STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

THE DOUGLAS COMPANY,
Plaintiff,

Case No. 19-112811-CB

V

Hon. F. Kay Behm

EASTSIDE TILE & MARBLE, INC.,
SELECTIVE INSURANCE COMPANY
OF SOUTH CAROLINA, and PAUL
MARTIN d/b/a PAULS'S PORCH
AND CHIMNEY,
Defendants.

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ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION

At a session of said Court held in the Courthouse
In the City of Flint, in said County,
on the 18th day of August, 2020.

PRESENT: HON. F. KAY BEHM, ASSIGNED CIRCUIT COURT JUDGE

Factual and Procedural History

On May 30, 2019, Plaintiff, The Douglas Company ("Douglas") filed a complaint against East Side Tile & Marble, Inc. ("East Side") and Selective Insurance Company of South Carolina

("Selective"). In its complaint, Douglas alleged that East Side breached its contract with Douglas to defend, indemnify, and hold Douglas harmless and asked the Court to grant declaratory relief ordering East Side and its insurer, Selective, to provide insurance coverage and a defense for a claim brought by Chris Mattice ("Mattice") against Douglas in Genesee County Circuit Court, Case No. 19-112316-NO (the "Companion Case"). On October 9, 2019, with the Court's permission, Douglas filed its First Amended Complaint wherein Paul Martin d/b/a Paul's Porch and Chimney ("Martin") was added as a defendant. In addition to its claims against East Side and Selective, Douglas also requested declaratory relief to order Martin to defend, indemnify, and hold Douglas harmless for the Mattice Companion Case.

On November 6, 2019, Douglas filed its Motion for Partial Summary Disposition. Douglas asked this Court to find that East Side must defend, indemnify, and hold Douglas harmless as set forth in its First Amended Complaint in: Count I - East Side's Breach of Contract to Defend, Indemnify, and Hold Harmless Douglas; Count II - East Side and Selective' s Breach of Contract to Provide Insurance and a Defense; and Count IV - Declaring Relief that Douglas be Held Harmless, Indemnified, and Defended by East Side and Martin and that Selective Provide Insurance Coverage and a Defense for the Companion Case[1]. Defendant East Side filed its answer to the dispositive motion on November 27, 2019. At oral arguments on December 2, 2019, East Side argued that the subject indemnification clause was void or voidable under MCL 691.991. The Court requested supplemental briefing as to the issues raised in this regard. Thereafter, Douglas filed its Supplemental Brief in Support of its Motion for Partial Summary Disposition and East Side filed its Supplemental Answer to Plaintiff's Supplemental Brief. On

[1] Count III, which is not at issue in this motion, addresses Douglas' claim that it is an intended third-party beneficiary of the subcontract agreement between East Side and Martin.

April 16, 2020, the Court issued an order denying Plaintiff's motion for partial summary disposition.

This matter arises out of an alleged injury that occurred on January 22, 2019, at Genesys Health Park in Grand Blanc, Michigan. Douglas was hired as the general contractor to build a senior residential facility on the Genesys Campus. Douglas hired East Side to perform certain ceramic tile work. East Side subcontracted Martin to do some of the ceramic tile installation. Mattice was an employee of Martin. Mattice sued Douglas in the Companion Case asserting that he was injured while he was taking scrap tile outside to the construction site's dumpster. Mattice claimed he stepped on an apparent mound of snow covering a pile of scrap 2x4's which moved and caused Mattice to fall. East Side asserted that there is no evidence as to how the scrap wood came to be on the ground, how long it was present, or who was in possession and control of the area when Mattice fell. Douglas contended that even if it is found to be in some part negligent, it cannot be found solely negligent because Mattice admited to tripping over an open and obvious hazard and, as such, the indemnification provision is valid and enforceable against East Side.

Legal Standard

"Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3); see also *McCormick v Carrier*, 485 Mich 851, 770 NW2d 357 (2009). Moreover, "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen. Ins. Co. of Mich.,* 284 Mich App 513, 519, 773 NW2d 758, 761 (2009) (citing *Pro-Staffers, Inc. v Premier Mfg. Support Servs., Inc.*, 252 Mich App 318, 328-329, 651 NW2d 811 (2002)); see also *Yoost*

v Caspari, 295 Mich App 209, 220, 813 NW2d 783, 790 (2012) (citations omitted) ("Ordinarily, a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided.")

For a court to grant a motion for reconsideration, the "moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). A palpable error is one that is easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, or manifest. *Luckow v Luckow*, 291 Mich App 417, 426, 805 NW 2d 453, 458 (2011) (quoting *Stamp v Mill St. Inn*, 152 Mich App 290, 294, 393 NW2d 614, 616 (1986)). A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Huntington Nat. Bank v Daniel J. Aronoff Living Tr.*, 305 Mich App 496, 515, 853 NW2d 481, 492 (2014) (citing *Churchman v Rickerson*, 240 Mich App 223, 233, 611 NW2d 333 (2000). "A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes." *Id.* (citing *Smith v Khouri*, 481 Mich 519, 526, 751 NW2d 472 (2008)).

