STATE OF MICHIGAN

COURT OF APPEALS

WALGREEN COMPANY,

Plaintiff/Counter-Defendant-Appellant,

V

RDC ENTERPRISES, L.L.C.,

Defendant/Counter-Plaintiff/Cross-Plaintiff/Cross-Defendant-Appellee,

and

CINCINNATI INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Cross-Defendant-Appellee,

and

HARLEYSVILLE LAKE STATES INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff-Appellee,

and

ICON IDENTITY SOLUTIONS, INC., and LINDHOUT ASSOCIATES ARCHITECTS, A.I.A., P.C.,

Defendants/Cross-Defendants-Appellees,

and

J. G. MORRIS, L.L.C., d/b/a J. G. MORRIS COMPANY,

UNPUBLISHED
August 23, 2011

No. 293608
Livingston Circuit Court
LC No. 07-023023-CK

Defendant/Counter-Plaintiff/Cross-Plaintiff/Cross-Defendant/Third-Party Plaintiff-Appellee,

and

ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ST. PAUL TRAVELERS,

Defendants-Appellees,

and

TRC SERVICES,

Defendant/Cross-Defendant,

and

PROVIDENCE STEEL & SUPPLY, INC.,

Third-Party Defendant.

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Plaintiff Walgreen Company ("Walgreen") brought this declaratory action to determine its entitlement to indemnification or insurance coverage from several defendants for its potential liability in an underlying negligence action arising from injuries sustained by Leo Saffaleo while performing signage work at plaintiff's store under construction in the city of Brighton. Defendants filed various counterclaims, cross-claims, and a third-party complaint. Following the trial court's resolution of the parties' claims pursuant to orders of dismissal or summary disposition, Walgreen filed this appeal as of right. We affirm.

I. BACKGROUND

In May 2001, defendant Lindhout Associates Architects, A.I.A., P.C. ("Lindhout"), entered into a contract with defendant RDC Enterprises, L.L.C. ("RDC"), to provide professional design, engineering, and construction administration services for a retail project in Brighton. In March 2002, Walgreen entered into a lease agreement with RDC to rent a building, real estate and other improvements to be constructed as part of the project. The interior of the building was to be designed and constructed in accordance with Walgreen's criteria. The lease term was to begin when Walgreen accepted possession of the premises. In December 2002, Walgreen obtained the services of Icon Identity Solutions, Inc. ("Icon"), to supply and install signs for the

Walgreen store. In January 2003, J. G. Morris, L.L.C. ("J. G. Morris"), entered into a construction contract with RDC to serve as general contractor for the retail project.

In March 2006, Saffaleo's wife, individually and as the conservator for Saffaleo, filed a negligence action against Walgreen, Icon, J. G. Morris, Lindhout, and RDC. The underlying plaintiffs alleged that Icon hired Saffaleo's employer, TRC Lighting and Signs, to install lighted signs in the interior of the Walgreen store, which were to be visible from outside the store. A catwalk above the store floor was erected so that workers could install and maintain the signs. While installing a sign on July 28, 2003, Saffaleo fell from the catwalk and struck his head on the store floor, causing traumatic brain and other injuries. The underlying plaintiffs alleged that the catwalk was negligently designed because it lacked safety structures for workers, such as railings, and that workers were not required to wear protective equipment, such as safety harnesses and hard hats. The underlying plaintiffs alleged that Walgreen designed the catwalk, and that RDC's architect, Lindhout, made modifications that were approved by Walgreen. The plaintiffs also alleged that RDC contracted with J. G. Morris to provide general contracting services and with Icon to provide and install lighting, including a lighted sign, inside the Walgreen store.

In July 2007, Walgreen filed this instant action against Icon, J. G. Morris, Lindhout, RDC, TRC Services, and the insurer for each of these defendants. In count I, Walgreen sought a declaration that Icon's insurer, St. Paul Fire and Marine Insurance Company ("St. Paul Insurance"), was obligated to provide a defense in the Saffaleo negligence case and to indemnify it for all claims as a primary insurer for Walgreen. In count II, Walgreen alleged that Icon had a contractual and common-law duty to indemnify it and hold it harmless from any liability arising from the signage work. In count III, Walgreen alleged that other insurance coverage existed for the Saffaleo negligence case. Lastly, in count IV, Walgreen sought a declaration that it was entitled to a defense and indemnification from RDC, TRC Services, J. G. Morris, and Lindhout.

