshold question whether the fact situation is covered by the indemnity contract "generally requires only a straightforward analysis of the facts and the contract terms." 41 Am Jur 2d Indemnity §30 p. 427 citing *Grand Trunk W RR Inc v Auto Warehousing Co,* 262 Mich App 345, 356-357; 686 NW2d 756 (2004).

C. The Purpose of Indemnity Clauses in a Subcontract is to Protect the General Contractor from the Consequences of Subcontractor Defaults.

In a large construction project, an owner contracts with a general contractor and/or construction manager who subcontracts portions of the work on the project to various subcontractors. To assure proper allocation of risk and responsibility for work on the project a subcontract contains at least two important provisions: (1) the subcontract provides that a subcontractor is contractually obligated to the general contractor to perform the subcontracted work in the same manner and to the same extent as the general contractor is obligated to the owner to perform such work and the subcontractor is bound by the Contract Documents to perform the subcontracted work in accordance with the project plans and specifications, (2) the subcontractor must indemnify the general contractor against claims of the owner or third persons

arising out of the subcontractor's defective work. Because there is no direct contractual relationship between the owner and the subcontractors and the general contractor is liable to the project owner for performance of the work, the subcontract provides that the subcontractor will indemnify the general contractor for damages caused by the subcontractor's performance of the contract. The indemnity includes claims, loss, damage or liabilities arising out of the subcontractor's work and frequently includes a defense obligation.

D. The Purpose of the Indemnity Clauses was to Protect Miller-Davis from the Consequences of Subcontractor, Ahrens' Defaults.

As an at-risk construction manager, Miller-Davis was contractually obligated to the Owner, Sherman Lake YMCA, to fulfill the obligations of all subcontractors in the event of the subcontractors' default. The purpose of the subcontractor indemnity clause was to protect Miller-Davis from the consequences of Ahrens' failure to perform its obligations, Ahrens' initial obligation to install the Roof System in accordance with plans and specifications and Ahrens' later obligation to correct its defective roof installation.

E. The Terms of the Four (4) Indemnification Clauses.

The subcontract contains the following four (4) clauses imposing upon Ahrens obligations of defense and indemnity from and against all claims, demands, losses, damages, and liabilities including attorney fees. (Note these are numbered in this brief for convenience and reference):

Clause 1:

> You [Subcontractor/Ahrens] agree to defend and save harmless and to indemnify MILLER-DAVIS COMPANY from any and all liens or claims arising out of the performance or fulfillment of this order and to furnish such guarantees as may be required, as to workmanship and materials. (Apx. 347a).

Clause 2:

You [Ahrens] as Subcontractor/Supplier agree to defend, hold harmless and indemnify Miller-Davis Company, its officers, employees, representatives, and agents from and against all claims, damages, losses, demands, liens, payments, suits, actions, recoveries, judgments and expenses including attorney fees, interest, sanctions, and court costs, which are made, brought, or recovered against Miller-Davis Company, by reasons of or resulting from, but not limited to, any injury, damage, loss or occurrence arising out of or resulting from the performance or execution of this Purchase Order by the Subcontractor/Supplier, its agents, employees, and subcontractors regardless of whether or not caused in whole or in part by any act, omission, fault, breach of contract, or negligence of Miller-Davis Company. The Subcontractor/Supplier shall not, however, be obligated to indemnify Miller-Davis Company for any damage or injuries caused by or resulting from the sole negligence of Miller-Davis Company. (Apx. 350a).

Clause 3:

You [Ahrens] as Subcontractor/Supplier agree to defend, hold harmless and indemnify Miller-Davis Company, the Owner, the Architect and other parties for all liabilities, either in tort or in contract, in the same manner and to the same extent that Miller- Davis Company is required to defend, hold harmless and indemnify the Owner, Architect, or other parties pursuant to Miller-Davis Company's Contract with the Owner, unless the liability arises solely as a result of the negligence of Miller-Davis Company. (Apx. 351a).

Clause 4:

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, 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 such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, 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. 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. (Apx. 331a).

Clause 4 appears in the AIA A201 General Conditions incorporated by reference in: a) Miller-Davis' contract with the Owner, Sherman Lake, and b) Miller-Davis' subcontract with Ahrens. The Court of Appeals held that Miller-Davis waived any claim regarding the application of the AIA General Conditions to this situation. The Court was wrong for the following reasons. The subcontract attached to Plaintiff's Complaint adopted by reference the General Conditions. The parties discussed the application of the general conditions exhaustively during trial. Finally, during the testimony of John VanStratt, the Defendants stipulated that the General Conditions were incorporated in the subcontract. (Apx. 653a). The situation is not one in which the Conditions were merely admitted into evidence; they were, by agreement of the parties, recognized to be incorporated into the subcontract. The General Conditions were the subject of additional testimony and were discussed at length in Plaintiff's proposed findings post-trial. The Court of Appeals' finding of waiver ignores the correct facts of the case. In Miller-Davis' contract with the owner, Sherman Lake is the "owner" referred to while in Miller-Davis' subcontract with Ahrens, Miller-Davis, is the "owner" referred to.

In summary, Ahrens agreed and was obligated to:

a. *Defend and indemnify* Miller-Davis against *any and all claims* arising out of the performance of the subcontract. (Clause 1)

b. *Defend and indemnify* Miller-Davis against *all damages, losses, demands, payments, including attorney fees* made or brought by reasons of or resulting from, but not limited to any damage, loss or occurrence arising out of or resulting from the performance of the subcontract. (Clause 2)

c. *Defend and indemnify* Miller-Davis against *all* liabilities, in tort or *contract* in the same manner and to the same extent Miller-Davis is required to defend and indemnify the owner pursuant to its contract with the owner. (Clause 3)

d. *Indemnify* Miller-Davis *to the fullest extent permitted by law against claims, damages, losses and expenses, including attorney fees,* arising out

of or resulting from the performance of the Work for destruction of tangible personal property (other than the Work itself) to the extent caused in whole or in part by the negligent acts or omissions of the subcontractor. (Clause 4)

F. This is a Simple Case of Subcontractor Default Requiring Indemnification.

This is a simple case involving the most basic application of an indemnification clause. A subcontractor's work is found defective. The Project Owner demands the general contractor/construction manager correct the subcontractor's defective work and issues a specific directive to perform the Corrective Work. The general contractor relays and tenders the demand to the subcontractor to correct its defective work and to defend and indemnify the general contractor against the owner's demand and for the costs of Corrective Work. The subcontractor fails to perform the work. The general contractor is required to correct the defaulting subcontractor's work incurring the cost of correcting the subcontractor's defective work. The general contractor sues (a) the subcontractor for (i) breach of contract and (ii) indemnity; and (b) the subcontractor's surety for the cost of correcting the defaulting subcontractor's defective work and for attorney fees.

Interpretation of the indemnity clause must be undertaken in the context of the wealth of case law holding defaulting subcontractors obligated to indemnify and reimburse a general contractor for the loss, damage, and expense incurred in correcting the defaulting subcontractor's work. See Annotation: Liability of Subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property. 68 ALR 3rd § 7 and as supplemented. See also *Zahn v Kroger Co of Mich,* 483 Mich 34, 40; 764 NW2d 207 (2009); *Ajax Paving Industries Inc v Vanopdenbosch Constr Co,* 289 Mich 639, 349-650, 797 NW2d

704 (2010); *Grand Trunk W RR Inc v Auto Warehousing Company,* 262 Mich App 345; 686 NW2d 756 (2004); *Skinner v D-M-E Corp,* 124 Mich App 580; 335 NW2d 90 (1983).

For specific examples of defaulting roofing subcontractor cases see among others: *Temple Beth Sholom Const Corp v Thyne Construction Corp,* 399 So 2e 525 (1981) and *MT Builders LLC v Fisher Roofing Inc,* 219 Ariz 297; 197 P3d 758 (Ct App 2008).

G. The Indemnity Clauses are Broad-All-Inclusive Clauses, including the Words "All" and "Any" and the Phrase "To the Fullest Extent Permitted by Law."

