STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK J. KRAUSE and CINNAMON KRAUSE,

Plaintiffs-Appellants,

v

GRACE COMMUNITY CHURCH, AMERICAN SEATING, and GREAT LAKES INSTALLATION, INC.,

Defendants-Appellees,

and

MONAHAN CO,

Defendant,

and

AMERICAN SEATING,
Cross-Plaintiff-Appellant/Cross-Appellee,

v

GREAT LAKES INSTALLATION, INC.,
Cross-Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
May 22, 2008

No. 276173
Wayne Circuit Court
LC No. 02-232085-NO

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In this negligence action, plaintiffs appeal by right the trial court's orders granting summary disposition to defendants Grace Community Church (Grace), American Seating, and Great Lakes Installation Inc. (Great Lakes). Cross-plaintiff American Seating and cross-defendant Great Lakes also appeal the court's order granting summary disposition to American Seating on its contractual claim for indemnity but awarding cross-defendant Great Lakes case evaluation sanctions under MCR 2.403(O). We affirm.

I. Summary of Facts and Proceedings

This case arises out of a construction worksite accident in which plaintiff[1] was injured when he stepped on a 7/16 inch diameter anchor bolt extending 1.5 inches from the cement floor of a step riser in the balcony of Grace's sanctuary. Grace hired defendant Monahan Company to act as general contractor and construction manager of a major expansion and renovation of its church building. Grace contracted directly with American Seating to manufacture and install additional theater-style seating (622 chairs) and to relocate similar seating already installed at the church (575 chairs). American Seating subcontracted the seating installation and relocation work to Great Lakes. The bolt plaintiff stepped on was one of hundreds Great Lakes installed in advance of delivery to the church of the new seats. Plaintiff worked for D. L. Custom Homes, a subcontractor Monahan hired to install sound baffling panels. Plaintiff knew the bolts had been installed because he had been working inside the building while they were being installed; it is also undisputed the lighting was good, and the bolts were visible. James D'Luge, plaintiff's supervisor, testified the bolts were extremely obvious, the area was well lit, and plaintiff had alternate travel routes available. D'Luge also did not believe the bolts presented an impalement hazard to workers wearing heavy-soled construction boots. Plaintiff testified at his deposition that he had no idea why he did not see the bolt he stepped on.

It is undisputed that installation of the seat bolts before delivery of the seats at the worksite was highly unusual and was done to accommodate Grace's insistence that the project be completed by the agreed completion date of Thanksgiving eve. The decision to preinstall the anchor bolts was made at a meeting attended by Timothy Belvitch, Monahan's supervisor, Tom McLean of American Seating, Dennis Millis of Great Lakes, and Grace's managing pastor, Keith Crawford. McLean was concerned that if the bolts were installed early they might be damaged by construction equipment, greatly complicating the installation process. Although Belvitch was concerned the bolts posed a trip hazard, he signed off on the idea of early installation against his better judgment. Great Lakes installed the bolts in the balcony on October 30 and 31, 2000, left the job site, and planned to return when the seating arrived. Great Lakes employee Randall Winright testified that he and another Great Lakes employee placed yellow caution tape around the area with the installed seat bolts. Belvitch and Crawford also testified the area was marked with yellow caution tape. Plaintiff was injured on November 9, 2000.

On September 11, 2002, plaintiffs filed their complaint against all defendants, alleging theories of premises liability, liability under the common work area doctrine, and common-law negligence. On January 31, 2003, American Seating filed a cross-claim against Great Lakes based on their contract for its costs defending against plaintiffs' claims and for indemnity should plaintiffs be successful. American Seating moved the trial court for summary disposition on plaintiffs' claims against it and as to its indemnification claim against Great Lakes. The trial court heard the parties' arguments on December 12, 2003. The trial court denied American Seating's motion, finding that plaintiffs raised a factual question based on an

[1] The singular plaintiff refers to injured worker Frederick J. Krause; Cinnamon Krause's claim is for loss of consortium.

affidavit of construction safety expert David Brayton that American Seating had acted as a general contractor, had retained control, and the area where plaintiff was injured was a common work area. The court ruled the indemnification clause was void to the extent that it required Great Lakes to indemnify American Seating for its sole negligence, but did not rule whether the indemnity clause was otherwise enforceable.

