NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOKAKE CONSTRUCTION COMPANY, an Arizona corporation, Defendant/Third-Party Plaintiff/Appellee, v. ELWARD CONSTRUCTION CO., an Arizona corporation, Third-Party Defendant/ Appellant.	1 CA-CV 08-0578 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-012148

The Honorable Carey Snyder Hyatt, Judge

AFFIRMED

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I R V I N E, Judge

¶1 Elward Construction Co. ("Elward") appeals from the superior court's grant of summary judgment in favor of Jokake Construction Company ("Jokake"), denial of its Motion for Reconsideration, and grant of attorneys' fees and costs to Jokake. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In May 2000, Furst Properties, L.L.C. ("Furst") entered into a contract with Jokake Construction Co. in which Jokake agreed to construct an office building (the "Project") for Furst in Scottsdale, Arizona. Jokake then executed agreements with Elward and Diversified Interiors of El Paso, Inc. ("Diversified") to assist in construction of the Project. Elward's scope of work consisted of windows and Diversified contracted to install exterior insulation and finish system.

¶3 Specifically, Elward's work on the Project according to the agreement (the "Agreement") included: (1) Doors and Windows; (2) Aluminum Entrances & Storefront; (3) Glass and Glazing; and, (4) Aluminum Curtain Walls. The Agreement included the following indemnification clause, in pertinent part:

> 9.1 SUBCONTRACTOR <u>shall indemnify and hold CONTRACTOR and OWNER harmless</u> from any and all liability, claims, suits, damage, loss, judgment or expense, including attorneys' fees, which, may be incurred by CONTRACTOR or OWNER by reason of SUBCONTRACTOR'S performance . . . [t]his agreement of indemnity <u>expressly indemnifies CONTRACTOR and OWNER</u> against all liability, claims,

> suits, damage, loss, judgment or expense, including attorneys' fees, which CONTRACTOR might incur because of CONTRACTOR's or OWNER's negligent failure to discover or remedy a dangerous condition created by SUBCONTRACTOR.

¶4 Section 9.2 of the Agreement included another indemnification clause and a duty to defend:

> SUBCONTRACTOR further agrees to indemnify, save harmless, and at CONTRACTOR'S request, defend CONTRACTOR and its agents and employees from and against any and all suits, actions, legal proceedings, claims, demands, damages, costs and expenses of whatsoever kind or character, including but not limited to, attorneys' fees and expenses, arising out of or . . . in any manner caused or occasioned to be caused by any act, omission, fault or negligence of subcontractors or anyone acting on his behalf, including but not limited to, sub-subcontractors and suppliers, their subcontractors and suppliers, and the employees and agents of any of the foregoing in connection with or incident to this contract or the work to be performed hereunder.

¶5 Section 9.3 of the Agreement stated that "[w]ith respect to the use of any item of equipment owned, rented to or leased by CONTRACTOR, SUBCONTRACTOR hereby assumes all responsibility and holds CONTRACTOR harmless for damages to the equipment or any property resulting from its use."

¶6 The Project was substantially completed in September 2001 and Furst began renting commercial leaseholds to third-party tenants. Furst soon learned that the building leaked when

it rained. Furst hired Heitman & Associates consulting group ("Heitman") to investigate the water leaks. Heitman's investigation found the following intrusions: (1) the intersection between the handrail and the Exterior Insulation and Finish System ("EIFS"); (2) the horizontal sill of the EIFS at the punched window resulting from a lack of weep holes in the window system; and (3) damaged EIFS unrelated to water intrusion. Heitman proposed repairs and tests which were performed and, for the most part, successful.

¶7 Elward was present at Heitman's testing[1] and proposed to repair the weep holes by "deglazing the punched windows and filling in the weep holes that occur underneath the sill." Heitman attempted to repair the weep holes in the way Elward suggested, but that did not resolve the leaks. Therefore, other contractors successfully repaired the leaks using the "wet seal" approach.

¶8 Jokake retained its own expert, David Garcia ("Garcia"), to evaluate water intrusion at the Project. Garcia inspected the Project twice – during the performance of repairs and following the completion of repairs. He also investigated all of Heitman's reports and concluded that Elward "failed to perform its work in compliance with the Project Manual,

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[1] The first meeting to address the water leaks was held on February 28, 2005.

specifically section 08410, which is the specifications for the aluminum entrances and storefronts.” Garcia also found that “Elward failed to ensure that moisture drained to the exterior of the building, and failed to provide a complete installation, which would have included necessary steps and/or parts, such as the effective installation of end caps or the equivalent, to prevent moisture from entering the interior of the building.”

