STATE OF MICHIGAN

COURT OF APPEALS

BAKER CONCRETE CONSTRUCTION, INC, and ETKIN CONSTRUCTION COMPANY OF MICHIGAN, f/k/a ETKIN CONSTRUCTION COMPANY,

Plaintiffs-Appellees,

v

WHALEY STEEL CORPORATION, CNA INSURANCE, TRANSPORTATION INSURANCE COMPANY, EDGEWOOD ELECTRIC COMPANY, L.W. CONNELLY & SON, INC, d/b/a CONNELLY CRANE RENTAL CORPORATION, d/b/a CONNELLY CRANE, ST. PAUL SURPLUS LINES INSURANCE COMPANY, UNITED STATES FIDELITY & GUARANTEE COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, and TIG INSURANCE COMPANY,

Defendants-Appellees,

and

UNITED STATES FIRE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 2, 2008

No. 272350
Oakland Circuit Court
LC No. 2001-029199-CZ

BAKER CONCRETE CONSTRUCTION, INC.,

Plaintiff-Cross-Appellee,

and

ETKIN SKANSKA CONSTRUCTION COMPANY OF MICHIGAN, f/k/a ETKIN CONSTRUCTION COMPANY,

Plaintiff-Appellant-Cross-Appellee,

v

No. 272448
Oakland Circuit Court
LC No. 2001-029199-CZ

WHALEY STEEL CORPORATION and CNA INSURANCE,

Defendants-Appellees-Cross-Appellants,

and

TRANSPORTATION INSURANCE COMPANY, EDGEWOOD ELECTRIC COMPANY, L.W. CONNELLY & SON, INC, d/b/a CONNELLY CRANE RENTAL CORPORATION, d/b/a CONNELLY CRANE, ST. PAUL SURPLUS LINES INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, and TIG INSURANCE COMPANY,

Defendants-Appellees,

and

UNITED STATES FIDELITY & GUARANTEE COMPANY,

Defendant-Appellee-Cross-Appellee.

BAKER CONCRETE CONSTRUCTION, INC,

Plaintiff-Appellant-Cross-Appellee,

and

ETKIN SKANSKA CONSTRUCTION COMPANY OF MICHIGAN, f/k/a ETKIN CONSTRUCTION COMPANY,

Plaintiff-Cross-Appellee,

v

No. 272449
Oakland Circuit Court

WHALEY STEEL CORPORATION and CNA INSURANCE,

Defendants-Appellees-Cross-Appellants,

and

TRANSPORTATION INSURANCE COMPANY, EDGEWOOD ELECTRIC COMPANY, L.W. CONNELLY & SON, INC, d/b/a CONNELLY CRANE RENTAL CORPORATION, d/b/a CONNELLY CRANE, ST. PAUL SURPLUS LINES INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, and TIG INSURANCE COMPANY,

Defendants-Appellees,

and

UNITED STATES FIDELITY & GUARANTEE COMPANY,

Defendant-Appellee-Cross-Appellee.

LC No. 2001-029199-CZ

BAKER CONCRETE CONSTRUCTION, INC, and ETKIN SKANSKA CONSTRUCTION COMPANY OF MICHIGAN, f/k/a ETKIN CONSTRUCTION COMPANY,

Plaintiffs-Appellees-Cross-Appellees,

v

WHALEY STEEL CORPORATION and CNA INSURANCE,

Defendants-Appellees-Cross-Appellants,

and

TRANSPORTATION INSURANCE COMPANY,

No. 272455
Oakland Circuit Court
LC No. 2001-029199-CZ

EDGEWOOD ELECTRIC COMPANY, UNITED STATES FIRE INSURANCE COMPANY, UNITED STATES FIDELITY & GUARANTEE COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, and TIG INSURANCE COMPANY,

Defendants-Appellees,

and

L.W. CONNELLY & SONS, INC, d/b/a CONNELLY CRANE RENTAL CORPORATION, d/b/a CONNELLY CRANE and ST PAUL SURPLUS LINES INSURANCE COMPANY,

Defendants-Appellants.