The parties again appeared before the court on May 20, 2004 to argue defendants' motions for summary disposition. Monahan asserted that on the basis of this Court's then recent decision of *Ghaffari v Turner Constr Co*, 259 Mich App 608; 676 NW2d 259 (2003) (*Ghaffari I*), rev'd 473 Mich 16; 699 NW2d 687 (2005) (*Ghaffari II*), it was relieved of liability under the open and obvious doctrine. Grace also argued that the premises liability claim against it should be dismissed under the open and obvious doctrine. Great Lakes argued both the open and obvious doctrine and that it was "horn-book law" since *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641(1974) that one independent contractor is not responsible for the worksite safety of another independent contractor's workers. Great Lakes also acknowledged *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719; 683 NW2d 229 (2004), but asserted it had breached no common law duty in performing its contract. American Seating joined the other defendants in asserting the open and obvious doctrine, noting that no special aspects were present in this case. See *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001). Plaintiffs argued that the heart of their case against all four defendants was active negligence in their joint decision to preinstall the seating anchor bolts, thus creating a dangerous situation.

Viewing the evidence in the light most favorable to plaintiffs, the trial court ruled the open and obvious doctrine would require granting defendants summary disposition as to all plaintiffs' claims of general negligence. The trial court also ruled that plaintiffs had failed to produce any evidence that Great Lakes had negligently installed the bolts; Great Lakes had installed the bolts according to its contract and then put up yellow caution tape. Further, the court ruled that evidence of Grace's pastor being on the site daily and talking with contractors was insufficient to establish Grace retained control of the work the contractors were performing. With respect to Monahan, the court observed that both the contract documents and witnesses' testimony established that Monahan was the general contractor in control of the project. The trial court then attempted to reconcile the common work area doctrine with the open and obvious doctrine, viewing the former doctrine as a special aspect under the latter doctrine, and on that basis, denied Monahan's motion for summary disposition.[2] The court also continued its prior ruling that a fact question was presented whether American Seating could be determined a general contractor for purposes of the common work area doctrine. The court entered orders granting summary disposition on June 7 (Grace) and 14 (Great Lakes), 2004.

Another hearing was held on various motions on August 20, 2004. Among the issues argued was American's renewed motion for summary disposition regarding plaintiffs' claims. Since the last hearing, Brayton had been deposed, acknowledging that American Seating was not

[2] Monahan was later dismissed from the case after it agreed to binding arbitration with plaintiffs.

a general contractor with overall responsibility for work performed at the construction site. Brayton also testified that the pre-installation of the seating anchor bolts was not itself a negligent act.[3] Plaintiffs conceded that American Seating's liability was contingent on it being a general contractor with supervisory and coordinating authority over a common work area. See *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53-57; 684 NW2d 320 (2004). Despite an affidavit by Brayton contrary to his deposition testimony, the court ruled there was no competent evidence to support a finding that American Seating acted as general contractor for purposes of the common work area doctrine. Consequently, the trial court entered an order on September 10, 2004 granting American Seating summary disposition as to plaintiffs' claims.

On November 7, 2005, the trial court finally issued its opinion regarding American Seating's indemnity claim. The court opined that the indemnification clause was void to the extent it required Great Lakes to indemnify American for its sole negligence, MCL 691.991. But the provision could be reformed to exclude the void part while giving effect to the parties' intention that the indemnification clause applies "to the fullest extent permitted by law." The court concluded there was no material disputed fact that plaintiffs' complaint alleged matters within the scope of the indemnification clause; therefore, Great Lakes was liable for American's costs in defending against plaintiffs' complaint. After several additional hearings, the trial court entered a final judgment on this case on January 25, 2007, requiring Great Lakes to pay American Seating $36,220.27 to indemnify it for its cost in defending plaintiffs' claims but also awarding Great Lakes $18,417.50 as sanctions under MCR 2.403(O) because the judgment was less than a $125,000 case evaluation award that American Seating rejected. All parties now appeal.