¶9 Anticipating Furst’s claims against it, Jokake sent a tender of defense and indemnity to Elward (via Elward’s insurance carrier) on May 19, 2006. This correspondence included a request that Elward “take over the control of the defense as to construction deficiencies related to Elward’s scope of work.” Elward did not initially respond to Jokake’s tender of defense.

¶10 On August 10, 2006, Furst filed a Complaint against Jokake based upon allegations of construction defects at the Project. On September 11, 2006, Elward filed a Third-Party Complaint alleging Jokake and Diversified were responsible for the defects that Furst alleged. Diversified filed its answer on October 18, 2006. Elward filed a Motion to Dismiss on November 27, 2006, which the trial court denied after oral argument on May 1, 2007. Elward filed an answer in July 2007.

¶11 The Project leaking caused Furst to incur more than $144,000.00 in expenses. In March 2007, Garcia advised Jokake that the defects attributed to Diversified totaled $4,400.00 of

Furst's claimed damages. He also advised that approximately ninety-five percent of the damages were attributed to Elward's work. After several negotiations, Furst accepted Jokake's settlement offer of $105,000 on July 23, 2007, and filed a Notice of Settlement with the trial court on August 27, 2007. On August 21, 2007, Diversified filed a Notice of Settlement with Jokake for $12,500.00, or approximately twelve percent of the total settlement.

¶12 Elward then filed a Partial Motion for Summary Judgment regarding Jokake's Express Indemnity Claim on August 27, 2007, and asked the court to characterize the indemnity provision in the Jokake-Elward contract as general rather than specific. Jokake, in turn, filed both a Response and a Motion for Summary Judgment on the Express Indemnity Claim, which the judge granted, determining that the indemnity provision was specific, not general. The court ordered Elward to indemnify Jokake to the amount of $92,500.00 and granted Jokake's request for attorneys' fees and costs. Jokake filed its Application for Attorneys' Fees and Costs to which Elward did not respond or object. The court then granted Jokake $54,478.00 in attorneys' fees and $2,376.63 in costs.

¶13 Elward filed a Motion to Vacate Nunc Pro Tunc Minute Entry Dated 5/14/08 Or in the Alternative Motion for Reconsideration on May 30, 2008, which the court treated as a

Motion for Reconsideration and denied.[2] Elward timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101.01(A)(1) (2003).

DISCUSSION

¶14 Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz.R.Civ.P. 56(c). A motion for summary judgment should be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In reviewing a grant of summary judgment, "we view the facts in the light most favorable to the party against whom judgment was entered." *Great Am. Mortgage, Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 124, 938 P.2d 1124, 1125 (App. 1997). We determine de novo whether any genuine issues of material fact exist and whether the superior court erred in applying the law. *Eller Media Co. v. City of*

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[2] Elward also filed a Response to Jokake's Application for Award of Fees and Litigation Costs (Or Alternative Motion to Reconsider) on May 30, 2008, sixteen days after the court entered judgment on the issue and fifty-one days after Jokake submitted its Application to the court. It claimed a docketing error prevented it from responding in a timely manner. The trial court did not accept the late Response and entered Judgment in favor of Jokake on June 18, 2008.

Tucson, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). On appeal, we will uphold the trial court's decision if it is correct for any reason, even if the reason was not considered by the trial court. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986).

I. Indemnity Provision

¶15 "The interpretation of [a] contract is a question of law for the court." *Hadley v. Sw. Prop., Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977). The court must give effect to the contract as it is written, and the clear and unambiguous terms of a contract are conclusive. *Goodman v. Newzona Inv. Co.,* 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966).

¶16 The parties' intent is best ascertained by the language in the contract itself. *See id.* "It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement." *Id.* If, after considering the parties' intentions in the language used, the intent remains uncertain, "a secondary rule of construction requires the provision to be construed against the drafter." *MT Builders, L.L.C. v. Fisher Roofing Inc.*, 219 Ariz. 297, 302, ¶ 10, 197 P.3d 758, 763 (App. 2008).

