

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RAFAEL ENRIQUEZ and MARY ENRIQUEZ,  
  
Plaintiffs-Appellees,

UNPUBLISHED  
February 27, 2001

v

No. 216929  
Wayne Circuit Court  
LC No. 96-632584-CK

NEW DIMENSION DEVELOPMENT,

Defendant-Third-Party Plaintiff-  
Appellant,

and

TITANUS CEMENT WALL COMPANY,

Third-Party Defendant-Appellee.

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Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant-third-party plaintiff New Dimension Development (New Dimension) appeals as of right from a post bench trial order of judgment. We affirm in part and reverse in part.

Plaintiffs contracted with New Dimension for construction of a house. New Dimension agreed to provide an eighteen-month home warranty. During the construction, New Dimension hired third-party defendant Titanus Cement Wall Company (Titanus) to pour the home's concrete footings, basement walls and basement floor. Approximately six months after taking possession of the house, plaintiffs complained to New Dimension that there were numerous construction defects. Among the defects were cracks and rod holes in the basement walls that caused water leakage.

Plaintiffs filed suit, alleging breach of contract, breach of warranty, negligence and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* New Dimension filed a third-party complaint against Titanus, alleging breach of warranty and negligence and seeking indemnity. At trial, plaintiffs asserted that significant structural repairs were needed to properly repair the defects to the basement. The trial court found New Dimension liable for breach of contract and breach of warranty and awarded plaintiffs \$33,085 as damages for below-ground-level structural defects. The court ruled in favor

of New Dimension on plaintiffs' negligence and MCPA claims and rendered a judgment of no-cause in regard to New Dimension's indemnity claim against Titanus after finding that New Dimension engaged in "tortious wrong-doing."

On appeal, New Dimension first argues that the trial court erred in denying its claim for common law indemnity.<sup>1</sup> New Dimension contends that because the trial court found that it is not liable on plaintiffs' negligence claim, it was error to find that New Dimension engaged in tortious conduct that bars indemnity.

A trial court's factual findings are reviewed for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). A finding is clearly erroneous if, although there is evidence to support it, a reviewing court is left with the definite and firm conviction that a mistake was made. *Id.* Questions of law are reviewed de novo. *Oakland Co Prosecutor v Beckwith*, 242 Mich App 579, 581; 619 NW2d 172 (2000).

"Generally, indemnification is an equitable doctrine that shifts the entire burden of judgment from one tortfeasor who has been compelled to pay it, to another whose active negligence is the primary cause of the harm." *St Luke's Hospital v Giertz*, 458 Mich 448, 453; 581 NW2d 665 (1998). Common law indemnity requires that the party seeking indemnification must be free of active negligence or fault. *Id.* at 454; *Williams v Litton Systems, Inc*, 433 Mich 755, 760; 449 NW2d 669 (1989). A party seeking indemnity at common law must plead and prove freedom from personal fault. *Peeples v Detroit*, 99 Mich App 285, 292; 297 NW2d 839 (1980), citing *Husted v Consumers Power Co*, 376 Mich 41, 51; 135 NW2d 370 (1965) and *McLouth Steel Corp v A E Anderson Construction Corp*, 48 Mich App 424, 430; 210 NW2d 448 (1973). To determine whether the party seeking indemnification was "actively" or "passively" negligent, the court examines the primary plaintiff's complaint. *Feaster v Hous*, 137 Mich App 783, 787; 359 NW2d 219 (1984). "If the complaint alleges 'active' negligence, as opposed to derivative liability, the defendant is not entitled to common-law indemnity." *Id.* at 787-788, quoting *Peeples*, *supra* at 293.

Here, plaintiffs' complaint did not allege a theory of derivative liability or passive negligence against New Dimension. New Dimension's third-party complaint did not plead

<sup>1</sup> There are three possible sources of a right to indemnification: the common law, an implied contract and an express contract. *Williams v Litton Systems, Inc*, 433 Mich 755, 760; 449 NW2d 669 (1989); *Dep't of Transportation v Christensen*, 229 Mich App 417, 425; 581 NW2d 807 (1998). In its statement of questions presented on appeal and the ensuing argument in its brief on appeal, New Dimension asserts that the trial court erred in dismissing its claim for common law indemnity. In an opinion and order issued after trial, the trial court specified that New Dimension is not entitled to common law indemnity. While New Dimension suggests in its reply brief on appeal that it is entitled to both common law indemnity and "implied indemnification," we decline to address argument regarding "implied indemnity" not contained in New Dimension's statement of questions presented and not considered below, see *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000); *Check Reporting Services, Inc v Michigan Nat'l Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991); see also MCR 7.212(C)(5) and (G), and restrict our analysis to the merit of New Dimension's argument regarding common law indemnity.