TRC Services was dismissed for lack of service. The remaining defendants filed motions for summary disposition pursuant to MCR 2.110(C)(10) with respect to Walgreen's request for declaratory relief. At that time, the sole claim pending against Walgreen in the Saffaleo negligence case was based on Walgreen's alleged negligent design of the catwalk.

The trial court initially granted summary disposition in favor of the insurance company defendants, including St. Paul Insurance, Cincinnati Insurance Company ("Cincinnati Insurance"), and Harleysville Lake States Insurance Company ("Harleysville Insurance"), based on its determination that Walgreen was not an additional insured under the insurance policies issued by these defendants. The court granted summary disposition in favor of Icon, J. G. Morris, and Lindhout with respect to Walgreen's request for declaratory relief under a theory of express contractual indemnification, but denied summary disposition with respect to Walgreen's request for declaratory relief under common-law and implied contractual indemnification theories because the negligent design claim was still pending in the Saffaleo negligence case. The trial court also denied RDC's motion for summary disposition with respect to Walgreen's request for express contractual indemnification on the ground that RDC's potential agent, Lindhout, was still facing a negligence claim in the Saffaleo negligence case.

On reconsideration, the trial court granted summary disposition in favor of Icon and Lindhout with respect to Walgreen's common-law and implied contractual indemnification theories because vicarious or derivative liability had not been alleged against Walgreen in the Saffaleo negligence case with respect to these defendants. The trial court also granted a renewed motion for summary disposition brought by J. G. Morris on this same ground. On reconsideration, it also granted summary disposition in favor of RDC with respect to Walgreen's claim for express indemnification, on the ground that an indemnification provision in the lease between Walgreen and RDC did not entitle Walgreen to indemnification absent allegations of vicarious or derivative liability in the Saffaleo negligence case.

II. STANDARD OF REVIEW

"In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). To establish an actual controversy, the plaintiff must plead and prove facts indicating an adverse interest that necessitates the sharpening of the issues raised. *Lansing Sch Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349, 372 n 20; 792 NW2d 686 (2010). Where an actual controversy exists, a trial court exercises discretion in deciding whether to grant declaratory relief. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs,* 270 Mich App 110, 127; 715 NW2d 398 (2006); see also *Mettler Walloon, LLC v Melrose Twp,* 281 Mich App 184, 221; 761 NW2d 293 (2008). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007).

We review a trial court's decision on a motion for summary disposition in a declaratory action de novo. *Farm Bureau Ins Co v Abalos,* 277 Mich App 41, 43; 742 NW2d 624 (2007). A motion under MCR 2.116(C)(10) tests the factual support for a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Adair v State of Mich,* 470 Mich 105, 120; 680 NW2d 386 (2004); *Maiden v Rozwood,* 461 Mich 109, 120-121; 597 NW2d 817 (1999). The court must consider the pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine if there is a genuine issue of material fact for trial. *Farm Bureau Ins Co,* 277 Mich App at 44. Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP,* 481 Mich 419, 425; 751 NW2d 8 (2008).

Issues involving the construction and interpretation of an insurance policy are also reviewed de novo as a question of law. *Citizens Ins Co v Pro-Seal Serv Group, Inc,* 477 Mich 75, 80; 730 NW2d 682 (2007). Language in an insurance policy should be interpreted in accordance with well-established principles of contract interpretation. *Id.* at 82.

III. ST. PAUL INSURANCE

Walgreen first challenges the trial court's grant of summary disposition in favor of St. Paul Insurance with respect to Walgreen's claim that it is entitled to coverage for general liability protection under an additional-insured endorsement of a policy issued by St. Paul Insurance to

Icon. Walgreen argues that it established all requirements necessary for it to be treated as an additional insured for purposes of the claim against it in the Saffaleo negligence case. We disagree. While we do not fully agree with the trial court's reasoning, we conclude that Walgreen has not established any basis for finding that it falls within the additional-insured endorsement.

The endorsement broadens the "Who is Protected Under This Agreement" provision for general liability protection by adding:

> We'll protect any person or organization that you are required to add as an additional protected person under:
>
> - a written contract or agreement; or
>
> - an oral agreement or contract where a certificate of insurance showing that person or organization as an additional protected person has been issued.