¶17 In *Estes Co. v. Aztec Constr., Inc.*, 139 Ariz. 166, 167-68, 677 P.2d 939, 940-41 (App. 1983), the indemnification clause indemnified the general contractor "from any claims,

liability or losses suffered *by anyone wholly or partially through the negligence of [s]ubcontractor*." This court held that the indemnity clause was general because it "[did] not specifically address what effect the indemnitee's negligence [would] have on the indemnitor's obligation to indemnify."[3] *Id.* In other words, a general indemnity clause is one in which the indemnitor agrees only to indemnify for damages caused by its own passive/active negligence and/or the indemnitee's passive negligence; it is silent as to whether or not it will indemnify for indemnitee's active negligence. In Arizona, a general indemnity provision is defined as one in which the indemnitee "is entitled to indemnification for a loss resulting in part from an indemnitee's passive negligence, *but not active negligence*." *Pioneer Roofing Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 474, 733 P.2d 652, 671 (App. 1986).

¶18 In contrast, a specific indemnity clause provides that the indemnitee can be indemnified even when it is actively negligent. *Wash. Elem. Sch. Dist. No. 6 v. Baglino Corp.*, 169

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[3] Active negligence is generally found "if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform." *Estes Co.,* 139 Ariz. at 169; 677 P.2d at 942. In contrast, "passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition, perform a duty imposed by law, or take adequate precautions against certain hazards inherent in employment." *Id.*

Ariz. 58, 62, 817 P.2d 3, 7 (1991) (holding that an indemnity provision that indemnified the School District "*regardless of whether or not [the injury] is caused in part by a party indemnified hereunder*" was specific because "caused in part" was broad and encompassed Indemnitee's active negligence) (emphasis added).

¶19 In *Cunningham v. Goettl Air Conditioning, Inc.*, 194 Ariz. 236, 238 n.1, ¶ 3, 980 P.2d 489, 491 (1999), the indemnity clause stated that Goettl Air Conditioning ("Goettl") would indemnify Washington Street Investments ("WSI") "against any and all claims . . . [when injury] *shall be caused in part or in whole* by the act, neglect, fault of or omission of any duty . . . or . . . *any act or negligence of [Goettl] . . . ." Id.* The Arizona Supreme Court characterized the clause as specific because it expressly and unequivocally required Goettl to indemnify WSI for damage caused "in part or in whole" by Cunningham. The court said that "a mechanical application of it should be avoided in determining the parties' intent" because "[r]elying exclusively on the active/passive distinction . . . may prevent an agreement from being enforced as the parties intended." *Id.* at 240, ¶ 16, 980 P.2d at 493. Instead, courts should look at the "all-encompassing language of the indemnification contract" and although the agreement was silent as to WSI's active or passive negligence, it stated it would

indemnify WSI for injury/damages caused "in part or in whole" by Goettl and was a specific indemnity provision. *Id.* at ¶ 17. Thus, Goettl was required to indemnify WSI for the tort injuries sustained on the property. *Id.*

¶20 In this case, the trial court characterized § 9.2 as a specific indemnity clause, reasoning that the language "*in any manner caused or occasioned to be caused by*" Elward was analogous to the language in *Cunningham*: "*shall be caused in part or in whole by*" Goettl. Elward argues the provision should be construed as general because "[h]ad Jokake and Elward intended that Elward would indemnify Jokake for Jokake's own negligence under all circumstances, it would have said so and would not have limited its specific indemnity agreement to only two circumstances – neither one of which is applicable to this case."[4]

¶21 We need not decide whether the indemnification clause at issue is general or specific. Even if the provision is general, Elward's allegations regarding Jokake's actions or omissions allege only "passive" negligence. Under a general indemnity clause, an indemnitee can be indemnified for its own

[4] The Agreement included two other indemnity clauses which required Elward to indemnify Jokake for (1) Jokake's negligent failure to discover or remedy a dangerous condition created by Elward and (2) Elward agreed to assume responsibility for damage to Jokake's equipment or property from Elward's use of the equipment.

passive negligence. *See Pioneer Roofing,* 152 Ariz. at 474, 733 P.2d at 671. For example, Elward claims that Jokake was negligent in early phases of construction when it refused to wait for properly fitted curtain walls to arrive and required Elward to install the oversized windows. Elward also points to Jokake as not adequately inspecting or supervising the construction. Neither assertion removes Elward's responsibility for the windows. Elward was responsible for the windows. The windows leaked. Jokake's negligence, if any, did not amount to active negligence.