The obvious intention of the indemnity clauses is to provide broad, all-inclusive indemnification protection. Clause 1 uses the phrase "any and all." Clauses 1, 2, & 3 use the word "all." Clause 4 uses the term "any" and begins "To the fullest extent permitted by law." Note the only restriction upon indemnity in the construction context is a statutory prohibition against indemnification against "sole negligence of the contractor." MCL 691.991. In this case there is no issue, claim or evidence that Miller-Davis was negligent or that the indemnity clause was unlawful or violated public policy.

The use of the term "all" in an indemnification clause is considered "broad-all-inclusive language" which provides for the broadest possible indemnification. *Calladine v Hyster Company,* 155 Mich App 175, 182; 399 NW2d 404 (1986), *Perry Drug Stores v NP Holding Corp,* 243 Fed Appx 989, 995 (CA6 2007) citing *Triple E Produce Corp v Mastronardi Produce Ltd,* 209 Mich App 165, 173; 530 NW2d 772 (1995). "[T]here cannot be any broader classification than the word 'all.' In 'its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Paquin v Harnischferger Corporation,* 113 Mich App 43, 50, 317 NW3d 279 (1982). The statement "To the fullest extent permitted by law" is evidence of intention to provide the broadest possible indemnification.

No construction is required or even permissible when the language employed by the parties in an indemnity contract is plain, unambiguous and capable of only one reasonable interpretation. 41 Am Jur 2d Indemnity §30 p. 429 citing *Anderson v US Fidelity & Guar Co,* 267 Ga App 624, 600 SE2d 712 (2004) When the contractual language is unambiguous, interpretation is limited to the actual words used, and an unambiguous contract must be enforced according to its terms. The same principles of contract construction that govern other types of contracts are applied to indemnity contracts. *Zahn v Kroger Co,* 483 Mich 34, 40; 764 NW2d 207 (2009). The Court of Appeals found no "ambiguity" in the terms of the indemnification clause because there is none. Therefore the indemnity provisions should be enforced according to their terms.

H. There was a "Claim" or "Demand" "Brought" Against Miller-Davis" and a "Liability" within the Commonly Understood Meaning of those Terms.

The Court of Appeals refused to apply the indemnification clause on the ground that "no one brought a claim or demand against the plaintiff within the meaning of the indemnification clause." (Apx. 66a). This conclusion defies law, logic, the testimony, documentary evidence, reasonable interpretation of the English language, and economic realities of the case. To reach its erroneous conclusion the Court of Appeals ignored the plain language of the indemnity clauses. It paid no heed and gave no force to the following:

a. Clause 1 *contains no requirement that a claim be "made or brought."* Rather it mandates indemnity *"for any and all... claims arising out of the performance or fulfillment of the"* subcontract. (Emphasis supplied).

b. Clause 2 *is not limited or confined to indemnity for "claims" and "demands."* Rather it mandates indemnity against *"damages," "losses," "payments" "including attorney fees."* (Emphasis supplied).

c. Clause 3 *contains no reference to or requirement of a "claim or demands."* Rather it mandates indemnity against "*all liabilities.*" (Emphasis supplied).

d. Clause 4 *contains no reference to or requirement than a claim be made or brought.*" Rather it mandates indemnity against "*damage, loss and expenses, including but not limited to attorney fees.*" (Emphasis supplied).

I. Failure to Enforce the Clear Mandate for Indemnity Against "Liabilities" is Ground for Reversal.

Failure to enforce the clear mandate for indemnity against *liabilities* contained in Clause 3 is sufficient ground for reversal of the Court of Appeals' decision. For even if there were no "claim" or "demand" "made" or "brought" Miller-Davis was entitled to indemnity against all "liabilities" under Clause 3. Miller-Davis was liable to the Owner to correct subcontractor defaults. (Apx. 329a).

Indemnity against "liability" requires only that there exist a "potential liability" and that the settlement be "reasonable." *Grand Trunk W RR Inc v Auto Warehousing Company,* 262 Mich App 345, 353; 686 NW2d 756 (2004). *Skinner v D-M-E Corp,* 124 Mich App 580, 589; 335 NW2d 90 (1983), 41 Am Jur 2d Indemnity §30 p. 455. The indemnitee has a duty to act prudently and mitigate damages and it is in the interest of justice that parties settle their differences rather than litigate. There is no claim or evidence Miller-Davis did not act prudently by settling with the Owner and acting promptly to mitigate damages.

The trial judge's findings are uncontroverted proof that a valid and legal obligation "liability" existed and Miller-Davis' action was timely, reasonable, necessary and served to mitigate damages and avoid the cost and expense of litigation. Miller-Davis was entitled to indemnity against liabilities under Clause 3.

J. Failure to Enforce the Indemnity Against "Losses" or "Damage" and without Requirement of a "Claim" or "Demand" being "Made" or "Brought" is Ground for Reversal.

Failure to enforce force to the defense and indemnity obligations contained in Clauses 1, 2 and 3 was ground for reversal. A broad indemnification provision including a defense clause against "claims" provides the indemnitee protection against claims without specifying who must make the claim or more importantly, whether the claim need even be proven. Clauses 2 and 4 only require "losses" or "damage." Thus the only requirement for indemnity is that there be "damage" or "losses." There is no requirement that a "demand" be in writing, no requirement liability be "proven," no requirement a lawsuit or arbitration proceeding instituted or pending or that damage or loss be reduced to judgment. *Ajax Paving Industries Inc v Vanopenbosch Constr Co,* 289 Mich App 639; 797 NW2d 704 (2010). Even if the language were confined to a duty to defend the benefit of such protection does not attach only if a claim is tried. *Volex v Dollar Tree Stores Inc,* No. 263820 (March 30, 2006) (Unpublished).

Indemnity does not require a suit be brought or a judgment recovered against the indemnitor. An indemnitee is entitled to settle a claim and an indemnitee who settles a claim retains a right of indemnification against the indemnitor. *Grand Trunk W RR Inc v Auto Warehousing Company,* 262 Mich App 345, 354-355; 686 NW2d 756 (2004). Refusing to recognize the settlement of the Owner's claims as documented by the Agreement for Corrective Action and Miller-Davis' loss and damage in incurring the expense of correcting Ahrens'

defective work was inexcusable and ground for reversal. Miller-Davis was entitled to indemnity against loss and damage under Clauses 2 and 4.

K. The Facts Demonstrate the Existence of the Owner's "Claim" and "Demand" as those Terms are Commonly Used and Understood in Law.

To arrive at its conclusion that no "claim was brought" the Court of Appeals erroneously ignored the ordinary meaning and/or contractual definitions of "claim," "demand," "made" or "brought."

The AIA General Conditions which were part of the contract in this case define "claim" saying:

> A Claim is a demand or assertion by one of the parties seeking, as a matter or right, adjustment to the interpretation of the Contract terms, payment of money, extension of time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. (Apx. 332a).

Webster's New World College Dictionary (4th Ed 2006) defines a "claim" as a "demand for something rightfully due or allegedly due... a right or title to something." Black's Law Dictionary (9th Ed 2009) defines "claim" as "the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional...a demand for money, property or a legal remedy to which one asserts a right... to assert; to urge; to insist." Webster's New World College Dictionary (4th Ed 2006) defines a "demand" as "the act of demanding...a thing demanded...a strong or authoritative request... an urgent requirement or claim. Black's Law Dictionary (9th Ed 2009) defines "demand" as "the assertion of a legal or procedural right...a request...a request for payment of a debt or an amount due." Webster's New World College Dictionary (4th Ed 2006) defines "make" as "to bring into being... to present for consideration... Black's Law Dictionary (9th Ed 2009) defines "make" as "to cause (something)

to exist (to make a record)...to enact (to make a law)...to acquire something...to legally perform..." Webster's New World College Dictionary (4th Ed 2006) defines "brought" (the past and past participle of "bring") as "to carry or lead a person or thing to a place...to cause to happen, come, appear, have ...to present, advance." Black's Law Dictionary does not define "brought" or "bring."