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

In Docket No. 272350, United States Fire Insurance Company (US Fire) appeals as of right from the trial court's June 30, 2006 opinion and order denying its motion for summary disposition and granting plaintiffs' motion for summary disposition against itself and its insured, Whaley Steel Corporation (Whaley). In Docket No. 272448, Etkin Skanska Construction Company (Etkin) appeals as of right the same order, asserting that the trial court erred in dismissing its insurer, St. Paul Fire & Marine Insurance Company (St. Paul Fire & Marine). Likewise, in Docket No. 272449, Baker Concrete Construction, Inc. (Baker) challenges the trial court's dismissal of its insurers, United States Fidelity and Guaranty Company (USF&G) and TIG Insurance Company (TIG). Additionally, Whaley and its insurer, CNA/Transporation Insurance Company (CNA), cross-appeal in Docket Nos. 272448 and 272449, asserting that Whaley is not required to indemnify Etkin or Baker and that CNA's policy does not cover Etkin or Baker. Finally, in Docket No. 272455, L.W. Connelly & Sons, Inc. (Connelly), and its insurer, St. Paul Surplus Lines Insurance Co (St. Paul Surplus), appeal as of right the trial court's June 30, 2006 order to the extent that it grants summary disposition to plaintiffs (against Connelly and St. Paul Surplus) on their claims for contractual indemnification and insurance coverage. We affirm.

I. FACTS

These consolidated appeals arise out of an underlying negligence action, which stems from injuries sustained by Jeffrey Rupersburg, an Edgewood Electric Company (Edgewood) employee, while working at the Centerpoint Marriott construction site in Pontiac, Michigan. Etkin was the general contractor for the project. Etkin hired Baker to construct the concrete framework for the project, and Etkin hired Edgewood to install the electrical system. Baker then

hired Connelly to provide a crane and a crane operator to assist in constructing the framework. Baker also hired Whaley to construct the steel reinforcement for the project.

The trial court summarized the undisputed facts of the underlying accident as follows:

> On November 24, 1999, a crane owned and operated by Connelly was lifting a "chair box[,]" in the blind, onto the ninth floor deck of the structure. The Connelly operator was following the direction of a Whaley employee via a two-way radio. During the lift operation, the chair box struck a stanchion[1] on the ninth floor, causing it to the fall onto Mr. Rupersburg, who was on the ground level. Mr. Rupersburg was injured and subsequently filed the underlying negligence action [against Etkin, Baker, Connelly, and Whaley for injuries he sustained at the construction project[2]]. . . . After hearing the evidence, the jury found that Etkin was 10% at fault, Baker was 25% at fault, and Whaley Steel was 60% at fault. The jury assessed 5% non-party fault against Edgewood and determined that Connelly was not at fault in the accident. The jury verdict awarded the Rupersburgs $8,117,732.00 in damages that was later reduced to the present value of $4,981,648.00.[3]

While the Rupersburgs' negligence case was pending, Etkin and Baker filed this declaratory action, seeking a determination as to whether some or all of the subcontractors and their insurers were responsible for payment of the jury verdict and defense costs in the underlying negligence action. The trial court initially stayed the declaratory action until after the jury rendered its verdict in the negligence action. After the jury verdict was rendered, the parties refiled cross-motions for summary disposition. Plaintiffs asserted that they were entitled to summary disposition because under the terms of both the construction contracts and the insurance contracts, defendants were required to indemnify plaintiffs for their losses. Conversely, defendants moved for summary disposition, arguing, under various theories, that they were not required to indemnify plaintiffs.