II. Duty to Defend

A. *Elward's Duty to Defend*

¶22 Elward argues that it did not owe Jokake a defense. The trial court disagreed and so do we. This court has found that an indemnity provision will not require a duty to defend where the word "defend" is absent. *MT Builders,* 219 Ariz. at 305, ¶ 20, 197 P.3d at 767 (holding the language in the indemnity provision "envisioned a determination of Fisher's [Indemnitor's] fault before Fisher would be required to indemnify and hold MT Builders [Indemnitee] harmless against all claims"). Section 9.2 of the indemnity agreement states, in pertinent part, that "[s]ubcontractor . . . agrees to indemnify, save harmless, and *at [c]ontractor's request, defend Contractor"* from legal claims caused or occasioned by Elward. Elward argues

that its duty to defend Elward under § 9.2 "was limited" to claims "caused or occasioned by any act, omission, fault or negligence of [Elward]" and because there was no judgment that Elward was negligent, it had no duty to defend Jokake: "Jokake cannot create a duty to defend where none exists by making up its own allegations against Elward."

¶23 Elward states that Furst never implicated Elward's work and consequently, there was no basis for a duty to defend. The record, however, shows that Furst's experts investigated the water intrusion and concluded it was caused directly by Elward's work. Elward's representatives were involved in water intrusion testing in March and June of 2005 and, in fact, proposed remedies for the leaking that were ultimately unsuccessful. Thus Elward cannot argue that its work was never implicated in the lawsuit and there was no basis for a duty to defend. Moreover, unlike the provision in *MT Builders* that did not include the word "defend," the provision in § 9.2 expressly stated that Elward would defend Jokake, at Jokake's request, when the claims were caused or occasioned by "any act" of Elward. No prior determination of fault was required. Elward's work was implicated by both Furst and Jokake. Therefore, it had a duty to defend Jokake against Furst's claims in advance of a determination of Elward's fault.

¶24 Elward argues that it could not defend because doing so would create a "conflict of interest," namely it could not defend Jokake because several parties were implicated and "[e]ach subcontractor [including Jokake] had an interest in proving that the building leaked for any reason relating to any other subcontractor, as long as it was not due to Jokake's sequencing or inspection." Elward also claims that Jokake's Vice President, Mike Smith, told Elward's CEO Brad Elward something to the effect of – it was a shame Jokake did not know what they were doing on that job.

¶25 We do not accept this argument as a reason to breach a contractual duty to defend because this is not probative evidence of a conflict of interest. Moreover, simply asserting that Jokake was negligent does not absolve Elward of its own responsibilities for the leaky windows, for which Furst could hold Jokake liable. Elward essentially responded to Jokake's request by saying it would only defend Jokake after Elward was definitively found to be at fault. This position ignores Elward's responsibility to defend Jokake by, in part, defending itself. It simply failed to do so.

¶26 Elward also argues that it decided not to defend Jokake because Jokake's counsel's March 30, 2007 letter stated that Elward must also defend Diversified claims. The letter, however, makes no mention that Elward would be required to

defend Diversified. Instead, the letter emphasizes that Elward owed Jokake a duty of defense and that "ultimate fault [was] not material to the duty to defend" (citation omitted).

¶27 At oral argument in the trial court, Jokake's counsel stated that Diversified and Elward "should have stepped in and defended their scope of work. It doesn't mean that Elward should have defended Diversified's work . . . ." Counsel's statement reflects Jokake's assertion that it did not expect Elward to defend Diversified's work. Even if Elward believed Jokake expected it to defend Diversified's claims as well as its own, it could have agreed only to defend against claims rising from its own work as it was required to do under the Agreement. Instead, Elward took no action to defend at all.

¶28 Even if the facts asserted by Elward are taken as true, it still had a duty to defend Jokake for several reasons. Heitman found only one leak attributed to Diversified's work and Jokake did not ask Elward to defend Diversified's work. Diversified settled its claim with Jokake. Moreover, the causes of water intrusion involved a lack of functional weep holes, end dams and improper installation of the window frame system. These causes were within Elward's control. Finally, even if Jokake was negligent in overseeing Elward's work, the indemnity provision encompasses passive negligence and Elward's duty to defend

remained. As noted above, we conclude that any negligence by Jokake was passive.