The existence of "claim," or "demand" is clear. In the spring of 2003 the Project Architect and the Owner's agent, after a partial roof tear-off, determined Ahrens' installation of the Roof System was defective. Miller-Davis discovered for years Ahrens had misrepresented and concealed the true condition of its defective work. The Architect, again acting as the Owner's agent, issued a written Agreement for Corrective Work that determined reinstallation of the roof deck could not be performed exactly as the original installation because certain components of the roof were already in place and could not be removed without creating problems for the structural integrity of the roof. It took into consideration modifications in the Corrective Work to allow for the then existing conditions and circumstances. (Apx. 429a).

The Agreement for Corrective Work was documented evidence of the "claim" or "demand" by the Project Owner. The "claim" was real. The liability was not only "probable," but also actual and certain. The Architect determined that Ahrens' work was defective and, based on the chain of contracts, demanded that Miller-Davis correct the work. The Agreement for such work is the key to this process. The trial judge said Ahrens' installation of the Roof System was so defective it was "not even a close call." That Miller-Davis made a corresponding claim and demand upon Ahrens to correct Ahrens' defective work was well documented by correspondence, cost estimates, and meetings. The Owner's claim and demand were known to Ahrens who knew it had the obligation to correct its defective work. When Ahrens failed to

show for a scheduled meeting at the end of June 2003, Miller-Davis gave a formal written demand to both Ahrens and Ahrens' surety to perform Ahrens' obligation to correct Ahrens' defective work. When Ahrens again refused to perform the required Corrective Work Miller-Davis gave notice to Ahrens and Merchants, as Ahrens' surety, terminating their right to perform under their contract. (Apx. 449a-455a). Ahrens and its surety at all times recognized and treated the matter as a claim.

Miller-Davis did not undertake removal and reinstallation of Ahrens' defective Roof System and incur a $348,000 expense out of a sense of charity. The Owner's claim and demand were of such nature that it would be reportable to Miller-Davis' auditors under the ABA Committee on Audit Responses which identifies three categories of "Loss Contingencies" – "overtly threatened or pending litigation," "contractually assumed obligations," and "unasserted possible claims or assessments." See ABA Statement in Effect on FINA 48 on Audit Response Letters October 16, 2008 and publication: ABA Lawyer's Responses to Auditors' Requests for Information, AU Section 337C, Exhibit II – American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information. (Approved December 1975).

The Owner's claim against Miller-Davis and Miller-Davis' claim against Ahrens were later deemed by the trial court to be substantial when it determined that Ahrens' work was defective and there was a valid legal obligation owing from Ahrens to Miller-Davis under Count I of Miller-Davis' complaint.

The existence and nature of the "claim" is well documented in the Agreement for Corrective Action. (Apx. 429a-448a). It contains detailed recitations giving rise to the Agreement, sets forth the investigation by the Project Architect, rejection of Ahrens'

nonconforming work, consideration of the alternative remedies, requires removal of the entire roof, salvage and reuse certain materials, and reinstallation of the Roof System with modifications to account for existing conditions and all under observation and monitoring by the Project Architect and a third party professional engineering firm. It recites assurances by the Architect as the Project's design professional that "removal and replacement of the entire Roof System will satisfactorily remedy and correct the NMP for the Owner in the future." Specific provisions for the Corrective Action are documented in detail. It defines the nature and extent of Miller-Davis' obligations to satisfy its contractual liability to the Owner to provide a Roof System conforming to the plans and specifications and as modified to account for the fact that the natatorium was already otherwise completed. Settlement of "claim[s]" is an express purpose of the Agreement. It states:

> This Agreement is the result of a compromise, settlement and accord reached in good faith after arm's length negotiations to avoid expense and delay and to effect a settlement of contested *claims*." (Apx. 435a) (Emphasis supplied).
>
> It provides for "release" of contractor by the owner of:
>
> "all *claims*, actions, suits, debts" the owner has and confirms the owner had not assigned any of those "*claims*." (Apx. 435a) (Emphasis supplied).

It contains a reservation of "claims" stating the owner and Miller-Davis retain their "claims" against third persons including Ahrens and the surety. (Apx. 435a). It makes no sense to think that Miller-Davis would retain the right to a claim against Ahrens if the Owner advanced no such claim against Miller-Davis.

The Agreement for Corrective Work constitutes incontrovertible evidence that a claim existed.

Ahrens and its surety recognized the existence of a claim throughout the proceedings, Merchants Bonding Company, as Ahrens' surety, paid the sum of $335,000 to settle its liability on appeal thus recognizing the fact and economic reality a claim existed and was "made" and "brought" in this case. This is another reason why the Court of Appeals' finding of the absence of any "claim" or "demand" being "made" or "brought" within the meaning of the indemnification clause is utterly contrary to the plain meaning of those terms and modern commercial and industry practice.

L. The Court of Appeals Erroneously Read into the Contract an Exclusion of Miller-Davis' Contractual Liability to the Owner.

The Court of Appeals was obviously uncomfortable finding there was no "claim" or "demand" made or brought against Miller-Davis and attempted to buttress its opinion by adding: "even if the owner's 'demand' that the plaintiff correct the natatorium moisture problem was within the meaning of the indemnification clause,...To the extent the owners demanded plaintiff correct the natatorium moisture problem the 'demand' arose out of the owner's contract with the plaintiff, not the plaintiff's contract with defendant." (Apx. 67a). The Court of Appeals erroneously applied the law and facts when it attempted to relieve Ahrens from its indemnification obligation on such grounds. The indemnification clause contains no limitation or restriction regarding the "source" of any claim and to read into that clause such a restriction is to rewrite the parties' agreement.

The source of the claim, demand or liability is irrelevant. Indemnification is not limited to third party claims, but includes first party disputes between the indemnitor and the indemnitee. *Wal-Mart Stores Inc v Qore Inc,* 647 F 3d 237 (2011). Although indemnity generally relates to third party claims, the general rule does not apply if the parties to a contract use the term

"indemnity" to include direct liability as well as third party liability. *Zalkind v Ceradyne Inc,* 194 Cal App 4th 1010, 124 Cal Rptr 3d 105, (4th Dist 2011).

An "indemnity contract" creates a direct, primary liability between the promisor and promisee that is original and independent of any other obligation. 41 Am Jur 2d Indemnity §30 p. 417 citing *Intercargo Ins Co v B.W. Farrell Inc,* 89 SW3d 422 (Ky Ct App 2002). No shared liability for debt is required to support indemnification. *Estate of Kriefall v Sizzler USA Franchise Inc,* 342 Wisc 29, 816 NW2d 853, 77 UCC Rep Serv 2d 1007, 2012 WI 70, (2012). The court must give effect to every word or phrase as far as practicable and "avoid an interpretation that would render part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency Inc,* 468 Mich 459, 468; 663 NW2d 447 (2003)

The Court of Appeals' conclusion is premised upon a fundamental mistake as to the contractual arrangements in the industry. Ahrens as subcontractor owed obligations for performance of the subcontracted work to *both* Miller-Davis and the Owner.

The indemnity clauses in this case included the AIA A201 General Conditions incorporated by reference into Ahrens' subcontract, which obligated Ahrens to perform and assume all obligations of Miller-Davis to the Owner regarding the subcontracted work. See *Binswanger Glass Co v Beers Constr Co,* 141 Ga Ap 715, 234 SE2d 393 (1977) in which a subcontract clause was held sufficient to incorporate by reference the general contract indemnity provisions where the subcontract provided the subcontractor would be bound to the contractor by the terms of the contract documents and the subcontract agreement provided the subcontractor would assume toward the general contractor all obligations and responsibility that the contractor assumed toward the owner and wherein the general contractor agreed to indemnify the owner. Ahrens was bound by the AIA General Conditions that defined "claim" to include "other

disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. (Apx. 332a).

The Court of Appeals creates a distinction without a difference and its interpretation would preclude indemnity against tort claims brought by persons having no contractual relationship with Miller-Davis or Ahrens. It is totally contrary to the intention, purpose, use and interpretation of indemnification clauses in the construction industry.