The trial court dispensed with oral argument and issued a written opinion and order on June 30, 2006. The trial court granted plaintiffs summary disposition as to the following defendants: Whaley and its insurers, CNA and US Fire; Connelly and its insurer, St. Paul Surplus; and Edgewood and its insurer, Transportation Insurance Company. More specifically,

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[1] A stanchion is "an upright bar, beam, post, or support, as in a window, stall, or ship." *Random House Webster's College Dictionary* (1991), p 1256.

[2] Edgewood was named as a non-party at fault.

[3] This Court affirmed the jury's verdicts and judgment in an unpublished opinion. *Rupersburg v Etkin Skanska Constr Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued November 30, 2006 (Docket No. 262388). Our Supreme Court denied leave to appeal on March 26, 2007. *Rupersburg v Etkin Skanska Constr Co of Michigan*, ___ Mich ___; 728 NW2d 429 (2007).

the trial court determined that Baker owed indemnity to Etkin, Edgewood owed indemnity to Etkin, Whaley owed indemnity to Etkin and Baker, and Connelly owed indemnity to Etkin and Baker. Further, the trial court dismissed Baker's and Etkin's insurers, St. Paul Fire & Marine, USF&G, and TIG Insurance Company because it concluded that Whaley, Connelly, and Edgewood had sufficient insurance to cover the judgment.

Connelly, St. Paul Surplus, Whaley, and US Fire moved for reconsideration of the trial court's decision. The trial court denied the motions, concluding that defendants had "failed to demonstrate palpable error by which the Court and the parties have been misled" and that defendants had merely presented the same issues it had previously ruled on, either expressly or implicitly. However, the trial court did amend its earlier order as follows:

> The Opinion should have stated that Baker, Whaley, Connelly, and Edgewood are each responsible to indemnify Etkin. Thus, under *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569; 683 NW2d 242 (2004), each party is responsible for a ¼ share. Then, in addition to their ¼ share, both Whaley and Connelly must also indemnify Baker and are responsible for ½ of Baker's ¼ share.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim. *Id*. When ruling on a motion under MCR 2.116(C)(10), the court must consider the pleadings and all documentary evidence, including affidavits and depositions, in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Likewise, this Court reviews the interpretation and application of statutes de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). When interpreting a statute, this Court must ascertain the legislative intent that may be inferred from the words of the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). "When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted." *Id.*

III. ANALYSIS

A. MCL 691.991 and MCL 600.2956

Defendants, Whaley, CNA, Connelly, St. Paul Surplus, and US Fire, first argue that the trial court erred in enforcing the indemnification provisions in this case because Etkin and Baker are seeking indemnification from liability for damages arising out of bodily injury caused by their sole negligence in violation of MCL 691.991. We disagree.

MCL 691.991 provides as follows:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Defendants' theory is that Etkin and Baker each committed a sole act that caused a share of the damages. However, this Court has rejected the theory that an allocated share of damages implicates a sole act of negligence by the indemnitee. *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 601; 513 NW2d 187 (1994). See also *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 460; 403 NW2d 569 (1987) (adopting an analysis that focused on the injury as a whole and rejecting an analysis that focused on the apportioned damages). The proper inquiry is the nature of the whole injury and whether a sole act by the indemnitee caused the injury. *Sherman*, *supra* at 601.[4] And as long as it is alleged that the indemnitee is comparatively negligent with others for the injury, the indemnitee is not solely negligent. *Id*. at 596-601. In this case, the whole injury was not caused by a sole act of either Etkin or Baker; therefore, the trial court did not err in finding that the indemnification provisions are not void or unenforceable under MCL 691.991.

Defendants argue that the enactment of tort reform, MCL 600.2956, in 1995 changed the inquiry, but this Court has held that that MCL 600.2956 does not apply to contractual agreements. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 642; 734 NW2d 217 (2007). Indeed, this Court has held that by its plain terms, MCL 600.2956 only applies to tort actions, "'or another legal theory seeking damages for personal injury, property damage, or wrongful death.'" *Id.*, quoting MCL 600.2956. While the indemnification claims at issue in this case do seek recovery for personal injury damages, the damages are sought pursuant to contract, and therefore, are actually contract damages that incidentally arise from personal injury damages. See *id.* at 642.