II. Standard of Review

We review de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120. Both the trial court and this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id*. at 120-121. If the moving party satisfies its initial burden of supporting its position with evidence, the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id*. Summary disposition is proper if there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record,

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[3] Brayton opined that the only negligence was not positioning the yellow caution tape with stanchions higher off the floor.

giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

We also review de novo questions of law, including whether a party has a duty of care giving rise to a tort action for negligence upon its breach. *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001). The interpretation of a contract is also a question of law this Court reviews de novo on appeal, including whether its language is ambiguous and requires resolution by the trier of fact. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469, 480; 663 NW2d 447 (2003); *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). An unambiguous contract must be enforced according to its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

III. Plaintiffs' Appeal

Plaintiffs first argue that the trial court misapplied the open and obvious doctrine to a construction site accident on the basis of this Court's decision in *Ghaffari I*, *supra*. No one disputes that our Supreme Court subsequently held that an "irreconcilable conflict" existed between the common work area doctrine that "imposes an affirmative duty to protect against hazards that are open and obvious," and the open and obvious doctrine that "asserts that *no* duty exists if the hazards are open and obvious." *Ghaffari II*, *supra* at 22-23. The two doctrines serve different purposes in different contexts; applying the "open and obvious doctrine in the general contractor setting would tend to thwart the goals of workplace safety advanced" by *Funk*, *supra* and its progeny. *Ghaffari II*, *supra* at 27. Finally, the Court found "there exist unique and distinct attributes of the construction setting that would make the rules applicable in the typical premises liability setting inappropriate." *Id*. 27-28. The Court concluded, "[t]he open and obvious doctrine has no applicability to a claim brought under the common work area doctrine." *Id*. at 31. We note, before discussing plaintiffs' claims under the common work area doctrine, that plaintiffs do not assail the trial court's analysis that plaintiffs' premises liability theory is barred by the open and obvious doctrine. See *Lugo*, *supra* at 517-519.

In general, at common law property owners and general contractors could not be held liable for the negligence of independent subcontractors and their employees. *Ormsby*, *supra* at 48, 53. But in *Funk*, *supra*, our Supreme Court modified the common law by establishing the common work area doctrine as an exception to the general rule of nonliability in cases involving construction projects. This exception, however, does not extend to subcontractors, i.e. to cases in which a construction worker of one subcontractor injured at a worksite seeks to recover from another subcontractor working on the same general project. *Id*. at 104, n 6; *Klovski v Martin Fireproofing Corp*, 363 Mich 1, 5-6; 108 NW2d 887 (1961). Rather, a construction employee's immediate employer is generally responsible for job safety. *Johnson v A & M Custom Built Homes of West Bloomfield, LPC*, 261 Mich App 719; 683 NW2d 229 (2004); *Hughes v PMG Building, Inc*, 227 Mich App 1, 12; 574 NW2d 691 (1997).

To establish liability under the common work area doctrine, a plaintiff must prove that "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby, supra* at 54. If a plaintiff does not satisfy any one of these elements, his claim fails. *Id*. at 59. Here, to survive defendants' motion for summary judgment,

plaintiffs were required to produce evidence to raise a question of fact with respect to Grace, i.e., that it retained control over supervision of the work being performed, and with respect to American Seating, that it was a general contractor with supervisory and coordinating authority. Without such evidence, the common work area exception to the common-law rule of non-liability simply does not apply. *Id*. at 56-57; *Ghaffari II, supra* at 31 n 7.

With respect to American Seating, we agree with the trial court that plaintiffs' reliance on various Internet definitions of "general contractor" and "prime contractor" is unavailing. American's direct contract with Grace to produce and install seating for Grace's expansion and renovation project did not give American general supervisory or coordinating authority over the project work or the worksite. Rather, Grace contracted with Monahan to perform that function as its construction manager for the project. Although American Seating retained significant control over Great Lakes in its subcontract regarding the actual installation of the seating, the subcontract required Great Lakes to submit to the safety directives of the general contractor, in this case, Monahan. Moreover, all witnesses, including plaintiffs' safety expert, testified that Monahan, not American Seating, was the general contractor with supervisory and coordinating authority over the project. Consequently, the trial court did not err in granting American Seating summary disposition under plaintiffs' common work area theory of liability. *Ormsby, supra* at 58; *Ghaffari II, supra* at 31 n 7.