M. Ahrens' Indemnity Obligations were Multiple and Included Indemnity Against "Claims," "Demands," "Losses," "Damages," and "Liabilities."

The Court of Appeals erroneously limited the scope of the indemnity clause to "defendant's ...failure to comply with the contract's plans and specifications." That was only Ahrens' first of many contractual defaults. Ahrens' obligations extended beyond its initial or original failure to install the Roof System in accordance with plans and specifications. Ahrens was obligated to correct its defective work.

Ahrens' indemnity obligations were not limited to a single initial default.

Clause 1 requires indemnity against "all ...claims." Clause 2 requires indemnity against "claims, damages, losses, demands... payments, ...by reasons of or resulting from, but not limited to, any...damage, loss or occurrence arising out of the performance or execution of this Purchase Order..." Clause 3 requires indemnity against "all liabilities... in contract that Miller-Davis is required to... hold harmless and indemnify the Owner ...pursuant to Miller-Davis Company's Contract with the Owner. Clauses 1, 2 & 3 impose a contractual duty to defend. The contractual duty to defend is broader than the duty to indemnify because it covers not only claims by which the indemnitor is liable, but also claims under which the indemnitor could be found liable. *Reyburn Lawn & Landscape Designers Inc v Plaster Development Co Inc,* 255

P3rd 268, 127 Nev Adv Op No 26 (Nev 2011). Indemnity clauses 1, 2, 3 and 4 specifically apply in this case.

N. The Court of Appeals Nonetheless Erroneously Read into the Contract an Intention to Apportion Liability.

Despite the fact it found no ambiguity in the indemnity clause, the Court of Appeals proceeded to ignore the plain language and began to limit and dismantle the indemnification clause saying:

> "We read the indemnification clause ... to apportion ultimate liability among the contracting parties for liability to third parties" [citing] *Baker Contractor Inc v Chris Nelsen & Sons Inc,* 1 Mich App 450, 454, 136 NW2d 771 (1965); (Apx. 66a).

Neither the word "apportion" nor any of its derivatives appear in the indemnification clause. The *Baker* case neither dictates nor supports the Court of Appeals' interpretation. The issue in *Baker* was "whether or not the indemnity clause in the contract is a defense to the breach of contract found by the lower court." No such issue or application of the indemnity clause appears in this case.

Clauses 1, 2 & 3 include a duty to defend. Where the duty to defend arises from contractual language, it generally is not subject to equitable considerations; rather it is enforced in accordance with the terms of the parties' agreement. *United Rentals Hwy Techs v Wells Cargo,* 289 P3d 221, 128 Nev Adv Op No 59 (Nev 2012). Apportionment of any original or indemnified liability has no application in this case. By imposing and adding any requirement of apportionment, the Court of Appeals impermissibly rewrote the contract under the guise of contract interpretation.

O. Ahrens' Indemnification Obligation Includes Attorney Fees.

Under Clauses 2 and 4, which expressly provide for indemnity for attorney fees, Miller-Davis is entitled to attorney fees incurred in having to enforce Ahrens' indemnity obligation. *Ajax Paving Industries Inc v Vanopenbosch Constr Co,* 289 Mich App 639; 797 NW2d 704 (2010); *Redfern v RE Daily Company,* 146 Mich App 8, 20-21; 379 NW2d 451 (1985). "Where a party is contractually entitled to be held harmless, that party is entitled to its costs and attorney fees incurred to enforce the contractually indemnity provisions." 41 Am Jur 2d Indemnity §30; p. 448 "[A]ny other outcome would not result in...[the indemnitee] being held harmless." *Delle Donne & Associates LLP v Millar Elevator Service Company,* 840 A2d 1244; 1256 (Del Spr 2004); In accord: *Pike Creek Chiropractic Center P.A. v Robinson,* 637 A2d 418 (1994). *Maule v Philadelphia Media Holdings LLC,* ED Pa. 2010 WL 3859613 (Not Reported in F Supp 2d 2101) *Blain v Sam Finley Inc,* (1969 Miss) 226 So 2d 742.

Indemnification for attorney fees includes those fees and expenses incurred in enforcing the indemnity obligations. *Wal-Mart Stores Inc v Qore Inc,* 647 F 3d 237 (2011) In *Perry Drug Stores v NP Holding Corp,* 243 Fed Appx 989 (CA6 2007) the 6th Circuit Court of Appeals let stand the lower court's award of attorney fees incurred in enforcing an indemnity clause which included attorney fees "incurred or sustained by [indemnitee]... resulting from...any breach or violation of...[the promises made by indemnitor]" even though the indemnitor did not breach the indemnification provisions. The Court said, "the use of the term 'all' in an indemnity clause has been interpreted to provide for the broadest possible indemnification. Under the interpretation of the indemnification provision, the District Court did not err in its award of damages." 243 Fed Appx 989, 997.

Clauses 1, 2 & 3 impose defense obligations on Ahrens. This is significant because Ahrens sought unsuccessfully to avoid and transfer defense costs to Miller-Davis by contesting indemnity liability. In so doing, it caused Miller-Davis to bear the expense of establishing Ahrens' indemnity liability. It forced Miller-Davis to litigate the very issues Ahrens would have been obligated to defend against had Miller-Davis failed to settle and required the Owner to litigate against Miller-Davis to recover the costs of correcting Ahrens' defective work. Equity will not permit what cannot be done directly to be done indirectly. *Corkins v Ritter*, 326 Mich 563, 568 (1950), *Advisory Opinion re Constitutionality of PA 1966*, No. 261, 379 Mich 56, 60 (1967).

When an indemnitor forces an indemnitee to litigate the indemnitor's indemnity obligation, the indemnitor does so at his peril. If the indemnitor loses that litigation the indemnitor must be liable under the indemnity clause to pay the indemnitee all of the indemnitee's attorney fees, costs and expenses incurred in enforcing the indemnitor's obligations. Any other rule allows the indemnitor to "game the system" and escape responsibility for the true cost of its defaults. A defaulting indemnitor should not be permitted to twice pick-the-pocket of the indemnitee. Miller-Davis is entitled to an award of attorney fees in this action including all fees incurred on appeal.

II. MILLER-DAVIS' INDEMNIFICATION ACTION WAS TIMELY UNDER MCL 600.5807(8) AND NOT BARRED BY THE CONTRACT STATUTE OF LIMITATIONS

A. Legal Principles Regarding Accrual of Actions for Contractual Defense and Indemnity.

The contractual duty to defend necessarily arises as soon as claims are made against the promisee and may continue until they have been resolved. This is the common understanding of

the word "defend" as it is used in legal parlance. *Crawford v Weather Shield Mfg Inc,* 44 Cal 4th 541,554; 187 P3d 424 (2008). An action for indemnification against loss accrues from the time "when the indemnitee has sustained the loss" *Ins Co of North American v Southeastern Electric Co Inc,* 405 Mich 554,557; 275 NW2d 255 (1979) or "when the promisor fails to perform under the contract." *Cordova Chem Co v Dep't of Natural Resources,* 212 Mich App 144, 153, 536 NW2d 860 (1995), *Tenneco Inc v Amerisure Mut Ins Co,* 281 Mich App 429, 458; 761 NW2d 846 (2008). An indemnification obligation against loss or damage arises at the time of payment of the underlying claim, the payment of a judgment on the underlying claim or payment in settlement of the underlying claim. *Henthore v Legacy Healthcare Inc,* 764 NE2d 751 (Ind Ct App 2002). An action for indemnification against liability may be brought as soon as the liability is incurred. *Amoco Oil Co v Liberty Auto & Elec Co,* 262 Conn 142, 810 NE2d 259 (2002). An action for indemnity against liability accrues when the liability is fixed and action for indemnity against loss or damage accrues when the indemnitee has suffered the actual loss. *Chase Bank NA v First American Title Ins Co,* 795 F Supp2d 624 (ED Mich 2011)

B. Miller-Davis' Indemnity Action Against "Liabilities" Accrued No Earlier Than August 27, 2003 When Miller-Davis Settled the Owner's Claim.