Whaley, CNA, Connelly, St. Paul Surplus, and US Fire further argue that enactment of MCL 600.2956 defines sole negligence for the purposes of MCL 691.991. However, this

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[4] To support their argument, Whaley, CNA, Connelly, St. Paul Surplus, and US Fire also refer this Court to *Ormsby v Capital Welding, Inc*, 255 Mich App 165; 660 NW2d 730 (2003), rev'd on other grounds 471 Mich 45 (2004) and *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340; 527 NW2d 79 (1995), where this Court refused to enforce claims of contractual indemnity for acts of negligence by the indemnitee. However, *MSI* and *Ormsby* are distinguishable from the instant action because in those cases there was specific contractual language limiting the scope of indemnity to the indemnitor's (subcontractor's) negligence only, which is absent in the instant action.

argument presupposes that MCL 600.2956 and MCL 691.991 address the same issue. And the plain language of the statutes indicates otherwise. MCL 600.2956 states:

> Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

Again, MCL 600.2956 contemplates "an action based on tort or another legal theory seeking damages for personal injury"; MCL 691.991 contemplates a clause to a construction "contract or agreement." The plain language of MCL 600.2956 cannot be interpreted to infer a legislative intent that it includes the type of contract actions that are covered by MCL 691.991. *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002). Therefore, we conclude that the trial court did not err in finding that MCL 600.2956 does not apply to the instant action—a request for a declaratory judgment to determine contract rights. Rather, the trial court correctly refused to read a meaning into legislation that was not there. See *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422-423; 616 NW2d 243 (2000).

Accordingly, the trial court did not err in finding that the tort-reform statute does not apply to this contractual-indemnification case. Further, the contractual-indemnification provisions in this case do not violate MCL 691.991 because the Rupersbergs alleged, and the jury found, that several defendants were negligent, and, therefore, they do not purport to indemnify Etkin and Baker for their sole negligence.

B. Connelly's Obligation to Indemnify Etkin and Baker

The trial court did not err in concluding that Connelly is required to indemnify Etkin and Baker.

"Indemnity contracts are construed in accordance with the general rules for construction of contracts." *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004), citing *Zurich Ins Co v CCR & Co* (*On Rehearing*), 226 Mich App 599, 603; 576 NW2d 392 (1997). "Where the terms of a contract are unambiguous, their construction is a matter of law to be decided by the court." *Id*., citing *Zurich Ins Co*, *supra* at 604. "An unambiguous contract must be enforced according to its terms." *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). But "[i]f indemnity contracts are ambiguous, the trier of fact must determine the intent of the parties." *Id*. While indemnity contracts are strictly construed against the drafter, they should also be construed to give effect to the parties' intentions. *Id*. at 352.

Connelly first argues that the trial court erred in concluding that it is required to indemnify Etkin because Etkin was neither a party, nor a third-party beneficiary to the Baker-Connelly contract. We disagree.

There is no dispute that Etkin is not a party to the Baker-Connelly contract. However, Etkin is a third-party beneficiary. A person is a third-party beneficiary of a contract when the

contract establishes that a promise has been undertaken directly to or for that person. MCL 600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428;670 NW2d 651 (2003). A court must look no further than the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of MCL 600.1405. *Schmalfeldt, supra* at 428.

Connelly argues that because the indemnification provisions in the Baker-Connelly purchase order do not reflect a promise to directly benefit anyone but Baker, Etkin is not an intended third-party beneficiary of the indemnification provisions. However, Etkin and Baker refer this Court to the following provision in the Baker-Connelly purchase order that they argue show that Etkin is a third-party beneficiary:

> 3. Vendor [Connelly] acknowledges that it is bound to Baker by all terms of all contract documents, by reference or otherwise, that form a part of Baker's contract with respect to this project and assumes toward Baker all the obligations and responsibility that Baker assumes therein toward the owner or others insofar as they are applicable to the materials, equipment, services, workmanship and transportation furnished under this purchase order. Copies of the applicable contract documents shall be made available to vendor upon request.