freedom from personal fault, but instead generally sought indemnity based on Titanus' negligence and breach of warranty. See *Peebles, supra* at 292. As noted *supra*, the trial court found for New Dimension on plaintiffs' negligence claim. However, the failure of plaintiffs' negligence claim is not dispositive of whether New Dimension proved freedom from personal fault as is required to collect on a theory of common law indemnity. See *id.* The trial court found New Dimension liable for breach of contract and breach of warranty. The dispositive question is whether the conduct that formed the bases of those claims supports the trial court's finding that New Dimension engaged in "tortious wrong-doing" and, therefore, is not entitled to indemnity.

New Dimensions does not challenge the following findings regarding plaintiffs' breach of contract and warranty claims:

5 . . . New Dimension, both expressly and impliedly warranted that Plaintiff's home would be fit for its purpose as a residence.

6. The Court finds that Defendant, New Dimension had a duty to provide Plaintiffs with a home construed [sic] to Industry Standards.

\* \* \*

8. The Court finds by a preponderance of evidence that the Defendant failed to provide Plaintiffs with a home construed [sic] to industry standards, failed to remedy the defects previously referred to and breached the express and implied warranties provided to Plaintiffs.

9. The failure of the Defendant to provide a home constructed to industry standards and to remedy the defects previously referred to constitute breach of contract, breach of express and implied warranties.

10. As a result of Defendant's breach of contract, and breach of express and implied warranties, the total amount of damages awarded to the Plaintiff for repair of Plaintiff's home below ground is \$33,085.00.

Those findings as they relate to New Dimension's breach of warranty suggest personal fault on the part of New Dimension. See *Feaster, supra* at 789-790. Evidence at trial supports the conclusion that the house in question was not constructed to industry standards. Under these circumstances, we cannot say that the trial court clearly erred in finding that New Dimension engaged in tortious wrong-doing. *Christiansen, supra*. Where New Dimension has failed to plead or prove freedom from fault, there is no reason in equity to allow indemnification. See *St Luke's Hospital, supra* and *Peebles, supra*. Consequently, the trial court properly concluded that New Dimension is not entitled to indemnity from Titanus. *Oakland Co Prosecutor, supra*.

New Dimension also challenges the trial court's damage award. First, New Dimension claims that the court clearly erred in awarding damages based on exterior excavation to repair cracks and rod holes in the basement walls. There was conflicting testimony regarding whether the basement walls needed to be repaired from the exterior. Plaintiffs' expert, William Callahan,

testified at deposition that exterior excavation was necessary to repair floating sections of the foundation. Other experts opined that the structural integrity of the basement was not at risk and that the walls could be repaired from the interior using epoxy injections. Given testimony that exterior repair is an accepted method of repair and, in one expert's opinion, the best method of repair under the circumstances, we cannot say that the trial court's finding of damages of \$10,575 for exterior repair and restoration was clearly erroneous.

New Dimension also challenges the damage award for costs related to fastening the superstructure of the house to the foundation using foundations straps or anchor bolts. The trial court found that the house did not have the necessary fasteners, apparently based on engineer Kenneth Winters' and Callahan's statements that they did not observe foundation straps upon inspection of the interior of the basement. Titanus' expert John Lamb testified that he, in fact, observed foundation straps on the house, but that they were only visible from the exterior of the house, and not inside the basement. Callahan clarified that he could not say with certainty that no anchor straps were present, just that he did not see any based on his observations in the basement. Under these circumstances, where one expert testified that the required hardware was, in fact, already present and other expert testimony on the subject was speculative, the trial court's finding that straps or anchor bolts were necessary was clearly erroneous. Therefore, on remand, the court shall deduct the amount of damages awarded to plaintiffs in connection with the addition of foundation straps or anchor bolts.

New Dimension further claims that the trial court erred in awarding damages for alternative methods of repair. The trial court adopted plaintiffs' proposed findings regarding the repairs necessary to support the top of the basement walls. Those findings were based on Callahan's recommendations. Callahan specified that he relied on Winters' report and recommendations. Regardless of the fact that Winters' report states that anchoring the floor joists and sill-plate to the top of the basement walls and placing steel posts vertically against the walls anchored into the basement floor and floor framing above are alternative methods of repair, the trial court considered both repairs when calculating damages. Including the cost for alternative methods of repair under these circumstances was clearly erroneous. On remand, the trial court shall determine which method of repair is proper and award damages accordingly.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Harold Hood  
/s/ Gary R. McDonald