The rules for accrual of an action for breach of contract for defense or indemnity are simple and straight forward. There is no reason to deviate from the established rules regarding accrual of indemnity actions. Clause 3 provides for indemnity against "liabilities." There is no dispute about the facts in this case regarding when Ahrens and its surety refused to honor their obligations and when Miller-Davis settled the Owner's claim as evidenced by the Agreement for Corrective Action dated August 27, 2003. Miller-Davis' indemnification action against liability accrued as of August 27, 2003.

C. Miller-Davis' Indemnity Action Against "Loss" and "Damage" Accrued No Earlier than December 8, 2003.

Clauses 2 & 4 provide for indemnification against "loss" and "damage." On December 8, 2003, an independent engineering firm certified to the Owner that Miller-Davis had satisfactorily completed performance and correction of Ahrens' defective work pursuant to the Agreement for Corrective Action. Miller-Davis incurred the cost of correcting Ahrens' defective work and was then entitled to reimbursement for such "loss" and "damage." Miller-Davis' action for indemnity against loss and damage accrued as of December 8, 2003.

D. Miller-Davis' Action for Defense and Against "Claims" Accrued No Earlier than February 26, 2003 and Continued Until August 27, 2003.

Clauses 1, 2, & 3 provide for defense. Clauses 1, 2, & 4 provide for indemnity against "claims." On February 26, 2003 there was a partial tear-off and an inspection of a section of the roof. This led to the Architect's determination Ahrens' work was defective and resulted in the Architect's issuance of a Directive for Corrective Action (See 432a). Miller-Davis' action for defense against "Claims" accrued no earlier than February 26, 2003 or August 3, 2003, the date of the Architect's Directive for Corrective Action and continued until August 27, 2003 when Miller-Davis signed the Agreement for Corrective Action settling the Owner's claims.

E. Miller-Davis' Complaint for Indemnification was Timely Filed.

Miller-Davis' Complaint for Indemnification was filed May 12, 2005 well within the six (6) year contract statute of limitations period of MCL 600.5807(8).

F. The Court of Appeals Erroneously Ignored the Contractually Established Date for Accrual of Indemnity and Rewrote the Parties Agreement under the Guise of Contract Construction.

The Court of Appeals acknowledged that Miller-Davis' claim for indemnification was "clearly brought within the six-year statute of limitations. MCL 600.5807(8)" saying

"[R]egarding the statute of limitations on a promise to indemnity, 'the period of limitations runs from 'when the indemnitee sustained the loss,' or 'when the promisor fails to perform under the contract.'" *Tenneco*, 281 Mich App at 458." However, it proceeded to determine Miller-Davis' indemnity action untimely saying: "plaintiff cannot use the alleged breach of this provision (and thus plaintiff's completion of the Corrective Work) as an alternative accrual date for its underlying breach of contract claim regarding defendant's alleged failure to comply with the requirements of the plans [and] specifications." (Apx. 66a).

The Court of Appeals provides no authority for its conclusion. It appears the result of that Court's persistent desire to import the language of the tort statute of repose (MCL 600.5839(1) into the contract statute of limitations (MCL 600.5807(8)) contrary to this Court's prior ruling in this case. The result of combining the two statutes creates an unrealistic and unworkable rule that would hold that no matter when a breach of a contractual indemnification clause occurs the accrual of the indemnification clause is the same as the date the indemnified promise is breached. This "relation back" doctrine is without support in reason or precedent.

There is no reason to deviate from the well-reasoned precedent that recognizes the accrual action for indemnity is not to be equated with the date for accrual of an action for breach of the indemnified promise. An indemnity action may be brought to recover for a settlement made within the period of the contractual statute of limitations period *even though* the statute of repose may have expired on the indemnified claim. *Ray & Sons Masonry Contractors Inc v United States Fidelity & Guaranty Co,* 353 Ark 201, 217; 113 SW3d 189 (2003). "By excepting claims for indemnity and contribution from the statute of repose, courts and legislatures can continue to serve the policy goals behind such statutes while ensuring that construction industry participants are not unfairly prejudiced." *See: Applicability of Statutes of*

Repose to Indemnity and Contributions Claims and 50 State Survey; *Journal of American College of Construction Lawyers*, Vol 7. No. 1 (2013) p. 21. Edward H. Tricker, Erin L. Ebler and Christopher R. Kortum.

The Court of Appeals "rule" destroys the freedom of contract and the right of the parties to establish their own accrual dates and allocate risks among themselves. See *Zahn v Kroger Co* 483 Mich 34, 45; 764 N2d 207 (2009) and *Terrien v Zwit,* 467 Mich 56, 71; 648 NW2d 602 (2002). It runs counter to cases which hold parties to a contract have great freedom to allocate responsibilities for each other's legal defense of third party claims as they see fit, subject to public policy considerations and established rules of contract interpretation. *Crawford v Weather Shield Mfg Inc,* 44 Cal 4th 541, 721, 187 P3d 424 (2008); *Continental Heller Corp v Amtech Mechanical Services Inc,* 53 Cal App 4th 500; 61 Cal Rptr 2d 668 (1997).

Such "rule" is contrary to the reasonable and customary practices within the construction industry and ignores the AIA A201 General Conditions provisions establishing accrual time or events for actions for breach for failure to perform guarantee work, corrective work, and indemnification. Such provisions are contractually permissible, customary and consistent with construction industry for they govern "not the time in which an action, once accrued may be brought, but rather establish the movement at which such action accrues." *Harbor Court Associates v Leo Daly Co,* 170 F2d 147; 152 (CA 4, 1991). In this case, the AIA General Conditions provided that the time for bringing an action did not begin until the "*last to occur*" of a) the date of Substantial Completion, b) Ahrens' failure to act pursuant to any warranty and correct defective work, or c) Ahrens' failure to perform any other duty or obligation owing under the Contract Documents. Section 13.7.1.1 and 13,7.1.3 (Apx. 344a). Under all of these provisions Miller-Davis' breach of contract and indemnification actions were timely filed.

There is no reason to gut the contract and refuse to recognize and enforce the multiple, independent promises contained in the subcontract agreement. The Court of Appeals recognized Ahrens was obligated to install the Roof System in accordance with plans and specifications. But failed to recognize that was not Ahrens' only obligation under the terms of the subcontract and that in addition Ahrens was contractually obligated to correct defective work. These constitute separate, independent, enforceable obligations or promises of future performance. They have different times for performance and different times for default or breach. A breach of Ahrens' obligation to correct its defective work and to defend and indemnify Miller-Davis for the cost incurred in correcting Ahrens' defective work could only arise *after and at a different time* than Ahrens' original default in its original obligation to install the Roof System in accordance with plans and specifications. This is not a nuanced reading of the contract. The Court of Appeals' failure to recognize that Ahrens' breaches of various obligations resulted in multiple defaults each of which gave rise to an actionable claim results in failure to give effect to its plain and explicit terms and enforce important and valid terms of the parties' agreement.

Only by viewing all of Ahrens' obligations as a single obligation – that of installing the Roof System in accordance with plans and specifications and using some poorly articulated and unprecedented "relation-back" doctrine and by ignoring the plain language of the various indemnity clause could the Court of Appeals conclude "plaintiff cannot use the alleged breach of this provision of the contract (and thus plaintiff's completion of the corrective work) as an alternative accrual date for its underlying breach of contract claim regarding defendant's alleged failure to comply with the terms and requirements of the plans specifications."

A court may not "twist or destroy" the language of a contract or "manipulate clear and unambiguous contract language under the guise of construing it." When the Court of Appeals

concluded there was no breach of the indemnification provisions, it engaged in the impermissible practice of rewriting the contract under the guise of contract interpretation. *Gelman Sciences Inc v Fidelity & Casualty New York,* 456 Mich 305, 318; 572 N22d 617 (1998); *Upjohn Co v New Hampshire Ins Co,* 438 Mich 197, 206-207, 476 NW2d 392 (1991).