USF&G further argues that Etkin is also a third-party beneficiary of the Baker-Connelly indemnification provisions because of the language contained in paragraph 16 of the contract. In paragraph 16, Connelly is required to indemnify and hold Baker harmless from any and all claims, including claims of Etkin, which arise out of Connelly's work on the project. Therefore, Connelly agreed to assume Baker's obligations to Etkin, so Etkin is a third-party beneficiary of the indemnification provisions. USF&G contends that paragraphs 3 and 16 indicate Baker's and Connelly's intent to benefit Etkin.

We agree with Etkin, Baker, and USF&G that Etkin is a third-party beneficiary under the Baker-Connelly contract. In paragraph 3, Connelly acknowledged that it was bound to Baker by all of the terms of Baker's contract with Etkin, and Connelly assumed all of Baker's obligations toward Etkin, including indemnifying Etkin. Therefore, Etkin is third-party beneficiary to the indemnification provisions of the Baker-Connelly contract.

Next, Connelly argues that because the underlying action is not covered by the indemnification clause in the Baker-Connelly contract, Connelly does not owe indemnity to Etkin or Baker. More specifically, Connelly asserts that because the jury found that Connelly was not at fault for the Rupersburg accident, contractual indemnification was not triggered in this case. Again, we disagree.

When reviewing a claim for indemnity based on express contractual language, this Court must first determine whether the indemnification provision applies to the facts of the underlying litigation. Indeed, "[t]he 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." *Grand Trunk, supra* at 357.

The Baker-Connelly agreement contains the following indemnification provisions:

> 16. Vendor [Connelly] agrees to indemnify and hold Baker harmless from any and all claims, demands, suits, and/or causes of action of any kind and nature whatsoever which may be brought against Baker by any supplier, subcontractor, laborer, owner, contractor, or any other person, organization or entity and any and all costs, expenses, settlements, and/or judgments related thereto, including but not limited to any attorney fees, costs and expenses which arise from or in any way relate to Vendor's performance of or failure to perform this purchases order.
>
> 17. To the fullest extent permitted by law, Vendor, with respect to the material, equipment and services supplied under this purchase order shall indemnify and hold Baker harmless from and against any and all claims, losses, damages and expenses, including but not limited to attorney fees, costs and expenses caused by, or claimed to have been caused in whole or in part, by any negligent act or omission by Vendor or any other person or entity directly or indirectly employed by Vendor or any person or entity for whose acts or omissions Vendor may be liable….

The language in paragraph 16 of the Baker-Connelly purchase order promises indemnity for any losses, "which arise from or relate in any way to [Connelly's] performance or failure to perform [the] purchase order." This language provides for indemnity without regard to fault. See *Waldbridge Aldinger Co v Walcon Corp*, 207 Mich App 566; 525 NW2d 489 (1994) (supporting the proposition that indemnity requires only a link between the work and the injury, regardless of the existence of fault). With this type of language, fault is irrelevant—all that is required is that the injury is work related.

We reject Connelly's contention that the jury's determination of zero fault, no negligence, and no proximate cause as to Connelly means that Rupersburg's accident did not arise from or in any way relate to Connelly's performance of the purchase order. Rupersburg's injuries arose out of, or were related to, Connelly's performance of its contract with Baker because Connelly provided the crane and the crane operator that were involved in the accident. While fault can be a prerequisite to indemnity, that is not what Connelly contracted for here. Therefore, the jury's determination regarding fault is irrelevant, and the trial court did not err in concluding that Connelly is required to indemnify Etkin and Baker.

