This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0564

Independent School District No. 477,
Appellant,

vs.

Midwest Asphalt Corporation,
Defendant,

Court Surfaces & Repair, Inc.,
Respondent.

Filed December 28, 2020
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge*

Mille Lacs County District Court
File No. 48-CV-16-1532

Elizabeth J. Vieira, Kristin C. Nierengarten, Rupp, Anderson, Squires & Waldspurger, Minneapolis, Minnesota (for appellant)

Nicole R. Weinand, Alex M. Halverson, Law Offices of John C. Syverson, Golden Valley, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and Halbrooks, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

This appeal and cross-appeal arise from alleged construction defects in high school tennis courts. Appellant Independent School District No. 477 (the school district) sued defendant-general-contractor Midwest Asphalt Corporation (Midwest), which brought third-party claims against respondent-subcontractor Court Surfaces and Repair, Inc. (Court Surfaces). Midwest settled with the school district and assigned to the school district its contractual-indemnity claim (based on breach-of-contract and breach-of-warranty claims) against Court Surfaces. The school district moved for summary judgment on Midwest's claims against Court Surfaces.

Based primarily on an admission by Court Surfaces that the court surface was not "free of defect," the district court granted partial summary judgment to the school district, concluding that there was no genuine issue of material fact that Court Surfaces breached its contract and warranty. The matter proceeded to trial on the issue of whether Court Surfaces was responsible for the cause of the defects and therefore required to indemnify for losses related to them.

Before the matter was submitted to a jury, the district court granted judgment as a matter of law (JMOL) to Court Surfaces on the contractual-indemnity claim. The school district moved for a new trial on several grounds, which the district court denied. On appeal, the school district argues that the district court erred by granting JMOL, denying its motion for a new trial, and awarding certain costs and disbursements. By notice of related appeal, Court Surfaces argues that the district court erred by granting summary

judgment to the school district on the element of breach (of contract and warranty) when genuine issues of material fact existed. We affirm in part, reverse in part, and remand.

FACTS

In June 2012, the school district entered into a contract with general contractor Midwest to reconstruct high school tennis courts. Section 3.5 of the general conditions of the contract between the school district and Midwest warranted that Midwest's work would be "free from defects," with certain exceptions.

Midwest entered into a subcontract agreement with respondent Court Surfaces to apply a color coat to the tennis courts. The subcontract provided that Court Surfaces agreed "to be bound to the Contractor by the terms of the General Contract." The subcontract also contained the following indemnification clause:

> [Court Surfaces agrees] [t]o defend, indemnify and save harmless the Contractor from any and all losses or damage occasioned by the failure of the Subcontractor to carry out the provisions of this Subcontract, unless such failure results from causes not the responsibility of the Subcontractor. Loss or damage shall include, without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor as part of the loss or damage or to enforce the provisions of this paragraph, unless such failure results from causes not the responsibility of the Subcontractor.

Midwest did most of the construction work on the tennis courts, including grading, placing an aggregate base, and laying an asphalt layer that sits underneath the color coat surface. Applying the color coat was the last step. The tennis courts were finished by August 2012.

The following spring, a significant number of cracks appeared on the tennis court surface. The school district sued Midwest for breach of contract and breach of warranty, alleging that Midwest failed to deliver tennis courts that were "free of defect" as required by the contract. Midwest, in turn, brought third-party breach-of-contract and breach-of-warranty claims against Court Surfaces, alleging that Court Surfaces was obligated to indemnify Midwest.

The school district hired American Engineering Testing, Inc. (AET) to determine the cause of the cracks. AET produced two reports in the summer of 2013, opining that a problem with the color coat applied by Court Surfaces caused the cracking. The manufacturer and supplier of the color coat retained Chosen Valley Testing (CVT) to analyze the defects. CVT generated a report, concluding that the cracking was caused by the thinness of the asphalt (which was thinner than the project specifications called for), the fineness of subbase materials, and the presence of frost-susceptible soils underneath the tennis courts.

The school district and Midwest settled the school district's claims against Midwest. The settlement agreement assigned Midwest's claims against Court Surfaces to the school district, and the school district took control of pursuing the third-party complaint.

Court Surfaces failed to timely respond to the school district's requests for admissions, and based on that failure, the district court entered an order deeming the requests admitted. Of relevance here, Court Surfaces admitted that "the tennis court surface installed by [Court Surfaces] is not 'free of defect' as that term is used in Section

3.5 of the AIA General Conditions of contract, which are incorporated into the contract between [the school district] and [Midwest]."