The endorsement also provides that the written or oral agreement must be "currently in effect or becoming effective during the term of this policy" and "executed prior to the injury or damage." It limits coverage, in pertinent part, as follows:

> That the person or organization is a protected person with respect to liability resulting from:
>
> - premises you own, rent, lease, or occupy; or
>
> - your work for that protected person by or for you.

It expressly excludes coverage for "injury or damage that results from an architect's, engineer's or surveyor's performance or failure to perform architectural, engineer, or surveyor professional services," and refers to the "Contract liability exclusion" to establish what is meant by these services. As set forth therein, "architect, engineer or surveyor professional services" includes:

- the preparation or approval of any drawing and specification, or any map, opinion, report, survey, change order, field order, or shop drawing; and

- any architectural, engineering, inspection, or supervisory activity.

In reviewing this endorsement, the trial court essentially assumed that the requisite contract or agreement existed, but determined that there was no coverage under the limitation "with respect to liability resulting from . . . your work for that protected person by or for you." Essentially, the trial court determined that Walgreen's liability could only arise from the negligent design claim that was pending against it in the Saffaleo negligence case. However, the court found that the negligent design claim was not based on Icon's work for Walgreen because Icon played no role in the design of the catwalk from which Saffaleo fell. Stated otherwise, the trial court determined that coverage is not available for Walgreen's own negligence.

Assuming that the requisite contract or agreement exists, we believe that the trial court construed the phrase "with respect to liability resulting from . . . your work for that protected person by or for you" too narrowly to conclude that Walgreen does not qualify as an additional insured. An insurance policy is enforced according to its terms. *Citizens Ins Co,* 477 Mich at 82. An unambiguous policy is enforced as written. *McDonald v Farm Bureau Ins Co,* 480 Mich 191, 198; 747 NW2d 811 (2008). A contract is ambiguous when two provisions irreconcilably conflict or are equally susceptible to more than one meaning. *Coates v Bastian Bros, Inc,* 276 Mich App 498, 503; 741 NW2d 539 (2007). The fact that a term is undefined in a contract does not render it ambiguous. *Citizens Ins Co,* 477 Mich at 82-83. Rather, a court will interpret contract terms according to their commonly used meanings. *Id.* at 83. When defining a phrase in the contract, the phrase will be read as a whole. *Id.* at 84. Where an undefined word or phrase has not been given a prior legal meaning, resort to a lay dictionary is appropriate. *Id.*

Considering the lack of any dispute in this case regarding whether "you" or "your" refer to Icon, it is appropriate to construe the pertinent coverage limitation to apply "with respect to liability [in the Saffaleo negligence case] resulting from . . . [Icon's] work for [Walgreen] by or for [Icon]." The insuring agreement provides the applicable meaning of the phrase "your work" by defining it as "work that you're performing or others are performing for you" or "service that you're providing or others are providing for you."[1] While the phrase "resulting from" is not defined, the word "result" is commonly understood as including "to arise or proceed as a consequence of actions, premises, etc.; to be the outcome." *Random House Webster's College Dictionary* (1997), p 1108.

The phrase "resulting from" has been given narrow construction by our Supreme Court, considering the dictionary definition of the word "result," for purposes of construing the level of causation necessary to apply the motor vehicle exception to governmental immunity, MCL 691.1405. See *Robinson v Detroit,* 462 Mich 439, 453-457; 613 NW2d 307 (2000). Because the motor vehicle exception must be narrowly construed, our Supreme Court determined that it could not be used to hold a city liable for injuries sustained by passengers in a vehicle fleeing from the police when the fleeing vehicle itself caused the accident. *Id.*

In *People v Wood,* 276 Mich App 669, 675; 741 NW2d 574 (2007), this Court found that the narrow construction given to the phrase "resulting from" in *Robinson* did not similarly apply

[1] "Your work" is further defined in the insuring agreement to include:

- all equipment, materials, parts, or tools being provided or used with or for your work;
- any statement being made, or should have been made, about the durability fitness, handling, maintenance, operation, performance, quality, safety, or use of your work; and
- all warnings, instructions, or directions being provided, or that should have been provided, with or for your work.

when construing the level of causation intended by the phrase "results in" in MCL 257.602a, which establishes the offense of first-degree fleeing or eluding a police officer, where the fleeing or eluding "results in the death of another individual." This Court determined that phrase "results in" was indicative of factual causation, not proximate causation, and that "[f]actual causation means just that: was defendant's criminal conduct a factual cause of the officer's death; or, but for defendant's fleeing and eluding, would the officer's death had occurred." *Id.* at 676.