Connelly also argues that even if it is required to indemnify Baker, its indemnification obligation to Baker would not extend to Baker's obligation to indemnify Etkin. More specifically, Connelly argues that as a contractual indemnitor, it is not liable for its indemnitee's (Baker's) assumed liability to another (Etkin). For this proposition, Connelly refers this Court to *Lynn v Detroit Edison*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2006 (Docket No. 258942), as well as several out-of-state cases. However, unpublished opinions are not binding on this Court. MCR 7.215(C)(1). Further, *Lynn* and the out-of-state cases cited by Connelly are distinguishable from the instant action because, here, in paragraph 16 of the Connelly-Baker contract, Connelly expressly agreed to indemnify Baker from any and all claims, of any kind and nature, including those that may be brought by Etkin.

Finally, Connelly argues that Baker and Etkin are not entitled to coverage from its insurer, St. Paul Surplus, because they do not qualify as additional insureds under the policy. Connelly again asserts that because the jury determined that there was no causal connection

between Connelly's work and Rupersburg's accident, there is no coverage under the St. Paul Surplus policy.

Paragraph 6 of the Baker-Connelly purchase order required Connelly to name Etkin and Baker as additional insureds. Accordingly, Connelly's policy with St. Paul Surplus contains the following endorsement:

> Owner or Contractor Endorsement – Additional Protected Persons
>
> **How Coverage is Changed**
>
> The following is added to the Who is Protected Under This Agreement section. This change adds certain protected persons and limits their protection.
>
> **Owner and Contractor**
>
> Any person or organization on file with the Company who requires in a written work contract that they be made a protected person under this agreement is a protected person. But only for covered injury or damage that results from your [Connelly's] work for them and only if you enter into that written contract before the injury or damage happens . . . .

By the plain terms of the policy, St. Paul Surplus is required to provide coverage for injury "that results from your [Connelly's] work." "Your work" is defined under the St. Paul Surplus policy as follows:

> Your work means any:
>
> - work that you're performing or others are performing for you; or
> - service that you're providing or others are providing for you.
>
> Your work includes:
>
> - all equipment, materials, or parts provided with or for your work;
> - any warranty provided with or for your work;
> - any statement made, or which should have been made, about the durability, fitness, handling, maintenance, operation, performance, quality, safety, or use of your work;
> - All warnings, instructions, or directions provided, or which should have been provided, with or for your work.

The St. Paul Surplus policy, like the Baker-Connelly indemnification provision, does not require fault; rather, it requires a simple causal connection between Connelly's work and the

accident. Therefore, because Rupersburg's injuries arise out of Connelly's contract performance, the policy is triggered. Again, the fact that the jury assessed zero fault against Connelly is irrelevant because the policy, like the indemnification provision, does not require fault as a basis for coverage.

C. Whaley's Obligation to Indemnify Etkin and Baker

The trial court did not err in concluding that Whaley is required to indemnify Etkin and Baker.

Whaley agreed to indemnify Baker as follows:

> **19. INDEMNIFICATION**
>
> To the fullest extent permitted by law, subcontractor, in connection with the work performed by subcontractor under this Agreement, shall indemnify and hold contractor, owner, architect, general contractor and construction manager and all of their agents and employees harmless from and against any and all claims, losses, damages and expenses, including but not limited to attorney's fees, caused or claimed to have been caused by any act by subcontractor or any other person or entity directly or indirectly employed by subcontractor or any person or entity for whose acts or omissions subcontractor may be liable.
>
> The indemnification provision of this section or of any section shall not be limited in any way by any limitation on the amount of damages, compensation or benefits payable by subcontractor, subcontractor or other person under any worker's or workmen's compensation acts, disability benefit acts or other employee benefit or similar acts.