With respect to Grace, an owner may lose its common-law insulation from liability for the actions of independent contractors where it "acts in a superintending capacity and has knowledge of high degrees of risk faced by construction workers . . . ." *Funk, supra* at 106-107. For the "retained control" subset of the common work area doctrine to apply, the owner must step into the shoes of and perform the functions of the general contractor to such an extent that the owner becomes the de facto general contractor. *Ormsby, supra* at 54; *Ghaffari II, supra* at 25. This Court in *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 75-76; 600 NW2d 348 (1999), reviewed extant case law regarding the "retained control" doctrine which held that there must be a high degree of actual control and that general oversight or monitoring is insufficient. The *Candelaria* Court also found instructive the *Funk* Court's analysis in determining that General Motors retained control of the project at issue in that case. Specifically, the *Funk* Court opined that GM's representatives "did more than observe whether the contract was being properly performed. In many instances, what they said, or left unsaid, determined how the work would be performed." *Funk, supra* at 108. The *Candelaria* Court concluded, "[a]t a minimum, for an owner . . . to be held directly liable in negligence, its retention of control must have had some actual effect on the manner or environment in which the work was performed." *Candelaria, supra* at 76.

In the present case, there was evidence that Grace's managing pastor was frequently at the worksite, conversed with contractors, and generally monitored the progress of the project. But this conduct is insufficient to establish that Grace retained control of the work to the point it was a de facto general contractor. Plaintiff also argues that Grace as the owner of the property could exclude persons from the premises. This argument must fail because it would completely eliminate the common-law rule that a property owner is not liable for the acts of independent contractors and would vitiate any need for the retained control doctrine. Finally, the evidence indicated that Grace exerted pressure on Monahan and Great Lakes to expedite the work to meet contract timetables. Viewing this evidence in the light most favorable to plaintiffs, one could

infer that Grace influenced *when* but not *how* the work would be performed. Specifically, Grace's pressure motivated the early installation of the seat bolts. But there is no evidence that Grace coordinated work among subcontractors or in any way affected what safety measures contractors or individual workers would utilize to avoid the perils of the workplace. We must recall when analyzing common work area claims that "the danger cannot be just the unavoidable, perilous nature of the site itself." *Latham v Barton Malow Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 132946, April 14, 2008), slip op at 2. Because there is no evidence that Grace retained coordinating and supervisory control over the manner in which the work was performed, the trial court did not err in granting Grace summary disposition under plaintiffs' "retained control" common work area theory of liability. *Ghaffari II*, *supra* at 31 n 7; *Candelaria*, *supra* at 76.

Last, plaintiffs argue that the trial court erred by finding that Great Lakes was not negligent and granting them summary disposition. Plaintiffs contend that Great Lakes had a duty to avoid active negligence, citing *Johnson*, *supra* at 722, and *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967). In *Clark*, the city of Otsego hired the defendant contractor to clean and paint its water tower. The defendant called a contract inspector employed by the city to inspect the work in progress; he slipped and fell on a greasy coating during the inspection. The Court discussed the basic common-law duty of care, "which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark*, *supra* at 261. The Court further opined, "[t]he general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors of inspectors, or anyone else lawfully on the site of the project, is well settled." *Id*. at 262.

In *Johnson*, this Court applied the *Clark* common-law duty to a situation in which an employee of one subcontractor negligently installed toe boards on a roof thereby causing an employee of another subcontractor to fall from it. *Johnson*, *supra* at 720. The Court recognized the general common law rule "in construction site injury cases is that only the injured person's immediate employer - - and not another subcontractor - - is responsible for job safety." *Id*. at 721. The Court also recognized that the exception to this rule, the common work area doctrine, did not apply to subcontractors. *Id*. at 721-722. But the Court reasoned that even if the defendant "had no direct duty to take proactive measures to make an otherwise unsafe work place safe, and therefore no duty to install toe boards to prevent [the plaintiff] from falling," having chosen to do so, it must do so in a non-negligent manner. *Id*. at 723.