In its Motion for Reconsideration, Douglas asserted that the Court was misled by East Side's erroneous statements of the law. In particular, Douglas disputes East Side's assertions regarding which party had the burden of establishing whether Douglas was, or was not, solely negligent for the acts or omissions that led to the injuries sustained by Mattice. In its Answer to Douglas' Motion for Partial Summary Disposition, East Side asserted that Douglas, as the moving party, bore the burden of demonstrating in its Motion for Partial Summary Disposition that the injuries sustained by Mattice did not arise out of Douglas' sole negligence. See page 9 of Defendant East Side's Answer to Douglas' Motion for Partial Summary Disposition and Brief in Support thereof. In support of its claim, East Side cited the case of *Trim v Clark Equipment,*

Co, 87 Mich App 270; 274 NW2d 33 (1978). In its Answer to Douglas' Motion for Reconsideration, East Side continued to assert that when Douglas filed its Motion for Partial Summary Disposition, Douglas had the initial burden of producing factual evidence through affidavits, depositions or other documentary evidence to support its claim that no genuine issue of material fact remained. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420, 522 NW 2d 335 (1994); *Quinto v Cross & Peters Co.*, 451 Mich 358, 361-363, 547 NW2d 314 (1996); *Maiden v Rozwood*, 461 Mich 109, 119-121, 597 NW2d 817 (1999). It is not disputed that Douglas did not attach additional documentary evidence to its Motion for Partial Summary Disposition and instead, relied on the language of the Subcontractor Agreement. East Side concluded that because Douglas failed to provide sufficient, or any, factual evidence to establish that no genuine issue of material fact exists that Douglas was not solely negligent for underlying claimant, Mattice's, claimed injury, Douglas was precluded from invoking the obligation to indemnify or defend.

In its Motion for Reconsideration, Douglas argued that East Side did not correctly stated the law. Douglas denied that the holding in *Trim* supports East Sides position. Douglas asserted that, instead, *Trim* "holds that a party seeking indemnity for a claim that it settled with a third person need only show its potential liability to that third person in order to recover on its indemnity claim." See footnote 10 on page 11 of Douglas' Motion for Reconsideration. Douglas argued that East Side had the burden to demonstrate a factual dispute and a disputed question of fact. In support thereof, Douglas sited *Patricia Foldi & Foldi v YMCA*, 2009 Mich App LEXIS 843 at *1 (Ct App, Apr. 21, 2009). In *Foldi*, the Plaintiff slipped and fell at a YMCA. Plaintiff brought suit against the YMCA, its construction manager (Barton Malow) and the construction manager's floor installation subcontractor (Artisan). Barlow Malow filed a cross-claim against Artisan for

indemnity and then sought summary disposition which was granted by the trial court and affirmed by the Court of Appeals.

The broad indemnification language in Barton Malow's contract was similar to the language at issue in this matter. Generally, both contracts required the indemnitor to indemnify the indemnitee for all injuries and claims which arose out of or in connection with the subcontractor's work, including the acts or omissions of the subcontractor's employees, agents and subcontractors as covered by the parties' agreement. In *Foldi*, while Barton Malow relied on the clear language of the indemnification agreement, Artisan argued that MCL 691.991 voided the indemnity clause because plaintiff's injury was caused by Barton Marlow's sole negligence. Similarly, in this matter, Douglas relied on the unambiguous language in the Subcontractor Agreement while East Side argued that summary disposition could not be granted in favor of Douglas, the indemnitee, unless Douglas offered evidence to the Court that it was not solely negligent. In *Foldi*, the Court of Appeals upheld the trial court granting summary disposition in favor of Barton Malow, the indemnitee, stating:

> Artisan had the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of material fact existed with respect to whether Barton Malow was solely negligent, which it failed to do so. Thus, Artisan has not shown that MCL 961.991 applies to void the application of the parties' indemnification clause. Accordingly, the clear language of the indemnification clause stands, and entitles Barton Malow to judgment as a matter of law.

Id. at 9 (citing *Quinto v Cross & Peters Co*, *supra*, 361-362; 547 NW2d 314 and *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 601-602; 513 NW2d 187 (1994).

Upon review of the case law cited by the parties, the Court agrees that the holding in *Trim* cited by East Side does not stand for the proposition that an indemnitor has the obligation to establish that it is not solely negligent before pursing indemnification. The Court of Appeals

specifically limited its holding in *Trim* to "cases of the type involved [t]here, that is, an enforceable contract of indemnity exists, a reasonable tender of defense with notice that a settlement will be entered is made and the tender of defense is refused." *Trim* at 277. The case law cited by East Side in its Response to Douglas' Motion for Reconsideration stated the general standards for deciding a motion for summary disposition but did not specifically address the reasoning or findings made by the Court of Appeals in *Foldi.* East Side has not offered through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of material fact existed with respect to whether Douglas was solely negligent.

Douglas has demonstrated to this Court that a palpable error occurred; that the parties and the Court were been misled; and that a different disposition of the motion must result from the corrections of the error.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration is granted. Plaintiff's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(10) as to East Side in Counts I, II and IV of Plaintiff's First Amended Complaint is granted.

Dated: August 18, 2020

/s/

HONORABLE F. KAY BEHM
ASSIGNED CIRCUIT COURT JUDGE