Whaley, CNA, and US Fire argue that Whaley is not obligated to indemnify Baker and Etkin because the fault allocated to them is the sole negligence of Baker and Etkin, and the Whaley-Baker contract limits Whaley's obligation to indemnify to those claims or losses caused or claimed to have been caused by Whaley. Again, we disagree.

Whaley agreed to indemnify Baker and Etkin for "any and all claims . . . caused or claimed to have been caused by any act by [Whaley] or any other person or entity directly or indirectly employed by [Whaley] . . .," which were done "in connection with the work performed by [Whaley] under the [Whaley-Baker] Agreement." This is not a fault-based indemnification provision because Whaley agreed to indemnify Baker for any act, whether negligent or not. Further, the contract language does not require that Whaley actually cause the claims (although that happens to be the case here). But, rather, it only requires that a claim be made that Whaley caused the injuries. Therefore, Whaley's indemnification obligation was triggered in this case when Rupersburg made a claim against Baker and Etkin arising out of Whaley's acts or omissions. Indeed, Rupersburg's injuries were caused, or were claimed to have been caused, by the act of Whaley Steel's employee, who was acting as a signal man for the crane lift. Further, Connelly's crane was lifting Whaley's materials at the time of the accident.

Moreover, Whaley also agreed to indemnify Baker under the use-of-equipment provision in the Whaley-Baker contract. That provision provides, in pertinent part, as follows:

> Subcontractor agrees to hold harmless and indemnify Baker Concrete Construction, Inc., and its agents and employees from any and all losses, costs (including attorney's fees), damages, expenses, and liability arising from or connected with claims for bodily injury or death or property loss or damage, by whomever such claims may be asserted, which are based in whole or in part upon any upon any act or omission in the use or [sic] said equipment [equipment owned or provided by Baker] on the part of subcontractor, its agents, servants, or employees.

Here, there is no dispute that the equipment involved in this case (the crane) was used by Whaley and provided by Baker. At the time of the accident, Whaley's materials were loaded on the crane and Whaley's employee was directing operations of the crane. Rupersburg's injuries arose when he was struck by a stanchion that fell after it was hit by the load attached to the crane. Therefore, Baker's liability for Rupersburg's injury falls squarely within the scope of the use-of-equipment provision.

We further reject Whaley's and CNA's assertion that Etkin and Baker are not additional insureds under the insurance policies issued to Whaley by CNA. The Whaley-Baker contract obligated Whaley to provide primary general insurance naming Baker and Etkin as additional insureds:

> **11 INSURANCE**
>
> Prior to commencing the work as described herein subcontractor shall, at its own expense, secure, and maintain in effect during subcontractor's work hereunder, and until final acceptance thereof, the following insurance. A copy of such policy/certificate demonstrating that such policies are in effect shall be presented to contractor.
>
> * * *
>
> **11.6 All policies shall be primary and Contractor's policy will be non-contributory.**
>
> Certificate of Insurance shall name Contractor, Construction Manager or General Contractor, Owner, and others as required in the Contract Documents as Additional Insureds. [emphasis in original].

Whaley fulfilled its contractual obligation by obtaining a $1,000,000 general liability policy from CNA. The CNA policy provides, in pertinent part, as follows:

> **A. WHO IS AN INSURED (Section II)** is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under:

1. A written contract or agreement….

* * *

B. The insurance provided to the additional insured is limited as follows:

1. That person or organization is only an additional insured with respect to liability arising out of:

a. Your premises;

b. "Your work" for that additional insured; or

c. Acts or omissions of the additional insured in connection with the general supervision of "your work."

Further, the term "your work" as used in CNA's policy is defined as follows:

21. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations,

"Your work" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

b. The providing of or failure to provide warnings or instructions.