Similar to *Wood*, the policy language at issue in this case does not involve the type of narrow construction of "resulting from" found appropriate in *Robinson*, 462 Mich at 456-457. While an ambiguous exclusionary provision is strictly construed in favor of an insured, *Brown v Farm Bureau Gen Ins Co*, 273 Mich App 658, 661; 730 NW2d 518 (2007), a court's first inquiry is to determine if the policy provides coverage. *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 24-25; ___ NW2d ___ (2010). An endorsement may grant coverage or remove the effect of an endorsement. *Id.* at 26. Here, the endorsement grants coverage to an additional insured.

We conclude that the phrase "resulting from" only affects the level of the causation necessary to find coverage. It is not a fault-based limitation on coverage. Consistent with the analysis in *Wood*, 276 Mich App at 676, the policy language is indicative of factual causation and, therefore, would not preclude coverage for Walgreen's own negligence. Cf. *Evanston Ins Co v ATOFINA Petrochemicals, Inc*, 256 SW3d 660, 664 (Tex, 2008) (rejecting fault-based interpretation of additional-insured endorsement); see also *Mikula v Miller Brewing Co*, 281 Wis2d 712, 730-733; 701 NW2d 613 (2005).

Because the claim in the Saffaleo negligence case is that an employee of Icon's subcontractor fell off a catwalk while doing signage work for Icon's subcontractor, Walgreen would be entitled to coverage under the additional-insured endorsement in the insurance policy. It is irrelevant that the only remaining claim against Walgreen is an allegation that it negligently designed the catwalk. Therefore, the trial court erred in declaring that no coverage existed on the ground that Icon played no role in the design of the catwalk. It is sufficient that Saffaleo was doing Icon's work at the time of his fall.

Nonetheless, we will not reverse a trial court's summary disposition ruling if the right result was reached for the wrong reason. *Pontiac Twp v Featherstone*, 319 Mich 382, 390; 29 NW2d 898 (1947); *Fisher v Blackenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009). In addition, an appellee such as St. Paul Insurance may argue alternative grounds for affirmance without filing a cross appeal. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). Therefore, we shall consider the parties' arguments with respect to the contract requirements for an additional insured and the professional services exclusion to determine if St. Paul Insurance has established an alternative basis for affirmance.

We are not persuaded that the trial court's determination that there is no coverage for Walgreen under the additional-insured endorsement could be affirmed on the basis of the provision that Icon be required to add Walgreen as an additional insured under a written or oral contract or agreement. While there was no evidence that Icon and Walgreen executed a written

contract containing an insurance requirement, the parties' intentions with respect to the particulars of an oral contract may be gathered from the circumstances of the case. *GRP, Ltd v United States Aviation Underwriters, Inc*, 402 Mich 107, 113; 261 NW2d 707 (1978). The requisite meeting of minds for a valid contract is judged by an objective standard, looking to the parties' express words and visible acts. *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990). Considering the evidence of a certificate of insurance, which was dated before Saffaleo's fall from the catwalk and which named Walgreen as an additional insured, and other evidence indicating that Walgreen had an annual practice of requiring certificates of insurance from its signage vendors, including Icon, we conclude that a genuine issue of material fact existed with respect to whether the endorsement requirement for an "oral agreement or contract where a certificate of insurance showing that person or organization as an additional protected person has been issued" was satisfied.

In contrast, we find merit to St. Paul Insurance's argument that the professional services exclusion applies to the activities that are the basis for the negligent design claim against Walgreen in the Saffaleo negligence case. Walgreen's reliance on the "practice of architecture" definition in MCL 339.2001(e) is misplaced because the insuring agreement contains its own definition of activities falling within the exclusion. The plain language of the insuring agreement is controlling. Cf. *Centennial Ins Co v Neyer, Tiseo & Hindo, Ltd*, 207 Mich App 235, 238; 523 NW2d 808 (1994) ("professional services" exclusion encompassing "maps, plans, opinions, reports, surveys, designs or specifications" and "supervision, inspection and engineering" services was unambiguous); see also *Brown*, 273 Mich App at 661 (while ambiguous exclusionary provisions are strictly construed, clear and specific exclusions are given effect because an insurer cannot be held liable for a risk that it did not assume).