Great Lakes argues that plaintiffs' reliance on *Clark* and *Johnson* are misplaced because the subsequent decision of our Supreme Court in *Fultz v Union-Commerce Assoc*, 470 Mich 460, 466; 683 NW2d 587 (2004), has undercut those decisions. *Fultz* held that whether a stranger to a contract may bring a tort action against a contracting party depends on "whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." Indeed, in *Ghaffari II*, *supra* the Court remanded the case to this Court to determine if a duty were imposed on two subcontractors under *Fultz*. *Ghaffari II*, *supra* at 31. On remand, this Court reasoned that a subcontractor could have a duty separate and distinct from its contract, specifically, the "common-law duty to act in a manner that does not cause unreasonable danger to the person or property of others." *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 466; 708

NW2d 448 (2005) (*Ghaffari III*), citing *Johnson*, *supra* at 722, and *Fultz, supra* at 468-469. This Court rejected the argument that *Johnson* and *Fultz* were incompatible, noting: "Both opinions indicate that when a defendant acts in a manner that places others in greater danger, the defendant may be held liable for the action." *Ghaffari III*, *supra* at 466 n 5. Nevertheless, the Court determined that a separate and distinct duty apart from the contract did not arise on the facts of the case because the subcontractor had failed to move certain pipes after a former storage area became a passageway. The Court held "a failure to act does not give rise to a separate legal duty in tort." *Ghaffari III*, *supra* at 466, citing *Fultz, supra* at 469.

We conclude the evidence in this case fails to raise a question of fact regarding whether Great Lakes violated the common-law duty discussed in *Johnson*. Unlike in that case, there is no evidence that Great Lakes improperly installed the anchor bolts thereby creating an unreasonable risk to plaintiff. Great Lakes' contract required it to install the anchor bolts for the purpose of installing American's seats. Great Lakes properly installed the anchor bolts, placed yellow caution tape in the area, left the worksite at least a week before the accident occurred, and did not return until after the accident. Even plaintiffs' expert conceded that the risk that resulted in plaintiff's injury was not the installation of the anchor bolts, but rather the alleged failure to guard the area from worker encroachment. The duty to provide a safe work place lay with Monahan, the general contractor, if the common work area doctrine applied, *Ormsby*, *supra* at 53-61, *Ghaffari II*, *supra* at 20-21, or with plaintiff's employer, D. L. Custom Homes, *Johnson*, *supra* at 721. Indeed, plaintiff was responsible for his own safety, including by avoiding obviously hazardous areas, by watching where he walked, and by wearing appropriate personal protection equipment such as hard-soled boots. Generally, a duty of care will not arise on the part of one party to protect another unless a special relationship exists between them, and the party on whom the duty is placed is in a position of control enabling the duty to be fulfilled. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Here, no special relationship existed between Great Lakes and plaintiff, and Great Lakes was not in a position of control that would enable it to protect plaintiff. So, the trial court properly granted Great Lakes summary disposition.

IV. Great Lakes' Appeal

The other part of this case is a cross-claim by American Seating against Great Lakes for contractual indemnity and defense. The contract between American Seating and Great Lakes in paragraph 12, titled "Indemnification," provides:

> a. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS AMERICAN SEATING, ITS DIRECTORS, OFFICERS, AGENTS, AND EMPLOYEES, ALONG WITH ANY OTHER ENTITY FOR WHOM INDEMINIFICATION BY AMERICAN SEATING IS REQUIRED UNDER THE PRIME CONTRACT ("THE INDEMNITEES"), AGAINST ALL LIABILITY AND CLAIMS FOR DEATH OF OR INJURY, INCLUDING BUT NOT LIMITED TO, EMPLOYEES OF SUBCONTRACTOR, OR OF ANY INDEMNITEE, OR PROPERTY DAMAGE, INCLUDING THE LOSS OF USE OF PROPERTY, INCLUDING EXPENSES AND ATTORNEY'S FEES RELATED THERETO, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THE SUBCONTRACT AGREEMENT OR PERFORMANCE OF THE WORK OR OTHER ACTIVITIES BY SUBCONTRACTOR AND ITS AGENTS AND EMPLOYEES ON AND AROUND THE PROJECT, EVEN IF SUCH CLAIM OR LIABILITY IS CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OF ANY INDEMNITEE, IT

BEING THE EXPRESS INTENT OF THE PARTIES THAT SUBCONTRACTOR INDEMNIFY THE INDEMNITEES EVEN FROM THEIR OWN NEGLIGENCE. . . .