The school district moved for summary judgment. The district court granted partial summary judgment to the school district on the element of breach (of contract and warranty), concluding that, given Court Surfaces' admission, no genuine issue of material fact existed as to whether Court Surfaces failed to produce work that was free from defect. But because there was conflicting evidence in the record regarding whether Court Surfaces was responsible for the cause of the cracking, the district court denied summary judgment on the indemnification claim as a whole.

The case proceeded to a jury trial. One of the primary issues was whether the cracking "result[ed] from causes not the responsibility of [Court Surfaces]," within the meaning of the indemnification provision in the subcontract. The school district called AET engineer David Rettner, who testified that the color coat caused the cracking. Court Surfaces called a witness from CVT, who testified that factors beyond Court Surfaces' control caused the cracking.

After the parties rested, but before the matter was submitted to the jury, Court Surfaces moved for JMOL. The district court granted Court Surfaces' motion on the record, concluding that expert testimony was required to prove what caused the cracking and that Rettner was "not recognized as an expert" and failed to render an expert opinion. The district court later issued a written order clarifying its JMOL ruling, noting that there were "significant lapses" in the foundation for Rettner's testimony. The district court

therefore concluded that the school district failed to introduce sufficient evidence to prove that the cracking resulted from Court Surfaces' work.

The school district moved for a new trial on the grounds that the district court erroneously excluded Rettner's expert testimony, erroneously assigned the burden of proof to the school district, and erroneously granted JMOL. The district court denied the motion, concluding that the school district properly bore the burden of proof, that it had not excluded Rettner's testimony, and that the school district failed to introduce expert testimony on causation.

This appeal and cross-appeal follow.

D E C I S I O N

The school district challenges the district court's decisions to grant JMOL and deny its motion for a new trial, arguing that the district court erroneously excluded or weighed Rettner's expert testimony in reaching its decision. The school district also maintains that the district court erred by assigning to it the burden of proving that the cracks resulted from a cause that was Court Surfaces' responsibility. In its cross-appeal, Court Surfaces contends that the district court erred by granting partial summary judgment on the element of breach (of contract and warranty). We begin with Court Surfaces' cross-appeal.

I. The district court did not err by granting partial summary judgment on breach.

We review the grant of summary judgment de novo to determine "whether there are genuine issues of material fact and whether the district court erred in its application of law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation

omitted). A district court must grant summary judgment if the "movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "The moving party has the initial burden to demonstrate an absence of genuine issues of material fact." *Hagen v. Steven Scott Mgmt., Inc.*, 847 N.W.2d 847, 850 (Minn. App. 2020). "If the moving party meets its burden, the burden then shifts to the nonmoving party to show a material fact exists to preclude summary judgment." *Id.* at 851.

In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). "All doubts and factual inferences must be resolved against the moving party." *Montemayor*, 898 N.W.2d at 628. Summary judgment is "inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Id.* (quotation omitted).

The district court concluded that summary judgment as to breach was appropriate because Court Surfaces admitted that "the tennis court surface installed by [Court Surfaces] is not 'free of defect' as that term is used in Section 3.5 of the AIA General Conditions of Contract, which are incorporated into the contract between [the school district] and [Midwest]." The warranty provision at issue states, in relevant part:

> The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse,

> alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage.

This warranty provision was incorporated into the subcontract agreement between Midwest and Court Surfaces through section two of the subcontract, in which Court Surfaces agreed

> to be bound to the Contractor by the terms of the General Contract, to conform and comply with the provisions of the General Contract, and to assume toward the Contractor all the obligations and responsibilities that the Contractor assumes in and by the General Contract toward the Owner, insofar as they are applicable to this Subcontract. Where any provision of the General Contract between the Owner and the Contractor is inconsistent with any provision of this Subcontract, this Subcontract shall govern.

The subcontract specifically defines "Work" as the color coat.

Reading these provisions together, Court Surfaces warranted that the color coat surface that it installed would be free from defect, except for defects "inherent in the quality of the Work the Contract Documents require or permit" and "damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage." Thus, Court Surfaces breached the subcontract and its warranty if it delivered a color coat that was not free from defect and no exception applied.