B. Proper Tender of Defense

¶29 A duty to defend is not triggered until there is a timely, proper, unqualified tender of the defense. *Litton Sys., Inc. v. Shaw's Sale & Serv., Ltd.,* 119 Ariz. 10, 14, 579 P.2d 48, 52 (App. 1978). Elward argues that Jokake "never made an unqualified tender of the defense – i.e., Jokake never provided an unequivocal, explicit demand to undertake the defense, with an offer to surrender complete control of the action." Jokake argues that Elward never challenged the sufficiency of Jokake's tender of defense and indemnity in the trial court and is therefore precluded from raising it on appeal.

¶30 The May 19, 2006 letter from Jokake's insurance representative, Paul Kular with St. Paul Travelers Companies, to Bill Gomm at Elward Construction Company stated the following:

> Therefore, St. Paul Travelers, on behalf of Jokake Construction, *hereby tenders its defense in the above-referenced litigation to Elward Construction* and your insurer. By this St. Paul Travelers and Jokake Construction mean to inform you that Elward Construction and your insurer *can take over the control of the defense as to construction deficiencies related to Elward's scope of work*.

The language in this letter meets the *Litton* requirements that a legitimate tender must be unequivocal, explicit, and include an

offer to surrender control. *See id.* at 14, 579 P.2d at 52. Jokake "tender[ed] its defense" to Elward and directed Elward to "take over the control of the defense . . . related to Elward's scope of work." Therefore, Jokake made a proper tender of the defense.

C. Jokake's Defense

¶31 Elward claims there is a fact question regarding whether Jokake reasonably defended Elward's work and therefore summary judgment was inappropriate. "[I]ndemnitee [Jokake] need not establish . . . that he would have lost the case, he need only establish that given the circumstances affecting liability, defense and coverage, the settlement was reasonable." *Assoc. Aviation Underwriters v. Wood*, 209 Ariz. 137, 171, ¶ 107, 98 P.3d 572, 606 (App. 2004) (citations omitted).

¶32 The record indicates that Jokake diligently and prudently defended against Furst's claims by: (1) retaining a qualified expert to investigate the claims; (2) engaging in discovery; (3) analyzing Furst's expert reports and repair records; (4) requesting clarification and justification for alleged damages; (5) responding to and defeating Furst's Motion for Summary Judgment; and (6) negotiating a reasonable settlement under the circumstances. After determining that its subcontractors' work caused the construction defects based on both Furst's and Jokake's expert opinions and that "[t]o any

juror, the overwhelming evidence as to Elward being at fault would have been beyond question," Jokake offered a settlement amount of $105,000 which was $39,000 less than Furst's claimed damages and costs. Thus, we affirm the trial court's finding that the settlement was reasonable. There being no genuine issue of material fact, the trial court properly granted Jokake's Motion for Summary Judgment.

D. Elward's Right to Contest the Settlement

¶33 Elward argues that "no duty to defend was ever triggered because Jokake has never proven that Elward was at fault in causing any damage" and thus it has a right to contest the settlement. We disagree. In *Cunningham*, the Arizona Supreme Court interpreted § 57 of the Restatement (Second) of Judgments[5]

[5] Section 57 states:

> (1) Except as stated in Subsection (2), when one person (the indemnitor) has an obligation to indemnify another (the indemnitee) for a liability of the indemnitee to a third person, and an action is brought by the injured person against the indemnitee and the indemnitor is given reasonable notice of the action and an opportunity to assume or participate in its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:
>
> (a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and

to "appl[y] when an indemnity obligation exists and judgment has been entered against the indemnitee." *Cunningham*, 194 Ariz. at 240, ¶ 19, 980 P.2d at 493. The court held that an indemnitor will be "estopped from disputing the existence and extent of the indemnitee's liability to the injured person" and barred from relitigating issues in the case against the indemnitee if the indemnitor received "reasonable notice of the action and an opportunity to assume or participate in its defense" and if the indemnitor did not participate, "the indemnitee defended the action with due diligence and reasonable prudence." *Id.*