Although the trial court found this clause unenforceable to the extent it ostensibly required indemnification for liability resulting from the sole negligence of a party, the court found that part of the clause severable and the remainder to be clear, unambiguous, and enforceable. The court further ruled that plaintiff's complaint came within the ambit of the clause, thus requiring Great Lakes to defend American Seating from plaintiffs' complaint and ultimately to indemnify American from any judgment rendered against American not based on American's sole negligence. Great Lakes contends the trial court erred, raising several arguments on appeal. We find none of Great Lakes arguments has merit.

Great Lakes first argues the indemnification clause is ambiguous, thus creating a jury question as to its meaning. We would agree with Great Lakes if indeed the clause contained two material provisions that irreconcilably conflicted with each other. *Klapp, supra* at 467-479, 480. Although Great Lakes discusses hypothetical factual scenarios not before the Court, it points to no irreconcilable conflict with respect to the language of the indemnification clause. An indemnity contract is construed in the same manner as other contracts. *Zurich Ins Co v CCR and Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1998). Like the trial court, we find the clause clear and unambiguous, requiring it be enforced according to the plain and ordinary meaning of the words used in the instrument. *Id.* at 604-605.

Great Lakes next argues that the indemnification clause differs from the indemnification clause contained in the parties' prior contracts. Great Lakes argues that American Seating used its past working relationship and bargaining power to surreptitiously insert the new clause in a "take-it-or-leave-it" contract. According to Great Lakes, these facts create a jury question regarding the parties' intent. We find this argument fails for several reasons. First, Great Lakes cites no authority to support its argument, and "where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Further, Great Lakes' argument has no factual support because the indemnification clause is prominently inserted in the contract in capital letters. Finally, courts must enforce the plain and unambiguous terms of a contract, not one party's "reasonable expectation" of what it believed the contract might contain. *Wilkie, supra* at 51-52.

Next, Great Lakes contends that the entire indemnification clause is void as against public policy under MCL 691.991 because the valid part of the clause was not supported by consideration separate and distinct from that underlying the whole contract. Great Lakes relies on *Ford v Clark Equipment Co*, 87 Mich App 270; 274 NW2d 33 (1978), a case on which the trial court also relied in ruling that the void portion of the indemnification clause could be stricken leaving enforceable the clear and unambiguous remainder. The *Ford* Court reviewed a similar broad indemnification clause and quoted Corpus Juris Secundum: "'A lawful promise based on good consideration is not invalid because an unlawful promise is made for the same consideration.'" *Ford, supra* at 276, quoting 17 CJS, Contracts, § 289(a), p 1220. The *Ford* Court reasoned that broad indemnification clause essentially contained two promises: one promise that was void under MCL 691.991, and another promise that was enforceable. The Court further reasoned that both promises were supported by the same consideration, and that it was not contrary to the parties' intent or the statute "to sever this independent, unenforceable promise from the rest of the indemnity clause . . . ." *Ford, supra* at 276.

Great Lakes also relies on *Higgins v Monroe Evening News*, 404 Mich 1, 12; 272 NW2d 537 (1978) (Moody, J., plurality opinion), for the proposition that a valid contract requires bargained-for consideration. "The essence of consideration, therefore, is legal detriment that has been bargained for and exchanged for the promise." *Id.*, citing Calamari, Contracts (1st ed), § 53, p 105. Great Lakes argues it did not bargain for the indemnification clause, and the issue of whether it was supported by valid consideration should go to the jury.