As the party moving for summary judgment, the school district had the initial burden of demonstrating an absence of genuine issues of material fact. *Hagen*, 847 N.W.2d at 850. We conclude that the school district met that burden by identifying Court Surfaces'

admission that the tennis court surface that it installed was not free of defect and pointing to evidence that Court Surfaces caused the defects.[1]

The burden then shifted to Court Surfaces to show that a genuine issue of material fact existed to preclude summary judgment. *Id.* at 851. Court Surfaces could not contest that the color coat was not free of defect, because a matter deemed admitted is "established for the purpose of the proceeding." *In re Welfare of J.W.*, 391 N.W.2d 791, 796 (Minn. 1986). Instead, Court Surfaces attempted to demonstrate that an exception applied, pointing to evidence that "insufficient grading and placement of frost-susceptible soils around and beneath the tennis court surface by Midwest" caused the cracks.

Viewing the evidence in the light most favorable to Court Surfaces, we conclude that Court Surfaces failed to show that a genuine issue of material fact existed as to whether a warranty exception applied. Court Surfaces argues that others' work on the tennis courts, which preceded installation of the color coat surface, caused the cracks to appear. But the warranty does not exclude defects caused generally by the work of others. Rather, the warranty excludes "*alterations* to the Work not executed by the Contractor." (Emphasis added.) None of the evidence identified by Court Surfaces relates to alterations to the color coat.

---

[1] Court Surfaces argues on appeal that it only admitted that the tennis courts in general were defective. We are not persuaded. Court Surfaces admitted that "the tennis court surface installed by you is not 'free of defect.'" It is clear that Court Surfaces specifically admitted that the tennis court *surface* that *it* installed was defective, not the tennis courts generally.

Court Surfaces also argues that there is a genuine issue of material fact as to whether the courts were properly maintained or that the cracks were not attributable to normal wear and tear or usage. In the district court, Court Surfaces contended that "[o]verwhelming evidence suggests that any alleged defects in [the school district's] tennis courts were caused by insufficient drainage and improper subsurface soils, entirely outside the scope of [Court Surfaces'] work." But Court Surfaces failed to identify any evidence in the record supporting its contention.

Because Court Surfaces admitted that the tennis court surface was not free from defect and failed to demonstrate genuine issues of material fact as to whether a warranty exception applied, we conclude that summary judgment was appropriate as to the breach element of the school district's breach-of-contract and breach-of-warranty claims. Consequently, we affirm the district court's grant of partial summary judgment.

II. The district court erred in granting judgment as a matter of law.

A district court may grant JMOL if "during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01(a). JMOL should be granted "only when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome." *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 55 (Minn. 2019). We review de novo a district court's decision to grant JMOL. *Overcocker v. Solie*, 597 N.W.2d 579, 581 (Minn. App. 1999). We view the evidence in the light most favorable to the non-moving party. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018).

The district court concluded, and it is undisputed on appeal, that expert testimony was required to prove the cause of the cracking. The district court determined that Rettner's testimony lacked sufficient foundation and that no reasonable jury could rely on his opinion. Thus, the district court reasoned that JMOL was appropriate because the school district failed to produce expert testimony on an issue that required expert testimony.

A. The district court abused its discretion by effectively excluding Rettner's expert testimony.

The parties disagree as to whether the district court excluded Rettner's testimony. The school district maintains that the district court effectively excluded Rettner's testimony, while Court Surfaces points to the district court's statement that it never ruled Rettner's testimony inadmissible. When the district court grants JMOL on the ground that a party's expert testimony was inherently unreliable on an issue that requires expert testimony, we have analyzed the district court's order for JMOL as if it had made an evidentiary ruling that the expert testimony was inadmissible. *See Knuth v. Emergency Care Consultants, P.A.*, 644 N.W.2d 106, 112 (Minn. App. 2002). Thus, we review the district court's decision on Rettner's testimony for an abuse of discretion. *See Reinhardt v. Colton*, 337 N.W.2d 88, 93 (Minn. 1983) (indicating that the exclusion of expert testimony "lies within the sound discretion of the trial court, and its ruling will not be reversed unless it is based on an erroneous view of the law or it constitutes and abuse of discretion").