Further, it is immaterial whether the plaintiffs in the Saffaleo negligence case could actually prove that Walgreen was at fault for the design of the catwalk, considering that Walgreen brought this action to obtain a declaration of its right to coverage before any loss occurred. One purpose for obtaining a preliminary determination of rights in a declaratory judgment action is to guide or direct a party's future conduct before loss occurs. *City of Huntington Woods v Detroit*, 279 Mich App 603, 616; 761 NW2d 127 (2008). There must be an adverse interest necessitating a sharpening of the issues raised. *Lansing Sch Ed Ass'n*, 487 Mich 372 n 20.

The matter before us does not require a sharpening of the issues being litigated in the Saffaleo negligence action, but only an assessment of their effect on insurance coverage. Therefore, it is unnecessary to determine if there is evidence that Walgreen lacks fault for the ultimate design of the catwalk. The material issue is whether the activities engaged in by Walgreen, and which form the basis for the claim against it in the Saffaleo negligence case, fall within the policy exclusion.

We also disagree that the averment of Walgreen's project architect, Ted Searcy, that he is not a licensed architect in Michigan creates a genuine issue of material fact. When considering an exclusion for professional services, the act or omission itself, and not the title or character of the person who performed or failed to perform the act, is considered. *American Fellowship Mut Ins Co v Ins Co of North America*, 90 Mich App 633, 638; 282 NW2d 425 (1979); see also *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 528; 679 NW2d 106 (2004).

The professional services exclusion does not state that it only applies to services provided by a licensed architect, let alone an architect licensed in Michigan. Therefore, because Walgreen has failed to establish evidence of any activities underlying the negligent design claim in the Saffaleo negligence case that would not fall within the exclusion, St. Paul Insurance was entitled to summary disposition under MCR 2.116(C)(10). As a matter of law, the exclusion precludes coverage for Walgreen's potential liability in the Saffaleo negligence case. Therefore, the trial court reached the right result when granting summary disposition in favor of St. Paul Insurance with respect to the issue of coverage.

Walgreen further argues that, regardless of whether coverage actually exists for the negligent design claim in the Saffaleo negligence case, St. Paul Insurance still had a continuing duty to provide a defense in that case. Although the trial court did not address this specific issue, it was raised below and, therefore, may be properly considered on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

The duty to defend is broader than the duty to indemnify. *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000). A duty to defend will be found if there are any theories of recovery against the insured that arguably fall within the insurance policy. *Id.* at 137. But the precise language of pleadings is not controlling. *Id.* The insurer must look behind the allegations to determine if coverage is possible. *Id.* at 137-138; see also *Shepard Marine Const Co v Maryland Cas Co*, 73 Mich App 62, 65; 250 NW2d 541 (1976). If a duty to provide a defense exists, it continues until the insurer confines the claim to a recovery that the insurance policy does not cover. *Polkow v Citizens Ins Co*, 438 Mich 174, 179; 476 NW2d 382 (1991).

An insurer may also undertake a defense with notice to an insured that it is reserving the right to challenge its liability under the insurance policy. *Van Hollenbeck v Ins Co of North America*, 157 Mich App 470, 480; 403 NW2d 166 (1987). But "[a]s a general rule, when an insurer is impressed with a duty to defend its insured under the terms of its policy, the insurer may be estopped from denying coverage based on a policy exclusion if, with knowledge of a defense to its policy coverage, the insurer participates in the defense of the insured for an unreasonable time and fails to provide timely notice of its intention to disclaim liability." *Multi-States Transport, Inc v Mich Mut Ins Co*, 154 Mich App 549; 398 NW2d 462 (1986).

Here, the evidence was unrefuted that St. Paul Insurance tendered a defense to Walgreen under a reservation of rights, which permitted Walgreen to choose its own counsel and control its defense, and that St. Paul Insurance subsequently withdrew the defense after it was determined in the Saffaleo negligence case that the only potential basis for liability was Walgreen's alleged negligent design of the catwalk. Walgreen does not argue that St. Paul Insurance may deny coverage for its defense under any type of estoppel theory. Considering the applicability of the professional services exclusion to the activities underlying the negligent design claim in the Saffaleo negligence case, Walgreen has not established any basis for concluding that St. Paul Insurance had a continuing duty to provide it with a defense. Thus, even assuming that factual support existed for Walgreen's position that it was an additional insured, the duty to defend ended when recovery was limited to a theory that the insurance policy did not cover. *Polkow*, 438 Mich at 179.