As noted above, the essence of this argument is that each separate promise in a contract must be supported by separate consideration. Nothing in either *Ford* or *Higgins* supports this underlying premise of Great Lakes' argument. Thus, Great Lakes has not cited legal authority that actually sustains its position. *Prince*, *supra* at 197. Furthermore, contracts must be read as a whole. "[C]ontracts are to be interpreted and their legal effects determined as a whole." *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516 (2000), citing 3 Corbin, Contracts, § 549, pp 183-186. With respect to consideration, courts will not generally inquire into its sufficiency. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 239; 644 NW2d 734 (2002). In this case, Great Lakes promised to install certain seating and American Seating promised to pay Great Lakes a certain sum of money. The contract contained a plethora of other promises. This Court will not dissect each individual promise to determine whether each was separately bargained for. Because the material provisions here at issue are not ambiguous, a jury question is not created. The trial court properly granted American Seating summary disposition.

V. American Seating's Appeal

This case was submitted to case evaluation before the trial court decided any of the parties' motions for summary disposition. The evaluators issued the following unanimous awards: (1) $500,000 for plaintiffs against Monahan; (2) $325,000 for plaintiffs against Grace; (3) $225,000 for plaintiffs against Great Lakes; (4) $200,000 for plaintiffs against American Seating; and (5) $125,000 for American Seating on their cross-claim against Great Lakes. Although plaintiffs accepted awards (2), (3), and (4), all defendants rejected the awards. Subsequently, Monahan was dismissed after agreeing to binding arbitration with plaintiffs, and the trial court granted summary disposition in favor of all remaining defendants. After the trial court granted American Seating summary disposition on its contractual indemnity claim, American moved for a determination of its cost in defending plaintiffs' claims. Great Lakes moved for case evaluation sanctions under MCR 2.403(O)(1), (3). The trial court held several additional hearings on these remaining issues, ultimately entering a final judgment on this case on January 25, 2007 that required Great Lakes to pay American Seating $36,220.27 to indemnify it for its cost in defending plaintiffs' claims but also awarding Great Lakes $18,417.50 as case evaluation sanctions because the "verdict" American obtained was less favorable than the $125,000 case evaluation award it rejected.

The primary issue on is appeal is the interpretation of MCR 2.403(O)(4)(a):

> (4) In cases involving multiple parties, the following rules apply:
>
> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to *the particular pair of parties*, rather than the aggregate evaluation or verdict as to all parties. However, costs may not

be imposed on *a plaintiff* who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation. [Emphasis added.]

Great Lakes argues that the first sentence of subrule 4(a) is dispositive in determining whether American's verdict is more or less favorable than the case evaluation award because when considering only *the particular pair of parties*, American's "verdict" of $36,220.27 was far less than the case evaluation award of $125,000. American Seating argues the "however" clause applies because it was *a plaintiff* on its cross-claim against Great Lakes. American Seating argues that under the case evaluation award it would have paid plaintiffs $200,000 but only received a payment of $125,000 from Great Lakes for a net loss of $75,000. Thus, by proceeding to verdict, American had to pay plaintiffs zero and obtained judgment against Great Lakes for $36,320.27. Thus, American argues, the aggregate verdict it received was far greater than the aggregate case evaluation award.

The interpretation and application of a court rule is a question of law subject to de novo review. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). The same legal principles regarding statutes apply: when the language of a court rule is unambiguous, the plain meaning expressed must be enforced without further judicial construction or interpretation. *Id*. at 413, citing *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000). If applicable to the circumstances, the imposition of case evaluation sanctions is mandatory, and a court's decision whether to grant sanctions is a question of law we review de novo on appeal. *Cusumano v Velger*, 264 Mich App 234, 235; 690 NW2d 309 (2004); *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997). In general, a party who rejects a case evaluation award is subject to sanctions if it fails to improve its position by proceeding to verdict. MCR 2.403(O)(1); *Rohl v Leone*, 258 Mich App 72, 75; 669 NW2d 579, 581 (2003); *Elia v Hazen*, 242 Mich App 374, 378; 619 NW2d 1 (2000).