¶34 In this case, Jokake sent at least two letters to Elward asking Elward to defend it against Furst's claims. Elward does not dispute that it received these letters and, in fact, responded to the March 2007 letter. Elward also filed an Answer to the Third-Party Complaint on June 1, 2007. Elward's representative was present at the initial meeting with Jokake's expert, Heitman, on February 28, 2005, and participated in the investigation and testing. Elward cannot argue that it did not receive reasonable notice of the action and did not have an

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> (b) The indemnitor is precluded from relitigating issues determined in the action against the indemnitee if:
>
> (i) the indemnitor defended the action against the indemnitee; or
> (ii) the indemnitee defended the action with due diligence and reasonable prudence.

opportunity to defend the litigation. We affirm the trial court's finding that Jokake defended the claims with due diligence and reasonable prudence. Therefore, Elward is precluded from relitigating the settlement amount.

III. Allocation of Damages

A. Jokake's Allocation of Damages to Elward

¶35 Elward argues that Jokake's Allocation of Damages to Elward was not supported by competent evidence and was a fact question which should have precluded summary judgment. In *MT Builders*, MV Condominium Association, Inc. ("Association") brought a construction defect claim against the general contractor, MT Builders, L.L.C. ("MT Builders") and the roofing subcontractor, Fisher Roofing ("Fisher"). 219 Ariz. at 301, ¶ 3, 197 P.3d at 762. MT Builders, the indemnitee, and Fisher, the indemnitor, had an indemnity agreement that required MT Builders to prove Fisher's fault in a construction defect case before it could obtain indemnification. *Id.* at 312, ¶ 50, 197 P.3d at 773. In its summary judgment motions, MT Builders relied on Association's expert's information regarding the cost of roof repair that conflicted with both Fisher's and its own experts.[6] *Id.* at ¶ 49. This court held that because there was conflicting

[6] The expert said Fisher's damages would amount to $856,223; MT Builder's expert estimated $86,000; Fisher's expert calculated approximately $32,000. *MT Builders*, 219 Ariz. at 312, ¶ 49, 197 P.3d at 773.

evidence regarding Fisher's fault and damages, the trial court erred in granting summary judgment on the issue. *Id.* at ¶ 50. The court said the question of Fisher's fault and what portion of the settlement sum was attributable to that fault was a genuine issue of material fact that precluded summary judgment. *Id.*

¶36 Jokake argues that it proved what portion of the settlement sum was attributable to Elward's defective work and therefore summary judgment was appropriate. Jokake retained David Garcia, a construction consultant with over thirty years of construction and architectural experience to evaluate Furst's claims. He determined that a minimum of ninety-five percent of the water intrusion problems and costs were attributable to Elward's window system installation and "that attempting to attribute any part of the resultant water damages to Diversified Interiors or damaged EIFS would be unsupportable." Furst's experts, Heitman & Associates and Associated Consulting Group, determined that "Elward's window installations were the primary source of water infiltration into the building," the "leaks caused by the work performed by Elward necessitated the investigation in its totality," and that "only a single leak that could have possibly related to Diversified's work, at a single balcony railing."

¶37 Jokake settled with Furst for $105,000, which was $39,000 less than Furst's claimed damages. Although Garcia said approximately five percent of the fault was attributable to Diversified, the settlement amount between Jokake and Diversified represented twelve percent of the total settlement amount. Therefore, Jokake requested the remaining eighty-eight percent from Elward. Elward argues that the amount attributed to its fault was arbitrary and unilateral because Jokake's expert changed the allocation amount after settlement. Elward also argues that Jokake's allocation of damages to Elward "has no relationship at all to Elward's work – which is the basis for any indemnification." We disagree with Elward.

¶38 Jokake's original response to Elward's interrogatories estimated that Elward's fault was approximately eighty-percent but also said the apportionment was preliminary and that "Jokake's expert's preliminary opinion, subject to amendment pending additional discovery to be conducted and potential lack of contribution from Diversified Interiors, indicates Elward's apportionment of damages related to repairs at $90,442.35." Garcia's later investigation apportioned ninety-five percent of fault to Elward which is more than the eighty-eight percent Jokake ultimately demanded.

¶39 Elward argues that summary judgment was improper and a trial should go forward to determine the proper allocation of

the settlement amount. Elward's expert, however, did not present evidence of what the proper allocation amount should be. In fact, Elward provided no probative evidence that it could offer at trial on the issue.[7] Moreover, Elward had a significant amount of time to hire an expert to evaluate its fault but chose not to do so until long after the original claim was filed. Thus, we conclude that there was no issue of material fact to preclude the trial court's grant of summary judgment in favor of Jokake.