Expert testimony must have "foundational reliability." Minn. R. Evid. 702. "Foundational reliability is a concept that looks to the theories and methodologies used by

an expert." *Kedrowski*, 933 N.W.2d at 56 (citing *Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 169 (Minn. 2012) (explaining that the "underlying reliability, consistency, and accuracy of the theory" of an expert lie at "the heart of the foundational reliability question")) (other citation omitted). "[E]xpert familiarity with the facts of a case is an essential element of reliability." *Id.* (quotation omitted). To determine whether expert testimony has a "reliable factual foundation, the question is whether '[t]he facts upon which an expert relies for an opinion [are] supported by the evidence.'" *Id.* (quoting *Gianotti v. Indep. Sch. Dist. 152*, 889 N.W.2d 796, 801-02 (Minn. 2017)).

> The factual foundation of an expert's opinion is inadequate if (1) the opinion does not include the facts and/or data upon which the expert relied in forming the opinion, (2) it does not explain the basis for the opinion, or (3) the facts assumed by the expert in rendering an opinion are not supported by the evidence.

Id. (quotation omitted). But an expert "need not be provided with every possible fact, but must have enough facts to form a reasonable opinion that is not based in speculation or conjuncture." *Gianotti*, 889 N.W.2d at 802. "Alleged deficiencies in an expert's factual basis go more to the weight of the expert's opinion than to its admissibility." *Kedrowski*, 933 N.W.2d at 60 (quotation omitted).

At trial, Rettner testified that, although he did not draft AET's 2013 reports and did not participate in testing or data collection from the courts, he was familiar with the reports and had reviewed them. Rettner explained that AET conducted a "petrographic analysis" of core samples gathered from the tennis courts. Petrographic analysis is the "microscopic evaluation of . . . the asphalt pavement looking at the aggregate and the matrix of the

asphalt." Rettner observed that the cracks in tennis courts started at the surface and were shallow. Based on this information, he opined that the cracks occurred because "there was a problem with the surface coating."

Rettner explained that it was his opinion that other potential causes of the cracking identified by CVT—thermal cracking, frost heave, and drainage issues—did not cause the tennis courts to crack in this case. He testified that thermal cracking did not cause the cracking because the cracks were shallow and started at the surface, but cracks caused by thermal cracking "typically penetrate the full depth of the asphalt." Rettner testified that frost heave did not cause the tennis courts to crack because there was no evidence that the net posts had lifted and no evidence of cracking or unevenness around them. He stated that, if frost heave had caused the cracking, there would be fewer cracks and the cracks would not be all over the courts. Finally, Rettner testified that if water pooling on the surface of the court alone caused the cracking, "then that's a problem with the topping" because in Minnesota's climate, water pooling in inevitable. Rettner testified that CVT's report, and the data contained therein, did not alter his conclusion that a problem with the color coat caused the cracking.

The district court concluded that Rettner's testimony lacked a proper foundation for his opinion on the cause of the cracking for several reasons, including: (1) Rettner testified that the cracking was "probably" related to the color coat; (2) Rettner was never expressly "recognized" as an expert witness; (3) Rettner lacked knowledge about the makeup of the color coat material and how it was applied; (4) Rettner did not see the cracks in 2013, when AET's reports were generated; (5) Rettner did not participate in taking the AET core

samples and could not answer questions about the testing—including where on the courts the samples came from and what happened to the third core sample that was not analyzed in the AET reports; (6) Rettner did not testify about variables that might affect cracking such as weather; and (7) Rettner did not perform any testing on the color coat surface. Based on these purported deficiencies, the district court concluded that Rettner failed to render an expert opinion. The school district maintains that these deficiencies, if any, speak to the weight of Rettner's expert testimony and not its admissibility. We agree.

To determine whether Rettner's testimony had an adequate foundation, the district court should have considered whether (1) Rettner's opinion testimony included "the facts and/or data upon which [he] relied in forming the opinion"; (2) Rettner "explain[ed] the basis for [his] opinion"; and (3) the facts that Rettner assumed in rendering the opinion were supported by the evidence. *Id.* at 56 (quotation omitted). Rettner's testimony satisfies these requirements.

Rettner identified the facts and data upon which he relied in forming his opinion. Namely, Rettner relied on the photographs, observations, and core sample analysis described in AET's reports. Rettner also testified about why the data and analysis in CVT's reports did not alter his conclusion that a problem with the color coat caused the cracking. He explained the bases for his opinions. He testified that the shallow surface cracks and the lack of evidence of thermal cracking or frost heave led him to opine that the cracks formed as a result of a problem with the color coat that Court Surfaces applied. And the facts that Rettner relied upon in rendering his opinion were introduced as evidence at trial.