Lastly, in light of our resolution of the coverage and duty-to-defend issues, we find it unnecessary to consider St. Paul Insurance's claim that it is not a primary insurer under the terms of the additional-insured endorsement.

IV. CINCINNATI INSURANCE

Walgreen argues that it is entitled to coverage under an insurance policy issued by Cincinnati Insurance to J. G. Morris, the general contractor for the retail project. Walgreen further asserts that, even assuming that it had something to do with the design of the catwalk, the issue of coverage cannot be fully determined until the litigation in the Saffaleo negligence case concludes because liability theories and judicial orders entered in that case may be modified.

We deem Walgreen's position that declaratory relief was premature to be abandoned for failure to address this issue with citation to supporting authority. *Mettler Walloon, LLC*, 281 Mich App 184, 221; *McIntosh v McIntosh*, 282 Mich App 471, 484-485; 768 NW2d 325 (2009). We note, however, that declaratory relief is equitable in nature. *Mettler Walloon, LLC*, 281 Mich App 221. A trial court exercises discretion in deciding whether to grant declaratory relief in a case of actual controversy. *Id.*; *PT Today, Inc*, 270 Mich App at 127. In this case, the trial court's relief was restricted to evidence showing that Walgreen's liability in the Saffaleo negligence case was limited to a theory of negligence design. Because Walgreen has not established any basis for a broader scope of declaratory relief, the negligent design claim in the Saffaleo negligence case forms the framework for reviewing the trial court's summary disposition ruling that Walgreen does not fit the definition of an additional insured under the policy issued by Cincinnati Insurance to J. G. Morris.

Examined in this context, Walgreen has not shown any basis for disturbing the trial court's decision to grant summary disposition in favor of Cincinnati Insurance pursuant to MCL 2.116(C)(10). The additional-insured endorsement in the policy requires a written or oral contract similar to the policy issued by St. Paul Insurance, except that the Cincinnati Insurance endorsement applies "only with respect to liability *arising out* of 'your work' performed by the insured by you or on your behalf" and contains an express exclusion for "*sole negligence* or willful misconduct of, or for defects in design furnished by, the additional insured or its 'employees'" (emphasis added).

Although the trial court did not explain the basis for its determination that Walgreen does not fit the definition of an additional insured, we are satisfied that the court reached the right result in finding no coverage available to Walgreen. Even assuming that Walgreen could use provisions in the construction contract between J. G. Morris and RDC, along with the certificate of insurance naming Walgreen as an additional insured with respect to general liability coverage, to establish that Walgreen is an additional insured, the additional-insured endorsement clearly excludes coverage for an additional insured's own negligence. Because the negligent design claim against Walgreen in the Saffaleo negligence case is based on Walgreen's own negligence, the trial court reached the right result in granting Cincinnati Insurance's motion for summary disposition pursuant to MCR 2.116(C)(10). Therefore, we affirm its decision. *Fisher*, 286 Mich App 70.

We decline to consider Walgreen's additional claim that it was entitled to a defense under the policy issued by Cincinnati Insurance to J. G. Morris. Given Walgreen's cursory treatment of this issue, we consider it abandoned. *McIntosh,* 282 Mich App at 484-485; *Mettler Walloon, LLC,* 281 Mich App at 220.

V. HARLEYSVILLE INSURANCE

Walgreen also makes a cursory argument that it is entitled to coverage under policies issued by Harleysville Insurance to RDC and TRC Services. This issue is not properly before us because it not set forth in the statement of the questions presented as required by MCR 7.212(C)(5). *Mettler Walloon, LLC,* 281 Mich App 221. In addition, considering Walgreen's cursory treatment of this issue, we deem it abandoned. *Id.* at 220-221; *McIntosh,* 282 Mich at 484-485.

VI. RDC

Walgreen next argues that it is entitled to indemnification from RDC pursuant to a mutual indemnification provision in the lease agreement with RDC. Walgreen argues that it is entitled to indemnification if it is subject to liability for Lindhout's negligence on the ground that Lindhout was RDC's agent, and that the trial court should have waited until after the Saffaleo negligence case concluded to resolve this issue.