Holding that the accrual for breach of the subcontractor's indemnity does not "relate back" to the accrual date to the subcontractor's initial breach in performing the defective work does not expose the subcontractor to an indefinite or open-ended period of limitations. Under the AIA General Conditions (ignoring any extended guarantee period), the limitations period for an owner or third person against a general contractor for a subcontractor's defective work would accrue as of the date of substantial completion and run for six (6) years. A claim would be barred after that (six) 6-year period. However, if the general contractor is sued, settles or incurs the cost of correction of the subcontractor's defective work within that (six) 6-year period, then an indemnity action would accrue from the date of such suit, settlement or incurring of correction expense and runs for six (6) years from that date. This would mean a maximum exposure for a subcontractor of twelve (12) years. It is not an exposure to indefinite liability as Ahrens has maintained. Such period is less than the fifteen (15) year statute of repose for construction defects in some states.

There is no reason in law or equity to refuse to enforce Ahrens' obligation to indemnify Miller-Davis for the costs incurred in remedying Ahrens' multiple defaults or breaches. There is no justice in allowing a subcontractor to avoid its responsibility to the owner and general contractor. To ratify such conduct rewards irresponsible action, lessens quality in construction and legitimizes a poorly disguised form of theft. The Court of Appeals' decision must be reversed.

III. MILLER-DAVIS ADEQUATELY PROVED DAMAGE "CAUSED" BY AHRENS' BREACH OF THE INDEMNIFICATION CLAUSE.

A. Introduction.

The cause of the NMP was no mystery. Ahrens' claimed it was a matter of design, but the evidence clearly showed it was the result of Ahrens' defective installation of the Roof System. To avoid condensation buildup on the interior of a roof surface, there must be insulation so that when the rising warm moist inside air meets the descending cold outside air, the dew point occurs at a point within the insulation. There must also be a vapor barrier to trap any condensation that may form to prevent it from setting into the insulation and/or leaking through the ceiling into the building interior. There were three major problems with Ahrens' installation of the Roof System: (1) failure to insulate all areas, (2) large gaps in the insulation, and (3) rips, tears, and/or missing vapor barrier. The result was a twofold disaster. First, the absence of insulation and gaps between the insulation compromised the effectiveness of the insulation by failing to block the moist warm inside air meeting the cold outside air, and causing condensation to form. Second, the absence or gaps in the vapor barrier failed to protect the interior and allowed the condensation to run down through the ceiling. This combination of errors created or caused the NMP. Any doubt regarding the probative weight of this "causal analysis" was removed by the fact the NMP did not reoccur after the roof was reinstalled correctly. Thus the trial judge's conclusion that Ahrens' defective work "caused" the NMP was not merely an inference solely drawn from the fact that the NMP was no longer present after the Corrective Work was performed. Rather, that fact merely added weight and confirmation to the analysis and explanations provided by the expert witnesses regarding the manner in which Ahrens' defective work caused the NMP. (Apx. 498a-501a, 591a).

B. The Court of Appeals Erroneously Injected the Term "Cause" in Interpreting the Contractual Indemnity Obligations.

The Court of Appeals stated:

> "Moreover, plaintiff failed to present sufficient proof at trial that the moisture problem was caused by defendant's failure to follow plans and specifications, or faulty workmanship. There is no evidence in the record that supports the finding that defendant's alleged defective workmanship caused the moisture problem other than an inference drawn from the fact that after the corrective work it was no longer present. (Apx. 66a-67a).

The relevant indemnity clauses (1 and 3) do not specify cause as a requirement. Clause 1 uses the phrase "arising out of the performance or fulfillment of this order." Clause 3 only refers to "liabilities, either in tort or in contract."[2]

A number of courts have dealt with attempts to read tort concepts of "cause" into indemnity clauses. For example, in *Graver Tank & Mfg Co v Fluor Corp,* 4 Ariz App 476, 421 P2d 909, 912 (1966) refused to read "causation" into a contract which stated "sustained in connection with or arising out of." Another court upheld indemnification for loss saying it was

> sufficient that there was a breach. The causal connection between the breach and the loss to [the general contractor] is to be determined by the construction of the contract of indemnity and not necessarily by tort law concepts of proximate cause. The parties bound themselves by the contract and this governs their relationship, and the rights and duties between them. It is not determined by their respective positions relative to the injured employee. *Pittsburgh-Des Moines Steel Co v American Sur Co of New York,* 365 F 2d 412, 415 (CA10 1966).

Another court concluded an agreement's express provision requiring indemnity for loss which "arises out of or is in any way connected with...[the subcontractor's] performance" obligated the subcontractor to indemnify the contractor even though he was not found to have

[2] The term "caused" appears only in clauses 2 and 4. Clause 2 uses the phrase "by reasons of or resulting from" "arising out of or resulting from" and only uses the term "caused" when referring to the negligence of Miller-Davis. Clause 4 uses the term "caused" only when referring to "negligence."

been negligent in installing a valve and did not "proximately cause" a leak in the valve and a subsequent explosion[3]. *Continental Heller Corp v Amtech Mechanical Services Inc,* 53 Cal App 4th 500; 506; 61 Cal Rptr 2d 668 (1997).

Similarly, the indemnity provisions of Clauses 1 and 3 do not require a finding of "causal" connection between Ahrens' work and the NMP. It is sufficient that Ahrens' work was found materially defective and that because of this materially defective work, Miller-Davis was liable to the Owner and required to correct Ahrens' contract default.

C. The Court of Appeals Erroneously Failed to Distinguish Between Damages for the Cost to Correct Defective Work and Collateral or Derivative Damages Above and Beyond the Cost of Correct Defective Work.

When interpreting the indemnification clauses, the Court of Appeals confused losses and damages claimed for the cost of correction of defective work with additional damages claimed for the derivative effects or consequences of defective work. A contractor is liable for failure to build improvements in accordance with plans and specifications, but is not is not liable for design of the improvements. This is recognized in Clause 4 and in the Agreement for Corrective Action under paragraph "1. Recitals" pages 2 &3 and paragraph "6. Warranty" pages 6 & 7. (Apx. 430a – 431a, 435a – 436a).

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[3] The use of the phrase "arising out of" in an indemnity clause imparts a more liberal causation than "proximate cause." In *Dixon v CertaintTeed Corp,* 944 F Supp 1501, 1507 (D Kansas 1996). The dictionary meaning of the word "cause" is to serve as the occasion of, bring into existence or make, and where the contract does not use the word "cause" its obligation is not limited to this restrictive term; and the contract language "sustained in connection with or arising out of" the performance of the subcontract is not to be equated with the word, "caused." 68 ALR 3d § 7, as supplemented p. 86 citing *Graver Tank Mfg Co v Fluor Corp,* 4 Ariz App 476, 421 P2d 909 (1966).

The rules regarding damage for correction of building construction defects are straightforward:

> "...the cost of correction or completion rather than the loss in property value ordinarily affords the proper basis for measuring damage resulting to the owner from the breach of a building or construction contract... The propriety of applying such measure of damages is especially clear where the correction or completion would not involve unreasonable destruction of work done by the contractor and the cost thereof would not be grossly disproportionate to the results obtained...Under the cost-to-repair measure of damages, an owner's damages are limited to the cost of repair or completion according to the original design embodied in the contract." 13 Am Jur 2d Building & Construction Contracts § 78 p. 82 citing *Temple Beth Sholom Const Corp v Thyne Construction Corp,* 399 So 2e 525 (Fla Dist Ct App 1981); *Martin v Phillips,* 122 NH 34, 440 A2 124 (1982); *Hollon v McComb,* 636 P2d 513 (Wyo 1981).

Ahrens in the first instance and Miller-Davis in the second instance were obligated to install the Roof System in accordance with plans and specifications *whether or not Ahrens' defective work "caused" the NMP.* Miller-Davis' claim for indemnification against Ahrens' several breaches of contract, was for the cost of correcting Ahrens' defective work and <u>not</u> for damages that might have been produced or contributed by reason of the conditions created by the defective work, for example, personal injuries of someone who slipped and fell, or for lost revenues. The cause of the NMP would only be relevant, if the Owner or someone sought to obtain damages for Ahrens' defective work beyond or over and above the cost of correction of the defective work.[4] As for Miller-Davis' claim for indemnity for attorney fees there is no question that was made necessary by Ahrens' refusal to honor its indemnification obligations.