B. Elward is Precluded from Litigating Underlying Damages

¶40 The trial court found that as a result of Elward's failure to defend Jokake, it was bound to the Furst-Jokake settlement unless there was evidence of fraud and collusion between Furst and Jokake, which there was not. Elward suggested a repair method which Furst undertook; it was unsuccessful. Elward did not obtain its own expert until over a year after Furst filed its Complaint against Jokake, despite being aware of the investigation of the water damage for several years. By then, Furst and Jokake had reached a settlement after engaging

[7] Elward's expert, Bert Howe & Associates ("Bert Howe"), did not determine Elward's fault but instead claimed that Jokake and Furst were negligent. The report stated that Jokake negligently oversaw the window installation and had Furst "followed through with manufacturer site inspections it is also highly probable that the leaking that is being alleged would have been detected and corrected." However, Bert Howe does not disclaim Jokake's allegations of Elward's defective work.

in approximately 24-30 months of discovery, evaluation, investigation, testing, and repairs.

¶41 Both Furst's and Jokake's experts attributed most of the damage to work performed by Elward. There is no competent evidence that Jokake's negligence contributed to the defects. Therefore, it was not required to "prove how much it paid for claims attributed to [its] work." Elward argues that its expert determined that Jokake negligently oversaw the project and should be liable for part of the damages. However, this assertion does not explain how Jokake's conduct resulted in leaky windows. Therefore, it is not enough evidence to create a fact question to preclude summary judgment.

IV. Trial Court's Denial of Elward's Motion for Reconsideration

¶42 Elward argues that the trial court erred in denying its Motion to Vacate Nunc Pro Tunc Minute Entry Order Dated 5/14/08 (where the court granted Jokake's application for costs, including $54,478 in attorneys' fees and $2,376.63 in costs) Or in the Alternative Motion for Reconsideration. Nunc Pro Tunc change requests are typically only granted to fix "clerical," "stenographic," or "transcriptional" errors, such as correcting the date on an order. *See Asarco, Inc. v. Indus. Comm'n of Ariz.*, 204 Ariz. 118, 120, ¶¶ 11-12, 60 P.3d 258, 260 (App. 2003); *see Cunningham*, 194 Ariz. at 238, ¶ 11, 980 P.2d at 491.

There is "no authority to enter a nunc pro tunc order in a situation where the record reflected what the court had actually done." *City of Phoenix v. Geyler*, 144 Ariz. 323, 327, 697 P.2d 1073, 1077 (1985).

¶43 In its Memorandum of Points and Authorities supporting its motion, Elward states no reasons to support vacating the minute entry nunc pro tunc based on a clerical, stenographic, or transcriptional error and does not argue that the record does not accurately reflect what the court did in the case. Instead, Elward argues the order should be vacated because Elward failed to file a response to Jokake's Application for Attorneys' Fees due to a docketing error. Under these circumstances, the trial court acted within its discretion when it elected to treat it as a Motion for Reconsideration.

V. Allocation of Fees

A. Attorneys' Fees incurred pursuing the indemnity or duty to defend claims

¶44 Elward argues it should not be required to pay Jokake's attorneys' fees incurred pursuing the indemnity or duty to defend claims against Elward. We disagree.

¶45 When Elward refused to defend Jokake in its claims against Elward pursuant to both the indemnity and duty to defend provisions in the subcontract, Jokake was required to spend its own money to investigate and ultimately settle the claims that

arose from Elward's faulty work. Elward cites no authority that supports its assertion that Jokake cannot recover attorneys' fees and costs associated with holding Elward accountable for failing to do what it was required to by contract: indemnify and defend Jokake.

B. Reasonableness of Jokake's Attorneys' Fees

¶46 Elward argues Jokake's Attorneys' Fees were unreasonable. Attorneys' fees and costs under A.R.S. § 12-341.01 (2003) "[are] left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *Rogus v. Lords*, 166 Ariz. 600, 603, 804 P.2d 133, 136 (App. 1991). To determine reasonableness of a fees award, the court should consider various factors, among them are: "(1) [t]he merits of the claim or defense presented by the unsuccessful party; (2) [t]he litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result; (3) [a]ssessing fees against the unsuccessful party would cause an extreme hardship; (4) [t]he successful party did not prevail with respect to all of the relief sought." *Grand Real Estate, Inc. v. Sirignano*, 139 Ariz. 8, 14, 676 P.2d 642, 648 (1983).