Again, however, Walgreen has not cited any authority in support of the proposition that summary disposition was premature in this declaratory action. As explained in section IV of this opinion, the trial court's summary disposition ruling was restricted to the negligent design claim in the Saffaleo negligence case. Thus, the material question is whether the mutual indemnification provision in the lease between RDC and Walgreen provides for indemnification for a party's own negligence. "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co,* 275 Mich App 527, 529; 740 NW2d 503 (2007).

The mutual indemnification provision in the lease agreement provides:

> Except for loss, cost and expense caused by fire or other casualty, Landlord and Tenant shall each indemnify, defend and hold harmless the other against and from any and all claims, damages, actions, loss, cost and expense (including but not limited to attorney fees) *resulting directly or indirectly from their own respective negligent acts or omissions or the negligent acts or omissions of their respective employees or agents* (acting within the scope of their employment or agency) and any breach of any of the representations, covenants, and agreements contained in this Lease. [Emphasis added.]

Under the plain language of this provision, Walgreen is not entitled to indemnification from RDC if Walgreen is found liable for negligently designing the catwalk in the Saffaleo negligence case, which is the only basis for liability alleged in that action. Therefore, the trial court did not err in granting RDC's motion for summary disposition pursuant to MCR 2.116(C)(10).

VII. ICON

Walgreen also challenges the trial court's grant of summary disposition in favor of Icon with respect to its request for declaratory relief under theories of express, common-law, and implied contractual indemnification. We find no error.

An indemnification action can generally only be maintained on the basis of an express contract or by a person who is free of active negligence or fault. *Williams v Litton Sys, Inc,* 433 Mich 755, 760; 449 NW2d 669 (1989) (opinion of Levin, J.). Indemnification is generally an equitable doctrine used to shift the burden of a judgment from one tortfeasor to another whose active negligence is the primary cause of harm. *St Luke's Hosp v Giertz,* 458 Mich 448, 453; 581 NW2d 665 (1998). Where there are multiple tortfeasors, neither party is entitled to indemnification. *Id.* at 454. Under the common law, a person who is found vicariously liable for the acts of another is entitled to indemnity. *Dep't of Transp v Christensen,* 229 Mich App 417, 427; 581 NW2d 807 (1998). In addition, "[c]ourts recognize implied contracts where parties assume obligations by their conduct." *Williams,* 433 Mich at 758. "In order to establish an implied contract to indemnify, there must be a special relationship between the parties or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification." *Palomba v East Detroit,* 112 Mich App 209, 217; 315 NW2d 898 (1982).

Walgreen has failed to establish a genuine issue of material fact with respect to its claim that an express oral contract for indemnification existed with Icon. While Icon's vice-president, Vincent DiSantis, used the word "indemnify" in his deposition testimony and sworn statement, he used the word to describe insurance. He provided no testimony regarding words actually exchanged with agents for Walgreen to establish an express indemnification agreement. DiSantis's mere use of the word "indemnify" to characterize the agreement, without specifying the actual terms of any agreement, is insufficient to create a genuine issue of material fact that an express agreement for indemnification existed. Cf. *SSC Assoc Ltd Partnership v Gen Retirement Sys,* 192 Mich App 360, 364; 480 NW2d 275 (1991) (conclusory opinions do not create genuine issues of material fact). This conclusion is further supported by the evidence that Walgreen is seeking declaratory relief relative to its potential liability in a case where the only existing claim against it is based on its own alleged active negligence. "A contract which purportedly indemnifies one against the consequences of his own negligence is subject to strict construction and will not be so construed unless it clearly appears that indemnification for the indemnitee's own negligence was intended." *Palomba,* 112 Mich App at 217. "[T]he requisite specificity and clarity required to give rise to a right to indemnity against the consequences of one's own negligence in the case of an *express* contract can never be found *by implication.*" *Skinner v D-M-E Corp,* 124 Mich App 580, 586; 335 NW2d 90 (1983) (emphasis in original). A valid contract requires a meeting of the minds on all essential terms. *Kamalnath v Mercy Mem Hosp Corp,* 194 Mich App 543, 548; 487 NW2d 499 (1992).