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[4] The distinction between the initial defective work and the larger consequences of defective work that may cause damage in addition to correction of the defective work is illustrated in a variety of contexts. Improper excavation, backfilling and soil compaction is not readily apparent and rarely gives rise to litigation directly. Rather improper performance of an excavation and backfilling contract may appear in the form and context of a later condition such as a hole, a depression, damage to pavement or some other improvement, which results in actual loss or damage and for which in turn indemnification, is sought. The failure to compact is a defect, which may be the proximate cause of resulting or additional

D. **Miller-Davis' Corrective Work Addressed Ahrens' Failure to Perform According to Plans and Specifications; Miller-Davis Did Not Represent Such Work Would Cure the NMP.**

The distinction between the cost of correction of the defective roof and the correction of the NMP was made clear in the Agreement for Corrective Work. (Apx. 429a-448a). Miller-Davis only agreed to remove the defectively installed Roof System and reinstall it in accordance with plans and specifications which were modified to allow for the fact that certain portions of the Roof System could not be removed without impairing the structural integrity of the roof. Miller-Davis was careful to warrant the Corrective Work would be performed in accordance with the plans and specifications and that it was not warranting or representing the Corrective Work would cure the NMP. If after the roof was correctly installed and the NMP continued, then the problem might have been an issue of improper design.

Miller-Davis was not under demand to correct, did not agree to correct, or was obligated to correct the NMP. Rather Miller-Davis was under demand and obligation to remedy Ahrens' defective work and to perform the Corrective Work as directed by the project Architect. Miller-Davis never agreed to cure the NMP and was not under obligation to do so.

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defects. See *Wahpeton v Drake-Henne Inc,* (ND) 215 NW2d 897, cert den 419 US 986, 42 Led2d 194, 95 SCt 245 (1973). However, even such instances the issue of "cause" may be irrelevant. "...[If] the indemnity agreement is broad and explicit enough to cover liability for negligence of the contractor a causal connection between the injury or damage and the work or act of the subcontractor is not requisite to indemnity." [Citing *Graver Tank & Mfg Co v Flour Corp,* 4 Ariz App 476, 421 P2d 909 (1966); *Ross v Smith,* (1970, DC Ark) 315 F Supp 1064 (applying Ark law), *MacDonald & Kruse Inc v San Jose Steel Co,* (1972) 29 Cal App 3d 413, 105 Cal Rptr 725, *Christy v Menasha Corp,* (1973) 297 Minn 334, 211 W2d 773, *Turner Constr Co v Belmont Iron Works,* (1957, DC Pa) 158 F Supp 309 (applying NY Law); *General Acci. Fire & Live Assure Corp v Smith & Oby Co,* (1959, CA6 Ohio) 272 F2d 581, 77 ALR2d 1134, reh den (CA6 Ohio) 274 F2d 819, 77 ALR2d 1142 (applying OH law)]

E. The Trial Judge Did Not Clearly Err in Concluding that Defendant Ahrens' Performance of Nonconforming Work Caused The Natatorium Moisture Problem.

The trial court explicitly concluded that Ahrens' nonconforming work caused the Natatorium Moisture Problem. (Apx. 23a- 24a) The holding was the result of several credibility determinations following a nine (9) day bench trial, reflected in a 2042 page transcript. The parties squarely framed the issues for the trial court. Plaintiff contended that the roof deck system was properly designed and would work without problems if correctly installed. The design of the system was crucial. The Defendants argued that the system was improperly designed and would never work, regardless of how the system was installed. They also argued that the installation was correct based on plans and specifications. The parties presented lay and expert testimony supporting their theories.

At the conclusion of the proofs, the parties presented proposed findings of fact and conclusions of law. The parties then appeared and presented closing arguments. The trial court took the matter under advisement. The trial court then decided this case, and issued detailed findings of fact and conclusions of law. The trial court found that Ahrens' installation of the Timber Roof System over the natatorium was not performed according to plans and specifications, and that the deficient installation of the roof deck system was the cause of the NMP. (Apx. 23a-24a). The trial court based this explicit finding on the evidence, evaluating witness credibility, weight of evidence, and balance contradictory testimony.

The Court of Appeals, in dicta, stated, "the only evidence in the record that supports finding that defendant's alleged defective workmanship caused the natatorium moisture problem is an inference drawn from the fact that after the corrective work the problem was not present." (Apx. 68-a). The Court of Appeals did not acknowledge the witnesses and documents proving

Plaintiffs' position, as found by the trial court. In this regard, the case is similar to the outcome in *People v Reese,* 491 Mich. 127, 159-160; 815 NW2d 85 (2012), where this court observed that it is "difficult to escape the conclusion that the panel simply substituted its interpretation of the testimony for the trial courts. This is inappropriate when the standard of review requires an appellate court to accept the trial court's findings of fact unless they are *clearly erroneous.*" *Id.* citing MCR 2.613(C) and *People v Robinson* 475 Mich 1, 5; 715 NW2d 44(2006). The Court of Appeals erred when it reversed the trial court's finding and apparently substituted its own judgment regarding the facts of the case, ignoring the trial judge's detailed findings of fact.

F. Miller-Davis' Evidence Supporting the Finding that Ahrens' Defective Work Caused the NMP.

Miller-Davis focused its evidence on the question of whether the roof deck system was built pursuant to project plans and specifications, the same evidence led to the inescapable conclusion that the defective work was the cause of the NMP. Plaintiff presented 37 exhibits, including 98 photographs of the roof after the tear-off, and a demonstrative exhibit showing the construction detail. Plaintiff presented 9 witnesses, in addition to calling Defendant Owner and President, Michael Ahrens. Defense witnesses included Defendant and his expert.

G. The Trial Court's Detailed Findings were Based on Evidence Presented, and Supported its Conclusion that Ahrens' Defective Work Caused the NMP.

The trial court explicitly found that the plans and specifications were established and known to Ahrens. (Apx. 20a-21a). They consisted of a "technical brochure that graphically describe[d] the manner in which to install the unmodified system's various components," as well as a "shop drawing" which provide[d] a detail of the system incorporating the vapor barrier." (Apx. 20a). Using this starting point the trial court used the competing testimony in the case to determine the cause of the NMP.

Miller-Davis' witnesses included engineers and veterans of the construction industry, all with first-hand experience with the Natatorium construction. They all had direct experience with the roof.

Richard Arlington, Vice President of Field Operations recently retired, with a degree in in Architectural engineering testified that no one knew the cause of the NMP when it began. (Apx. 548a-578a). After the Owner called Miller-Davis to report the problem, he testified that he viewed the NMP. When the partial tear-off was performed, they quickly determined that Ahrens' work had not been performed according to plans and specifications. (Apx. 549a, 560a). He indicated that the same gaps in insulation and tears in the vapor barrier were found through the roof. (Apx. 572a). He testified that after the partial tear-off, he saw gaps between insulation and tears in the vapor barrier that did not comply with the plans and specifications. (Apx. 554a). He testified that at that point, it was clear that Ahrens had not installed the roof properly but that prior to that, Miller-Davis had represented to the Owner that the work had been properly installed because Ahrens represented that it had done so. (Apx. 557a). Jim Buckhout was the photographer of the photographs found at (Apx. 213a-314a), and witnessed the various stages of the roof tear-off and reconstruction. (Apx. 633a-652a). John Van Stratt has a BS and MS in civil engineering and is a Vice President with Miller-Davis. (Apx. 653a).

Jon Rambow, President of Slocum Architects and an architect licensed in Michigan testified at length about the steps that were taken to address the NMP and its ultimate solution. (Apx. 483a-527a).

Jim Derks is an architect with Slocum Associates. (Apx. 483a-527a). He designed the roof deck system for the recreational building. (Apx. 488a). He saw the roof deck at the time of

the tear-off, and indicated that he did not believe that the work was in substantial compliance with the plans and specifications. (Apx. 509a-510a).