The fact that Rettner did not personally observe the cracking or participate in gathering the data does not undermine the factual foundation of his expert opinion testimony. *See* Minn. R. Evid. 703(a) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived *or made known to the expert at or before the hearing*." (Emphasis added.)). That Rettner could not testify to facts about where the core samples were taken from, or testify to what happened with the third core sample, goes to the weight of his opinion testimony—not its admissibility. *Cf. Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 824 (Minn. 2000) (indicating that an expert witness's extrapolation from four positive dust samples taken from five units of an apartment building to conclude that the entire 450-unit building was contaminated went to the weight, and not the admissibility, of the testimony). Similarly, any other purported factual gaps go to the weight of Rettner's opinion testimony. *See Kedrowski*, 933 N.W.2d at 60 (concluding that perceived factual gaps and the failure to account for certain circumstances go to weight, not admissibility, of expert opinion admissibility); *Gianotti*, 889 N.W.2d at 802 (indicating that an expert "need not be provided with every possible fact, but must have enough facts to form a reasonable opinion that is not based in speculation or conjecture"). In sum, Rettner's testimony was "properly the subject of a detailed cross-examination and argument to the jury, rather than a foundational-reliability determination under Rule 702." *Kedrowski*, 933 N.W.2d at 60. The district court abused its discretion by effectively excluding Rettner's expert testimony.

We also observe that the district court reasoned, in part, that Rettner's testimony could not be construed as expert testimony because the school district failed to move the

district court to recognize Rettner as an expert witness. Neither the district court nor the parties have identified any authority requiring formal recognition of an expert witness during trial, and we are unaware of any such requirement in Minnesota law. The school district properly identified Rettner as an expert witness before trial. To the extent that the district court rejected Rettner's testimony on this basis, the district court's decision was based on an "erroneous view of the law." *Reinhardt*, 337 N.W.2d at 93.[2]

B. The district court erred by granting JMOL when Rettner's testimony is properly considered.

Court Surfaces argues on appeal that JMOL was appropriate even when Rettner's expert testimony is properly considered because Rettner failed to identify a specific aspect of the color coat or its application that caused the cracks to form. Relying on *E.H. Renner & Sons, Inc. v. Primus*, 203 N.W.2d 832, 834 (Minn. 1973), Court Surfaces argues that even considering Rettner's testimony, a jury would only be able to speculate that Court Surfaces was responsible for the cracking.

"This court has repeatedly held that verdicts cannot be based upon mere speculation or conjecture." *E.H. Renner*, 203 N.W.2d at 834. "Where the entire evidence sustains, with equal justification, two or more inconsistent inferences so that one inference does not

[2] The school district also argues on appeal that the district court erred in the timing of its ruling—by making an evidentiary ruling on the admissibility of Rettner's testimony when it granted JMOL. Because we conclude that the district court abused its discretion by excluding Rettner's opinion testimony based on the substance of its ruling, we do not address whether the district court erred in the timing of its ruling. *See Kedrowski*, 933 N.W.2d at 55 (discussing Minnesota precedent regarding whether a district court may "reconsider rulings on the admissibility of evidence when ruling on a posttrial motion for judgment as a matter of law").

reasonably preponderate over the others, the complainant has not sustained the burden of proof on the proposition which alone would entitle him to recover." *Id.* at 835. "It becomes the duty of the trial court to direct a verdict because failing to do so would cause any verdict to the contrary to be based on pure speculation and conjecture." *Id.*

Although Rettner's testimony was not particularly specific as to what failure of the color coat caused the cracking, he testified that neither thermal cracking, frost heave, nor drainage issues caused it. He testified that the thinner-than-specification pavement did not contribute to the cracking. And he testified that the failure to replace the soils underneath the court did not affect his opinion that a problem with the color coat caused the cracks to appear. Viewing Rettner's testimony in the light most favorable to the school district, a reasonable jury did not need to resort to speculation to find that Court Surfaces was responsible for a problem with the color coat that caused the courts to crack. Because a reasonable jury could find, based on Rettner's testimony, that Court Surfaces was responsible for the cause of the cracking, we conclude that the district court erred by granting JMOL. We therefore remand for a new trial.

III. The district court properly applied the burden of proof.

Although we reverse and remand for a new trial on the ground that the district court erred by effectively excluding Rettner's testimony and granting JMOL on that basis, we address, in the interests of judicial economy, the school district's argument that, under the terms of the subcontract, Court Surfaces bears the burden of proving that it was not responsible for causing alleged damage or loss.