We agree that as a matter of fact American Seating improved its position by proceeding to verdict as defined in MCR 2.403(O)(2) rather than by accepting the case evaluation awards regarding plaintiffs *and* Great Lakes. But we must still apply the court rules as written. Further, we must follow the rule of law established by prior decisions of this Court. MCR 7.215(J)(1). With respect to the second sentence of MCR 2.403(O)(4)(a) on which American Seating relies, this Court has held that when determining whether "a plaintiff" has obtained an aggregate verdict more favorable than the aggregate evaluation, only the claims asserted by that party as a plaintiff, in a complaint, cross-complaint, or countercomplaint, should be considered. *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 433-435; 670 NW2d 729 (2003), vac'd in part on other grounds 471 Mich 925; 689 NW2d 227 (2004), on rem 265 Mich App 380; 695 NW2d 347 (2005), rem'd 474 Mich 1073; 711 NW2d 327 (2006), rev'd 480 Mich 987; 742 NW2d 120 (2007). Specifically, the Court held, "the plain language, context, and purpose of the rule compels us to conclude that when our Supreme Court used the term 'plaintiff,' it meant plaintiff with respect to only those *claims* in which that party is a plaintiff, not *cases* in which the party is a plaintiff with respect to only one or some of the claims." *Id*. at 435. Our Supreme Court subsequently vacated and eventually reversed only that part of *HA Smith* addressing attorney fees under the Construction Lien Act, MCL 570.1101 *et seq*. Consequently, our Supreme Court has not reversed or modified the decision in *HA Smith* regarding MCR 2.403(O). It remains binding precedent under MCR 7.215(J)(1).

American Seating next argues that the trial abused its discretion in determining a proper attorney fee to award as a sanction. The essence of American's argument is that the trial court determined that an award based on an hourly rate greater than that which counsel actually charged his client was a reasonable attorney fee. We disagree.

When sanctions are awarded, the actual costs to be charged are the costs taxable in any civil action plus a reasonable attorney fee. MCR 2.403(O)(6); *Dessart v Burak*, 470 Mich 37, 40; 678 NW2d 615 (2004). We review the trial court's determination of a reasonable attorney fee for an abuse of discretion. *Zdrojewski v Murphy*, 254 Mich App 50, 73; 657 NW2d 721 (2002). A trial court abuses its discretion when its decision is outside the range of principled outcomes. *Patrick v Shaw*, 275 Mich App 201, 204; 739 NW2d 365 (2007), citing *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

> There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. See generally 3 Michigan Law & Practice, Attorneys and Counselors, § 44, p 275 and Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics. [*Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973).]

In *Zdrojewski*, *supra* at 71-72, this Court opined, "[a] reasonable attorney fee must be based on a reasonable hourly or daily rate for services necessitated by the rejection of the evaluation." In doing so in this case, the trial court employed the multi-factor analysis first delineated in *Crawley*, *supra*. With respect to American Seating's argument that the trial court failed to give adequate weight to the actual fees charged by Great Lakes' counsel, we note that a reasonable attorney fee is "not equivalent to actual fees charged." *Zdrojewski*, *supra* at 72. Here, as in *Zdrojewski*, the trial court determined that $150 an hour is a reasonable hourly rate to calculate a reasonable attorney fee. This determination was not outside the range of principled outcomes. Consequently, the trial court did not abuse its discretion.

Finally, American Seating argues that Great Lakes should be required to indemnify it under its contract for the case evaluation sanctions. American Seating asserts the case evaluation sanctions are "attorney's fees related . . . arising or alleged to arise out of or in any way related to the subcontract agreement" within the meaning of the indemnification clause in its contract with Great Lakes. We reject this argument for several reasons. First, case law interpreting both contractual indemnity and common-law indemnity, while permitting recovering of attorney fees and expenses to defend an underlying claim that is the subject of indemnification, has not permitted recovering fees and costs incurred in establishing the right of indemnity. See *Hayes v General Motors Corp*, 106 Mich App 188, 200-202; 308 NW2d 452 (1981) (contractual indemnity), and *Warren v McClouth Steel Corp*, 111 Mich App 496, 508-509; 314 NW2d 666 (1981) (common-law indemnity). More importantly, to the extent a causal link between the parties' contract and the case evaluation sanctions exists, it is too attenuated to permit contractual recovery; any link was broken by the supervening cause of case evaluation under the court rules. In other words, the case evaluation sanctions did not arise out of the parties' contract. The

sanctions ensued from case evaluation and the verdict American Seating obtained after rejecting the case evaluation award. To allow indemnification of the case evaluation sanctions would completely frustrate the purposes of the court rules. Consequently, this argument fails.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey