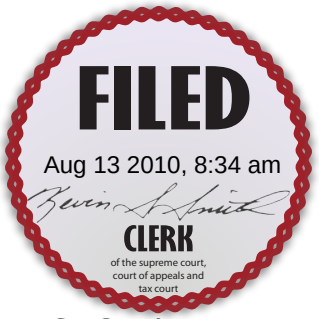

ATTORNEY FOR APPELLANTS:

DAVID A. COX
Bayliff, Harrigan, Cord, Maugans & Cox, P.C.
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

JOHN M. STUCKEY
ROBERT R. ELDER
Stuart & Branigin LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DIMENSIONS, INC. and DI CONSTRUCTION SERVICES, INC., Appellants-Plaintiffs, vs. THE ODLE, McGUIRE & SHOOK CORPORATION, Appellee-Defendant.	)))))))))))	No. 49A05-0909-CV-540

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S. K. Reid, Judge
Cause No. 49D14-0808-CT-38056

August 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dimensions, Inc., and DI Construction Services, Inc. ("DI Construction") (collectively, "Appellants"), appeal the trial court's grant of summary judgment in favor of The Odle, McGuire & Shook Corporation ("OMS") on Appellants' claims for breach of contract and negligence. We affirm.

Issues

We restate the issues as follows:

I. Did the trial court err in granting summary judgment in favor of OMS on Dimensions' breach of contract claim?

II. Did the trial court err in granting summary judgment in favor of OMS on Dimensions' negligence claim?

III. Did the trial court err in granting summary judgment in favor of OMS on DI Construction's breach of contract claim?

IV. Did the trial court err in granting summary judgment in favor of OMS on DI Construction's negligence claim?

Facts and Procedural History

Appellants are Indiana corporations based in Howard County. Tim Miller is the president of both corporations. OMS is an Indiana corporation based in Marion County. On November 10, 2006, OMS executed an agreement with Dimensions to provide HVAC, plumbing, and electrical design services for the construction of a Holiday Inn Express in Newark, Delaware ("the Project"). On May 21, 2007, Dimensions executed an agreement with DI Construction to provide architectural services for the Project. On May 22, 2007, DI Construction executed an agreement with Concord Towers, Inc. ("the Owner"), to design and

build the Holiday Inn Express. OMS did not execute an agreement with either DI Construction or the Owner.

OMS prepared the HVAC, plumbing, and electrical designs for the Project, which Dimensions incorporated into its designs. DI Construction used the foregoing to obtain bids for the HVAC and electrical work and used these bids to negotiate the contract price with the Owner. According to an affidavit from Miller, OMS's designs were "faulty" and required construction changes that "increased the cost of construction to DI Construction [] in excess of $200,000." Appellants' App. at 93. "Those increased costs were not and, under the Design/Build Contract, could not be passed on to the Owner since the price to the Owner was capped." *Id*. Consequently, "DI Construction paid the increased construction costs and has also incurred other damages such as lost profits and added expenses from construction delay as a result of the faulty designs." *Id*.

On August 21, 2008, Appellants filed a complaint against OMS which reads in pertinent part as follows:

> COUNT I: BREACH OF CONTRACT
>
> 10. OMS Corp. contracted to provide designs that met local, state and federal codes.
>
> 11. OMS Corp. breached its contract by failing to provide designs that met all applicable codes.
>
> WHEREFORE, Plaintiffs request that the Court enter judgment against the Defendant for actual, incidental and consequential damages plus costs and interest and all other relief proper in the premises.
>
> COUNT II: NEGLIGENCE

12. OMS Corp. had a duty to skillfully and carefully perform its services.

13. OMS Corp. negligently and erroneously provided defective engineering design services for the project, and as a result the Plaintiffs were damaged.

WHEREFORE, Plaintiffs request that the Court enter judgment against the Defendant for damages, costs and interest and all other relief proper in the premises.

Id. at 6-7.

On June 23, 2009, OMS filed a motion for summary judgment. On August 8, 2009, Appellants filed a response thereto. In support of their response, Appellants designated the aforementioned agreements between the various parties, as well as an undated "Indemnification Agreement" between Dimensions and DI Construction that reads as follows:

Whereas DI Construction Services, Inc. engaged Dimensions, Inc. to provide design and construction documents for the construction of a Holiday Inn Express in Newark Delaware for Concord Towers, Inc. and

Whereas the electrical and HVAC designs furnished by Dimensions, Inc. were faulty, leading to increased construction costs, lost profits, delay in construction, and other damages for DI Construction Services, Inc., and

Whereas, DI Construction has a claim in excess of $200,000.00 against Dimensions for such damages, and

Whereas Odle, McGuire & Shook Corporation furnished the electrical and HVAC designs to Dimensions, Inc. and

Whereas a lawsuit is pending in Marion Superior Court by DI Construction and Dimensions for recovery of damages against OMS, it is agreed as follows:

> Dimensions undertakes to indemnify DI Construction from any and all liability, loss or damage suffered by DI Construction arising out of or as a result of the faulty and defective electrical and HVAC designs for the project. Rights of subrogation accrue upon execution of this agreement, before the undertaking is paid or satisfied. Any recovery by Dimension in the lawsuit against OMS shall be paid to DI Construction and applied toward this undertaking. In return, any recovery from the lawsuit to DI Construction Services, Inc. from OMS arising from the Holiday Inn Express project shall be credited toward this undertaking.

Id. at 155. The agreement was signed by Miller in his capacity as president of both entities.

On August 24, 2009, the trial court entered an order summarily granting OMS's motion for summary judgment. This appeal ensued.[1]

Discussion and Decision

Our standard of review is well settled:

> When determining the propriety of an order granting summary judgment, we use the same standard of review as the trial court. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving party, and resolve all doubts against the moving party. If the trial court's grant of summary judgment can be sustained on any theory or basis in the record, we must affirm.

[1] According to OMS, it filed a reply in support of its summary judgment motion on September 17, 2009, "because it had not yet received notice that its motion had been granted." Appellee's Br. at 7. In its reply, OMS pointed out that Appellants' indemnification agreement was undated, was not mentioned in Appellants' complaint, and was not brought to OMS's attention until more than a month after OMS filed its summary judgment motion. Appellants' App. at 178.

Ryan v. Brown, 827 N.E.2d 112, 116-17 (Ind. Ct. App. 2005) (quotation marks and some citations omitted). "The party appealing the summary judgment bears the burden of persuading us that the trial court erred." *Bhatia v. Kollipara*, 916 N.E.2d 242, 245 (Ind. Ct. App. 2009).[2] We address the propriety of the trial court's ruling as to each cause of action asserted by Appellants.

I. Dimensions – Breach of Contract

"The essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages." *Fairfield Dev., Inc. v. Georgetown Woods Sr. Apts. L.P.*, 768 N.E.2d 463, 473 (Ind. Ct. App. 2002), *trans. denied*.

> Generally, the measure of damages for breach of contract is either such damages as may fairly and reasonably be considered as arising naturally from the breach itself, or as may be reasonably supposed to have been within the contemplation of the parties at the time they entered into the contract as a probable result of the breach.

Id.

[2] Because Appellants' contentions in their initial brief are often framed as responses to OMS's summary judgment motion, rather than as freestanding claims of error, it is often difficult to follow the thread of their arguments as to each cause of action.

It is undisputed that a contract existed between Dimensions and OMS. Assuming, without deciding, that OMS breached the contract,[3] we note that the only damages asserted by Dimensions are those allegedly incurred pursuant to its indemnity agreement with DI Construction. Appellants assert that "[t]he question of whether damages are the natural and proximate result of a breach of contract within the contemplation of the parties is one for the trier of fact." Appellants' Br. at 13 (citing *Strong v. Commercial Carpet Co.*, 163 Ind. App. 145, 152-53, 322 N.E.2d 387, 392 (1975), *trans. denied*). We seriously doubt that OMS contemplated that Appellants (or, more precisely, Tim Miller) would execute a post hoc indemnification agreement in a last-ditch effort to salvage Dimensions' breach of contract claim.[4] We further note that Dimensions has never asserted an indemnity claim against OMS. As such, we agree with OMS that Appellants "cannot deprive OMS of its right to judgment by conjuring a cause of action that was never plead in the trial court." Appellee's Br. at 23.

---

[3] In *Greenhaven Corp. v. Hutchcraft & Associates*, 463 N.E.2d 283 (Ind. Ct. App. 1984), we stated,

> There is implied in every contract between an architect and his employer an agreement that plans and specifications prepared by the architect will be suitable for the purpose for which they are prepared. This implied agreement includes the architect's duty to draw plans and specifications that conform to building codes, zoning codes and other local ordinances. However, it is also generally held that an architect's duties to his employer depend upon the agreement he has entered into with that employer. Thus, if an architect and his employer agree that plans be prepared so as not to conform to applicable codes and ordinances, the architect no longer has a duty to provide conforming plans.

Id. at 285 (footnote and citations omitted). OMS does not dispute that these principles apply to other design professionals, but it asserts that it "did not expressly contract to provide designs conforming with Delaware Code" and therefore did not breach its contract with Dimensions. Appellee's Br. at 24. The question is not whether OMS did *not* contract to provide designs that *do* conform with Delaware Code but whether OMS *did* contract to provide designs that do *not* conform with Delaware Code.

[4] We note that Appellants could have protected themselves with contractual indemnity clauses *vis-à-vis* each other and OMS prior to the initiation of the Project.

Therefore, we affirm the trial court's grant of summary judgment as to Dimensions' breach of contract claim.

II. Dimensions – Negligence

"In a negligence action, a plaintiff must prove the following three elements: 1) a duty owed to the plaintiff; 2) a breach of that duty by the defendants; and 3) damages to the plaintiff proximately caused by the breach." *Hanson v. St. Luke's United Methodist Church*, 682 N.E.2d 1314, 1320 (Ind. Ct. App. 1997), *vacated in part on other grounds*, 704 N.E.2d 1020 (Ind. 1998). Because the only damages asserted by Dimensions are those incurred pursuant to its indemnity agreement with DI Construction, and because Dimensions did not assert an indemnity claim against OMS, we affirm the trial court's grant of summary judgment as to Dimensions' negligence claim.[5]

III. DI Construction – Breach of Contract

"A person typically cannot be held liable for breach of contract unless it is shown that he was a party to the contract. Contractual obligations are personal in nature and privity of contract is essential for the establishment of such liability." *Columbia Club, Inc. v. Am. Fletcher Realty Corp.*, 720 N.E.2d 411, 417 (Ind. Ct. App. 1999) (citation omitted), *trans. denied* (2000). It is undisputed that OMS was not in contractual privity with DI Construction.

[5] We need not address OMS's argument that "Dimensions may not recover damages from OMS because such recovery would constitute a betterment or windfall." Appellee's Br. at 20.

In their reply brief, under the heading "DI Construction vs. OMS: Contract[,]" Appellants argue that "[a]lthough DI Construction has no contract with OMS, DI Construction's losses may be asserted by Dimensions as one legally obligated to pay the losses" pursuant to the indemnity agreement. Appellants' Reply Br. at 5. We have already determined that Dimensions' indemnity claim is a nonstarter. Therefore, we affirm the trial court's grant of summary judgment as to DI Construction's breach of contract claim, such as it is.

IV. DI Construction – Negligence

Finally, we address Appellants' contention that OMS, as a design professional, is liable to DI Construction in negligence. In *Thomas v. Lewis Engineering, Inc.*, 848 N.E.2d 758 (Ind. Ct. App. 2006), we held that "a professional owes a duty to a third party outside of a contractual relationship only if the professional has actual knowledge that the third party will rely on the professional's opinion or service." *Id*. at 762. The *Thomas* court explained that "[m]ere foreseeability is not enough. Instead, the actual knowledge exception to the privity rule has been applied only where there has been contact between the professional and the third party." *Id*. at 760 (citing *Brown v. Sims*, 22 Ind. App. 317, 53 N.E. 779 (1899), and *Ohmart v. Citizens Sav. & Trust Co.*, 82 Ind. App. 219, 145 N.E. 577 (1924)). Our supreme court recently reaffirmed this principle. *See U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 747 (Ind. 2010) ("A professional may owe a duty to a third party with whom the professional has no contractual relationship, but the professional must have actual knowledge that such third person will rely on his professional opinion. [*Thomas*, 848 N.E.2d

at 760] (stating that the actual knowledge prong requires contact between the professional and the third party, not mere foreseeability that a third party may rely on the professional opinion).”). Here, it is undisputed that OMS had no contact with DI Construction. Consequently, Appellants’ arguments on this point are unavailing.

Equally unavailing is Appellants’ argument that DI Construction may seek recovery in negligence because “[f]ollowing OMS’s designs meant imminent exposure to fire and life danger.” Appellants’ Reply Br. at 7. Our supreme court recently rejected this argument in a similar case. *See Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 732 (Ind. 2010) (rejecting construction project owner’s argument that its negligence claims against two subcontractors and engineer were not barred by the economic loss rule “because the damages it suffered … presented the imminent risk of personal injury.”).[6] Therefore, we affirm the trial court’s grant of summary judgment as to DI Construction’s negligence claim.

Affirmed.

VAIDIK, J., concurs.

RILEY, J., dissents with separate opinion.

[6] In *Hiatt v. Brown*, 422 N.E.2d 736 (Ind. Ct. App. 1981), *trans. denied*, on which Appellants rely, another panel of this Court stated, “In [Indiana], the privity barrier has repeatedly collapsed if it is established that the architect’s design was done so negligently as to create a condition imminently dangerous to third persons.” *Id*. at 740. In *Indianapolis-Marion County Public Library*, our supreme court acknowledged this statement but noted that the plaintiffs in *Hiatt* (and in all the cases cited therein) “actually suffered serious personal injury.” 929 N.E.2d at 734 n.10. Therefore, we are unpersuaded by Appellants’ reliance on *Hiatt*.

IN THE
COURT OF APPEALS OF INDIANA

DIMENSIONS, INC., and DI CONSTRUCTION SERVICES, INC.,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A05-0909-CV-540
THE ODLE, McGUIRE & SHOOK CORPORATION,	)	
Appellee-Defendant.	)	

RILEY, Judge, concurring in part and dissenting in part with separate opinion.

While I agree with the majority's decision affirming the trial court's summary judgment in favor of OMS on DI Construction's contractual and negligence claim, I respectfully dissent from the majority's decision affirming the trial court's summary judgment in favor of OMS with respect to Dimensions' contract and negligence claim. Finding a genuine issue of material fact, I would reverse the trial court with respect to Dimensions' claims.

I. *Dimensions' Breach of Contract Claim*

Dimensions entered into an agreement with OMS on November 10, 2006 to provide HVAC, plumbing and electrical designs for the Project. Based on this contractual relationship, Dimensions now claimed that it was damaged. To support its claim for damages, Dimensions relies on the undated indemnification agreement entered into with DI Construction after the filing of the lawsuit in the present case. In essence, Dimensions claims that by way of the subrogation clause inserted in the indemnification agreement, any damages suffered by DI Construction for the defective electrical and HVAC designs, became Dimensions' damages and can be recovered from OMS. I agree.

Rights of indemnification can arise in three contexts: (1) express contractual obligation, (2) statutory obligation, or (3) common law implied indemnity. *Sears, Roebuck, & Co. v. Boyd,* 562 N.E.2d 458, 461 n.2 (Ind. Ct. App. 1990). Here, we are faced with indemnification arising through a contract. In Indiana, a party may contract to indemnify another for the other's own negligence. *GKN Co. v. Starnes Trucking, Inc*, 798 N.E.2d 548, 552 (Ind. Ct. App. 2003). However, this may only be done if the party knowingly and willingly agrees to such indemnification. *Id*. Such provisions are strictly construed and will not be held to provide indemnification unless it is so stated in clear and unequivocal terms. *Id*. We disfavor indemnification clauses because we are mindful that to obligate one party for the negligence of another is a harsh burden that a party would not lightly accept. *Id*. In the case before us, Dimensions and DI Construction knowingly and willingly entered into an indemnification agreement to indemnify each other.

The designated evidence indicates that DI Construction incurred a total of $213,111.04 of extra charges in the Project, which through the indemnification and subrogation agreement now act as damages incurred by Dimensions. However, OMS claims that no damages were incurred; rather, OMS contends that these perceived damages arose out of change orders requested by the Project owner to improve the HVAC and electrical systems originally designed by OMS.

In support of its argument that the damages constituted in effect upgrades, OMS focuses on designated deposition testimony from John Kedzierski (Kedzierski), a representative for both Dimensions and DI Construction, which indicates that improvements were made to OMS's original designs. Kedzierski conceded that if these upgrades had been included in the original bidding documents, then OMS would have included the cost of this improvement in the contract and the overall Project cost would have increased. Therefore, OMS asserts that these improvements constitute a windfall for the Project owner for which the owner is responsible.

Nevertheless, the designated evidence also includes an affidavit by Kedzierski which unequivocally states that during construction of the Project, some of the elements of the electrical design did not pass approval by the local government electrical inspector and created a serious fire risk and life safety. In addition, Tim Miller, president of both DI Construction and Dimensions, stated in his affidavit that OMS's designs were faulty and would not work without construction changes to build the Project. Therefore, based on the designated evidence before us, I find that there is a genuine issue of material fact as to

whether the additional project costs amounted to damages because of OMS's allegedly faulty design or were simply the result of improvements requested by the Project owner.

II. *Dimensions' Negligence Claim*

With respect to Dimensions, the parties focus their claim on the damages element of the negligence claim. Dimensions asserts that its "exposure to liability to DI Construction is one that is a natural, foreseeable, and proximate result of the faulty designs prepared by OMS." (Appellants' Br. p. 13). "Moreover, under the principle that the 'doctrine of subrogation may be invoked in favor of persons who are legally obligated for a loss caused by another's tort,' Dimensions may assert the claims of DI Construction directly." (Appellants' Br. p. 15) (internal citation omitted). I agree.

I already stated that because of the indemnification agreement which includes subrogation rights and which was entered into between DI Construction and Dimensions, Dimensions was placed in DI Construction's shoes with respect to the perceived damages DI Construction incurred in the Project. However, as I also pointed out OMS contends that these damages arose out of change orders requested by the Project owner to improve the HVAC and electrical systems originally designed by OMS. Because there is conflicting evidence as to whether the additional project costs amounted to damages because of OMS's allegedly faulty design or were simply the result of improvements requested by the Project owner, I would reverse the trial court's grant of summary judgment with respect to the negligence claim brought by Dimensions and remand for further consideration.