"Contract interpretation is a question of law that we review de novo." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). "The primary goal of contract interpretation is to determine and enforce the intent of the parties." *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 692 (Minn. 2018) (quotation omitted). "We look to the language of the contract to determine the parties' intent." *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). If the contract is clear and unambiguous, "we enforce the agreement of the parties as expressed in the language of the contract." *Id.* (quotation omitted).

Two provisions in the subcontract address indemnification. Section 6.2 provides:

> The subcontractor agrees to assume entire responsibility and liability to the fullest extent permitted by law, for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of, resulting from or in any manner connected with, the execution of the Work provided for in this Subcontract and including, without limitation, those damages or injuries occurring or resulting from the use by the Subcontractor, its agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties. Further the Subcontractor, to the fullest extent permitted by law, agrees to defend, indemnify and save harmless the Contractor, its agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be liable and legal fees and disbursements paid or incurred in defense of such claims or to enforce the provisions of this paragraph.

Section 6.3 provides that Court Surfaces agrees

> [t]o defend, indemnify and save harmless the Contractor from any and all losses or damage occasioned by the failure of the Subcontractor to carry out the provisions of this Subcontract, *unless such failure results from causes not the responsibility of*

> *the Subcontractor*. Loss or damage shall include, without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor as part of the loss or damage or to enforce the provisions of this paragraph, *unless such failure results from causes not the responsibility of the Subcontractor*.

(Emphasis added.) The school district maintains that the italicized language in section 6.3 places the burden of proof on Court Surfaces to establish at trial that the cracks resulted from "causes not the responsibility of" Court Surfaces. It asserts that this interpretation of section 6.3 avoids an interpretation in which sections 6.2 and 6.3 are redundant. Court Surfaces contends that section 6.3 merely limits the extent to which it agreed to indemnify Midwest for damages.

Indemnification agreements seeking to indemnify for losses caused by that party's own negligent acts are not favored and are strictly construed against the party seeking indemnification. *Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). Similarly, Minn. Stat. § 337.02 (2018) provides that

> an indemnification agreement contained in, or executed in connection with, a building or construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates . . . .

See also Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc., 825 N.W.2d 695, 711 (Minn. 2013) ("Section 337.02 therefore renders unenforceable indemnification

agreements in which a party assumes responsibility to pay for damages that are not caused by the party's own wrongful conduct.").

We conclude that the language of section 6.3 unambiguously establishes a substantive limit to the extent to which Court Surfaces agreed to indemnify Midwest. The provision appears to track the limit established by section 337.02 so as to ensure that the indemnification agreement is enforceable. Nothing in the contract language itself suggests that the provision is intended to shift the burden of proof away from the party seeking to enforce the clause. We cannot "rewrite, modify, or limit the effect" of an unambiguous contract provision by giving it a "strained construction." *Savela v. City of Duluth*, 806 N.W.2d 793, (Minn. 2011) (quotation omitted).

We also reject the school district's argument that section 6.3 is otherwise redundant of section 6.2. The school district is correct that, when interpreting a contract, we "attempt to avoid an interpretation of the contract that would render a provision meaningless." *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990). But sections 6.2 and 6.3 are not redundant—the former addresses damages or injury connected with execution of the work, while the latter addresses losses or damage occasioned by the subcontractor's failure to fulfill the subcontract. On remand, the school district will bear the burden of proving that Court Surfaces is responsible for causing the defects and therefore required to indemnify the school district.

In sum, we affirm the grant of partial summary judgment to the school district because no genuine issue of material fact exists regarding the element of breach. We reverse the grant of JMOL because a reasonable jury, viewing all of the evidence, including

Rettner's testimony, in the light most favorable to the school district, could find that Court Surfaces is responsible for the cause of the cracking. We observe that, although Court Surfaces has admitted that it breached the contract, the extent to which Court Surfaces may be at fault for the damage to the tennis court surface, and therefore the extent to which Court Surfaces must indemnify the school district, remains at issue for trial. On remand to the district court for a new trial, the school district bears the burden of proving that it is entitled to indemnification under the terms of the subcontract.[3]

Affirmed in part, reversed in part, and remanded.

[3] The school district also challenges the district court's decision to award certain costs and disbursements to Court Surfaces as the prevailing party. In light of our decision to reverse the district court's grant of JMOL and remand for a new trial, the award of costs and disbursements is also reversed.