1. Merits of the Claim

¶47 Elward claims it did not indemnify or defend Jokake because the indemnity provision was general, not specific, and

therefore it was not required to indemnify or defend Jokake for Jokake's active negligence.

¶48 The case law supports the trial court's conclusion that the contract contained a specific indemnity provision. Moreover as noted above, even if the court determined it was a general indemnity clause, Elward has presented no evidence of Jokake's *passive* negligence, let alone *active* negligence. Therefore, Jokake both reasonably defended and settled the case.[8]

2. Whether the Successful Party Prevailed

¶49 Jokake was the successful party at trial, a factor that weighs in Jokake's favor.

3. Whether Litigation Could Have Been Avoided or Settled

¶50 Elward claims it did not settle because Jokake's allocation of fault to Elward was "not supported by any evidence." This clearly was not the case, as is evidenced by several expert reports that detail Elward's defective work. Elward simply refused to acknowledge fault to any degree.

¶51 Elward refused to defend Jokake, in violation of the contract, and failed to obtain an expert to investigate the claims until long after Furst filed its Complaint against Jokake, implicating Elward's window work. For years, Elward consistently tried to deny responsibility, instead of

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[8] *See* discussion *supra* at ¶¶ 19-20.

investigating on its own.[9] Instead, Elward argues that Jokake was negligent in not conducting proper post-construction testing. The alleged evidence Elward provides to prove that "neither deficiency" in the windows is its fault (even though it was responsible for window installation) was simply too late.

4. Whether Assessing Fees Constitutes an Extreme Hardship

¶52 To qualify as extreme hardship, Elward must provide specific facts that it will be unable to pay the fee award. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App. 1990). Elward argues that "[g]iven the parties' unequal economic status in this case" the trial court's award of fees would be detrimental. Elward does not explain why the parties' statuses are so unequal, other than stating its insurance carrier did not settle the case. We find no extreme hardship.

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[9] Elward did not answer Jokake's Third-Party Complaint but instead filed a Motion to Dismiss which was denied. It did not file an Answer until nearly nine months after Jokake filed its Third-Party Complaint. Elward did not provide any evidence that it could not be at fault during the course of litigation – that is, until after fourteen months after being reasonably noticed of the litigation and some time after Furst and Jokake settled the claims.

The only "evidence" of Jokake's active fault comes from hearsay: an affidavit that Jokake's Vice President told Brad Elward that "[i]t's a shame we did not know what we were doing on the job."

C. Jokake's Expert Fees

¶53 Elward argues that under A.R.S. § 12-341.01, Jokake is not entitled to recover its expert costs. We agree that expert fees are not recoverable under that statute. We disagree, however, that Jokake is not entitled to recover expert fees. The Arizona Supreme Court has held that a trial court has discretion to award nontaxable costs pursuant to the parties' contract. *See Ahwatukee Custom Estates Mgmt. Ass'n v. Bach,* 193 Ariz. 401, 404, ¶¶ 15-17, 973 P.2d 106, 109 (1999). Elward refused to defend Jokake, as required by the subcontract. Therefore, Jokake had to hire its own expert to evaluate the claims against it – claims that were attributable to Elward's faulty work. Moreover, § 9.2 of the indemnity agreement between Elward and Jokake states that Elward agrees to "indemnify, save harmless, and . . . defend" Jokake, "including but not limited to, attorneys' fees and *expenses,* arising out of . . . any liability . . . in any manner caused or occasioned or claimed to be caused or occasioned by any act, omission, fault or negligence of [Elward]." The evidence implicates Elward's faulty work as the cause of the construction defects and therefore, Elward is liable for expenses associated with the litigation, including expert fees.

CONCLUSION

¶54 For the reasons stated above, we affirm the judgment and award of attorneys' fees and costs. We also award Jokake its reasonable attorneys' fees and costs on appeal upon compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

/s/
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PATRICK IRVINE, Judge

CONCURRING:

/s/
____
JOHN C. GEMMILL, Presiding Judge

/s/
____
JON W. THOMPSON, Judge