Baker and Etkin are identified on the certificate of liability issued in connection with the CNA policy, and Whaley and CNA concede that Etkin and Baker are additional insureds under the policy. However, Whaley and CNA argue that the loss at issue here is not covered for Baker and Etkin because it does not arise out of Whaley's work. More specifically, Whaley and CNA argue that Whaley's work for Baker and Etkin involved the installation of steel. The liability that Rupersburg asserts against Etkin and Baker arises out of an accident that occurred while Connelly was lifting steel. Thus, it was Connelly's work, not Whaley's work, that gave rise to the underlying claim. We disagree.

The Rupersburg accident is covered under the terms of the CNA policy. According to the policy, Baker and Etkin are insured with respect to liability that arises out of work performed by Whaley on Baker's behalf. Again, Rupersburg's injuries occurred when a load of material was being transported by Connelly for Whaley, at Whaley's request, and by the instruction of Whaley's employee. Therefore, Etkin and Baker are covered for the Rupersburg accident.

D. Dismissal of Etkin's and Baker's Insurers

Plaintiffs argue that the trial court erred in dismissing their insurers, St. Paul Fire & Marine, USF&G, and TIG without first making a determination as to their insurers' obligation to defend and indemnify them when no one else would. Defendants Whaley, CNA, and US Fire agree that the trial court erred in dismissing plaintiffs' insurers from the suit, arguing that St. Paul Fire & Marine, USF&G, and TIG are required to equally share in indemnifying Etkin and Baker. We hold that the trial court was correct in determining that there was no need to reach the issue of Etkin's and Baker's insurers' obligations because there was sufficient coverage provided by the policies that were primary to Etkin's and Baker's policies.

To support its conclusion that the indemnification provisions in the construction contracts controlled coverage in this case, the trial court relied on *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646; 671 NW2d 539 (2003). In *Wausau*, this Court concluded that insurance and indemnity are not legally equivalent. This Court rejected the contention that a contractual obligation to procure insurance effectively extinguishes an express contractual right to indemnification contained in the same contract. *Id*. at 652. In reaching its conclusion, this Court noted the there is a difference between the terms indemnify and insure, stating that "an insurance policy may not cover the entire loss but when one promises to indemnify another, the promise is to reimburse for the entire loss." *Id*. at 653. Accordingly, the purchase of insurance policies by the indemnitor did not discharge its contractual duty or negate the indemnitee's contractual right to indemnification. So *Wausau* supports the trial court's conclusion. Additionally, this proposition—that contractual indemnification agreements control over insurance policies—has been upheld by other jurisdictions. See, e.g., *American Indemnity Lloyds v Travelers Prop & Cas*, 335 F3d 429 (CA 5, 2003); *Wal-Mart Stores, Inc v RLI Ins Co*, 292 F3d 583 (CA 8, 2002).

Further, while US Fire may assert that its policy is secondary to Etkin's and Baker's primary policies because of its "other insurance" clause,[5] the construction contracts expressly

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[5] US Fire's Policy contains the following "other insurance" clause:

> III. Condition L. Other Insurance, is deleted and replaced by the following:
>
> If other insurance has been purchased by you [meaning Whaley] to apply on a like basis as the insurance provided by this policy, this policy shall contribute with such other insurance on a pro rata basis, if such other insurance covers a loss covered hereunder. In a like manner, expenses covered by both insurances shall be pro rated. If other collectible Insurance; including other insurance with us [U.S. Fire], is available to you covering a loss covered hereunder, and which is:

(continued…)

state that the insurance Whaley and Connelly were required to secure for the benefit of Etkin and Baker is to be considered primary and Etkin's and Baker's policies are to be noncontributory. Therefore, because the contractual language takes priority over the insurance policy, the trial court did not err in dismissing Etkin's and Baker's insurers because their coverage was secondary and not needed to satisfy the judgment.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

(…continued)

a) not purchased to apply on alike basis as this insurance, or

b) not purchased to apply in excess of the sum of the "Retained Limit" of liability hereunder,

that insurance shall be considered to be "Underlying Insurance" and the insurance hereunder shall be in excess of, and not contribute with, such other insurance.