Miller-Davis President, Rex Bell and Vice President, Tom Georgoff, both engineers, testified. They testified that Miller-Davis provided the Owner with the roof deck system that the Owner paid for and had a right to expect.

Ahrens called Michael Ahrens, and its expert, Robert Kudder. Ahrens testified that the roof deck system was correctly installed. This claim was squarely rejected by the trial court and a review of Ahrens' work (For example see Apx. 216a-217a) when compared with the project specifications and photographs of the roof (For example see Apx. 242a), shows that the claim is ridiculous. Dr. Kudder, who had never been on the roof but formed his opinion based on photographs, eventually admitted that there were gaps but contended that "they were of no consequence." (Apx. 670a-671a). Ahrens' expert testified that Ahrens' installation was irrelevant because the design was flawed. (Apx. 654a). He testified that the corrective work would fail. (Apx. 654a). It did not. The trial court was entitled to rely on this fact, and did so.

Witness credibility was the lynchpin of this case. The testimony and credibility of Michael Ahrens and Dr. Kudder were obviously in doubt. Contrary to their testimony, Miller-Davis proved that the roof deck system was improperly installed by Ahrens, and that the installation was the cause of the NMP. (Apx. 23a-24a). Photographs discussed by witnesses and reviewed by the trial court clearly showed tears in the vapor barrier, gaps between the block insulation and structural components, and areas over warm areas that did not have vapor barrier or insulation. All of these requirements for the Timber Systems Roof System were described in the job plans and specifications. (Apx. 20a-21a).

Miller-Davis first proved why the system design was proper for this use. Thomas R. Bergeon designed the roof deck system. (Apx. 528a-530a). Timber Systems had installed roof systems above enclosed pools before and they never experienced condensation problems. Mr. Bergeon prepared the brochure which described in detail how to install the system. (Apx. 540a). He explained the basis for the design and precisely why the defective installation seen here would create problems. He described why a vapor barrier was necessary. He testified why insulation was required. He testified about the precise specifications set forth in the project documents and why they were required. He also testified that gaps between Styrofoam blocks and the sub T's of an inch would be unacceptable in a "swimming pool situation" because "they would allow a little pocket in there where high moisture air could concentrate." (Apx. 540a). In addition, he indicated that in order to create a "perfect" vapor barrier, the sheets would be cut, overlapped and stapled at the top of the sub-tees. (Apx. 541a). That did not happen here despite the explicit specifications.

Mr. Bergeon had an opportunity to observe the roof deck system in the area underneath the OSB. (Apx. 546a). He saw that there were "big gaps" in the vapor barrier and the vapor barrier had "not been cut into narrow strips and stapled into the T system but it was spread out, and then the foam was pushed down into the vapor barrier." (Apx. 546a). He saw a number of tears in the vapor barrier, a condition that was not acceptable for the system. (Apx. 547a). He testified that the system was appropriate for this use, and that the installation was defective. He testified that a correctly installed system would have worked in this case.

The trial court was entitled to rely on the specific testimony offered by Mr. Bergeon. It surely did so. The trial court was entitled to reject the testimony of Ahrens and his expert. Just as surely, the trial court rejected this testimony. The Court of Appeals was not entitled to ignore

the explanatory testimony and it did just that. Miller-Davis did not prove just that the roof deck worked after repair, it proved why the system was correct, and proved what happened when the components of the system were installed.

Miller-Davis went much further in proving its case on cause. Jonathan Rambow testified that he was a licensed architect in Michigan, Indiana, New York and New Hampshire, and President of Slocum Associates, a Kalamazoo based architectural firm. (Apx. 579a). He was present before construction when Tom Bergeron reviewed installation specifications in a meeting attended by Ahrens. The positive aspects of the system, including effectiveness and cost, were discussed and were of the utmost importance to the Owner. In approving the Timber Deck System, his understanding of the installation instructions was that a "tight fit" meant a gap that did not resemble those in the Ahrens' installation. (Apx. 602a-603a).

Mr. Rambow first heard about the natatorium moisture problem in the winter of 1999-2000. (Apx. 606a). He testified that before the final repair, the problem would recur every winter, and that to address the problem, the parties tried incremental steps. (Apx. 581a).

They did a partial tear-off only when all of the incremental steps failed. Mr. Rambow was present. (Apx. 619a). He testified that, "[o]nce it was opened up it was quite obvious that we had discovered the problem." (Apx. 619a). (Emphasis supplied). He indicated that they saw a multitude of problems with the Ahrens' installation, including torn and cut vapor barrier and gaps in the insulation. (Apx. 620a-621a). Referring to Trial Exhibit 25-3 (Photo 6) (Apx. 217a) he indicated that it illustrated the gaps which were contrary to the plans and specifications. (Apx. 623a). Further, he indicated that there was "an absolute correlation" between places where there were cuts or tears in the vapor barrier, and water coming through. (Apx. 620a).

When the vapor barrier was lifted in those areas, there was visual water damage to the wood. (Apx. 620a).

He testified at length regarding the importance of the vapor barrier, and the manner in which it should be installed. He further testified that the integrity of the vapor barrier in Ahrens' work was gone and that there really was no vapor barrier in the system. (Apx. 621a). He testified, "the decision was made that we needed to put the vapor barrier back in the way it was designed – the way it should have been put in." ProCor was only used as a more cost effective alternative to properly reinstalling the sheet vapor barrier which would have required disassembling much of the roof. (Apx. 622a-623a).

Mr. Rambow indicated that rigid foam insulation was to be used throughout. (Apx. 627a). Mr. Rambow went on to describe in detail tears in the vapor barrier which had been caused by stapling which was contrary to the plans and specifications. (Apx. 628a). The system that was approved called for staples at the top of the T's to hold the lap of the vapor barrier together. *Id.* He testified, "[w]hat we saw were-were hundreds of staples down in the bottom of the cells, and we weren't-When we first opened it up we really weren't sure why that was done, but we only assumed it was done to kind of hold the-the vapor barrier-the Visqueen into place while they were trying to pack in the foam insulation. But what it-what it did was wherever-a lot of locations where there was a staple, when they packed the insulation in-the rigid insulation, it would-it would rip. It would tend to move that vapor barrier and cause little rips by all those staples." *Id.*

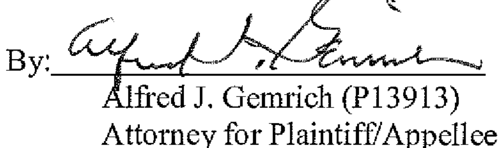
Miller-Davis explained the basis for using the system, the importance of its components, its proper installation and the reasons why the defective work compromised crucial elements of the system. Miller-Davis proved that it installed a system containing all of the key components of the system. Finally, Miller-Davis explained why the improper installation, which did not include the crucial system components (e.g., vapor barrier and insulation), caused the NMP problem. The testimony of Bergeron and Rambow, bolstered by the testimony of other witnesses who saw and opined about the defective work, provided a sufficient factual basis for the trial court's conclusion. The trial court did not find Ahrens and his expert credible. The case is as simple as that. This credibility determination should not be disturbed.

CONCLUSION AND RELIEF REQUESTED

Miller-Davis requests this Court to hold that the indemnity clauses in the contract between Miller-Davis and Ahrens apply to the work which Ahrens performed; the action filed by Miller-Davis for indemnification was timely and the trial court did not commit clear error in finding that Ahrens' defective work was the cause of the Natatorium Moisture Problem. Miller-Davis respectfully requests that this Court reverse the decision of the Court of Appeals and hold Miller-Davis is entitled to indemnity for the cost of corrections, as well as all attorney fees, costs and expenses of this litigation.

Date: July 29, 2013

GEMRICH LAW PLC



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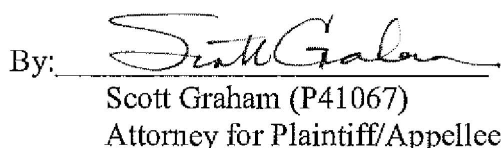

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