Accordingly, the vague "indemnify" language used by DiSantis in his deposition is insufficient to raise a genuine issue of issue of fact regarding whether Icon orally promised to assume liability for Walgreen's negligence, independent of providing insurance coverage in some form. Therefore, the trial court did not err in granting Icon's motion for summary

disposition with respect to Walgreen's request for declaratory relief under a theory of an express contract of indemnification.

Walgreen also argues that it has a special relationship with Icon that gives rise to entitlement to indemnification. In addition, Walgreen continues to argue that the theories of relief in the Saffaleo negligence case could change, and it contends that the underlying plaintiffs' complaint failed to specify the particular negligence theory applicable to each defendant.

Courts examine the primary plaintiff's complaint in the underlying action to determine if a party is actively or vicariously liable for purposes of deciding the availability of common-law or implied contractual indemnification. See *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc,* ___ Mich App ___; ___ NW2d ___ (Docket No. 294780, issued 3/22/11), slip op at 7; *Dep't of Transp,* 229 Mich App at 426. Where a trial has been conducted in the underlying action, the issues actually submitted to and decided by the fact-finder may also be considered. *Botsford Continuing Care Corp,* ___ Mich App at ___ (slip op at 7).

In this case, although the negligence count in the complaint in the Saffaleo negligence case was not well drafted with respect to which duty or duties apply to each defendant, there is no basis for finding that the complaint contains any allegations of vicarious or derivative liability against Walgreen with respect to Icon's activities. The only allegation of vicarious liability is that "[d]efendants are vicariously liable for the negligent acts of its subcontractors." But there is no allegation that Icon's relationship with Walgreen was that of a subcontractor. The allegations against Walgreen were that it provided "blueprints and design criteria and specifications" and approved changes made by Lindhout.

More importantly, while a judgment had not yet been rendered in the Saffaleo negligence case, the only claim against Walgreen in the Saffaleo negligence case at the time of the trial court's summary disposition ruling was the negligent design claim. Thus, the trial court reached the right result in concluding on reconsideration that the absence of allegations of vicarious or derivative liability precluded liability under either a common-law of implied contractual indemnification theory. Thus, the court properly granted summary disposition in favor of Icon.

VIII. LINDHOUT

Walgreen challenges the trial court's grant of Lindhout's motion for summary disposition by arguing that Lindhout's contract required it to provide architectural services to Walgreen, and asserting that a question of fact exists concerning its role in designing the store. Walgreen also argues that it is entitled to common-law or implied contractual indemnification if it is held responsible for design issues. Given Walgreen's failure to cite any evidence that the negligent design claim against it in the Saffaleo negligence case is based on derivative or vicarious liability for Lindhout's activities, we conclude that the trial court did nor err in granting summary disposition in favor of Lindhout. As a joint tortfeasor, Walgreen would not be entitled to indemnification. *St. Luke's Hosp,* 458 Mich at 453-454.

Although Walgreen also asserts that an indemnification clause existed in Lindhout's contract with RDC, it has not established any basis for it to enforce that contract, let alone shown that the contract was intended to grant it indemnification rights. Further, any claim that the

contract provided Walgreen with an express right of indemnification is not properly before us because this issue is not presented in the statement of questions presented. MCR 7.212(C)(5); *Mettler Walloon, LLC*, 281 Mich App at 221.

IX. J. G. MORRIS

Walgreen challenges the trial court's grant of J. G. Morris's motion for summary disposition by arguing that the construction contract between J. G. Morris and RDC contains indemnification provisions for an "owner" and "architect." Again, however, Walgreen has not identified any basis for allowing it to enforce that contract, nor has it shown that the contract was intended to grant it indemnification rights. Walgreen also makes a cursory argument that it would have "passive or vicarious" liability for any design or construction defect that falls within J. G. Morris's responsibility. Assuming that this argument is directed at the trial court's decision to grant J. G. Morris's renewed motion for summary disposition regarding Walgreen's request for declaratory relief based on common-law or implied contractual indemnification, Walgreen has not established any basis for disturbing the trial court's ruling. There being no evidence that Walgreen faced potential derivative or vicarious liability in the Saffaleo negligence case with respect to J. G. Morris's activities at the time of the trial court's ruling, neither common-law nor implied contractual indemnification was available to Walgreen. *St Luke's Hosp*, 458 Mich at 453-454.

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens