

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Patrick M. Meter, Michael J. Kelly, and Kirsten Frank Kelly (dissenting)

SHERYL L. SPIGNER,
Plaintiff-Appellee,

Supreme Court No. 150396

Court of Appeals No. 315616

v

Lower Court No. 11-2037 NO

YARMOUTH COMMONS ASSOCIATION and
KRAMER-TRIAD MANAGEMENT GROUP, LLC,

Defendants,
and

YARMOUTH COMMONS ASSOCIATION and
KRAMER-TRIAD MANAGEMENT GROUP, LLC,

Third-Party Plaintiffs/Cross-Appellants,

-vs-

W & D LANDSCAPING & SNOW PLOWING, INC.,

Third-Party Defendant/Appellant/Cross-Appellee.

THIRD PARTY
DEFENDANT-APPELLANT
/ CROSS-APPELLEE
W & D LANDSCAPING &
SNOW PLOWING, INC.'S
ANSWER TO YARMOUTH
COMMONS ASSOCIATION
AND KRAMER-TRIAD
MANAGEMENT GROUP'S
APPLICATION FOR
LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

Third-Party Defendant-Appellant/Cross-Appellee, W&D Landscaping and Snow Plowing, Inc. (hereinafter "W&D") acknowledges that this Court has the discretion, under MCR 7.302, to consider the Application for Leave to Appeal filed by Defendants/Third-Party Plaintiffs Yarmouth Commons Condominium and Kramer-Triad Management Group (hereinafter "Yarmouth/Kramer"). W&D further acknowledges that Yarmouth/Kramer has complied with MCR 7.302(A) and (C). Indeed, W&D concurs in the relief requested in Argument I of Yarmouth/Kramer's Application, for reasons explained in W&D's own Application for Leave to Appeal to this Court, filed on October 27, 2014, which has been assigned Case No. 150327.

However, W&D disagrees that Argument II of Yarmouth/Kramer's Application – dealing with Yarmouth/Kramer's alleged entitlement to indemnity from W&D – satisfies MCR 7.302(B). W&D does not believe that the denial of Yarmouth/Kramer's Motion for Summary Disposition on this issue "involves legal principles of major significance to this state's jurisprudence," MCR 7.302(B)(3), or that the Court of Appeals' holding on this point was "clearly erroneous" or in conflict with any precedent, MCR 7.302(B)(5). Moreover, the Court of Appeals' holding on this point was correct for reasons explained below.

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STATEMENT OF THE QUESTIONS PRESENTED

- I. **DID THE LOWER COURTS CORRECTLY FIND THAT QUESTIONS OF FACT PRECLUDED SUMMARY DISPOSITION IN FAVOR OF YARMOUTH/KRAMER ON THEIR CLAIM FOR INDEMNITY, WHERE W&D'S DUTIES UNDER SNOW REMOVAL CONTRACT WERE LIMITED TO THE REMOVAL OF SNOW AND NOT ICE, WHERE A QUESTION OF FACT REMAINS AS TO WHETHER MS. SPIGNER SLIPPED ON SNOW OR ICE, AND WHERE THERE ARE FACTS INDICATING THAT YARMOUTH/KRAMER WAIVED THE INSURANCE REQUIREMENT?**

The trial court answered "Yes."

The Court of Appeals answered "Yes."

Plaintiff Sheryl Spigner did not take a position as to this issue below.

Yarmouth/Kramer answer "No."

W & D Landscaping respectfully suggests that the answer should be "Yes."

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On February 4, 2011, Plaintiff-Appellee Sheryl Spigner (“Plaintiff”) allegedly slipped and fell on either snow or ice near the mailbox of her mother’s condominium unit. The facts and arguments surrounding Plaintiff’s slip and fall have been discussed at length in previous briefs. Of particular relevance to this Brief, Plaintiff sued Yarmouth/Kramer, who in turn filed a Third-Party Complaint against W&D for indemnification and breach of contract (for failing to add Yarmouth/Kramer as additional named insureds on its policy).

Relative to the third-party claims, one of the disputed issues was whether the Plaintiff fell on snow or ice. W&D argued that Plaintiff had to have fallen on snow in order to trigger W&D’s indemnity obligations under the “Snow Removal Contract.” (See Yarmouth/Kramer’s Application, p 6.) This is because the contract repeatedly refers to “Snow Removal,” not ice. (See *Id.*, pp 3-4.) As W&D averred below, “salting services were the responsibility of Defendants Yarmouth/Kramer...” (Ex. 1, p 3.) Yarmouth/Kramer, however, has argued that Plaintiff did in fact fall on snow and that even if she did not, the “Snow Removal Contract” also obligated W&D to remediate ice. (See *Id.*, p 5.)

At her discovery deposition, Plaintiff testified that her slip and fall was caused by ice and that she was not touching the mailbox at the time of her fall:

Q. What caused you to slip, or what caused you to fall?

A. The ice.

Q. All right. When you were there, did you see any salt on the ground?

A. No.

Q. After you fell, did you look at the area where you fell?

A. Yeah. I was sitting on ice.

Q. At the time that you were looking around, did you see any salt down there?

A. No. (Ex. 1-C, p 180.)

Q. ...Do you know, before your accident on February 4, 2011 - that day before your accident, when you were walking to the mailbox, could you tell if the roads had been plowed already that day?

A. Yeah. ... Yes, they were plowed.

Q. ...When you actually fell, were you touching the mailbox in any way?

A. No.

Q. You had taken a step or two from it?

A. Yes. (Id., p 154.)

Q. Now, tell me what happened after you pushed off [the mailbox] with both hands.

A. I turned to go walk back towards the Jeep, walking southbound on Yarmouth, and there's a big ice - right here is where I slipped and fell.

Q. You started walking to the south, towards Harbor Lane?

A. Yes.

Q. How many steps did you take before the incident occurred?

A. A couple.

Q. Well, when you say "a couple," do you mean two, approximately?

A. One to two. (Id., pp 37-38.)

Plaintiff's boyfriend at the time, Terry Wadowski, noted that after her fall, Plaintiff was complaining about how salting services were not provided:

Q. What did you do?

A. Asked her if she was okay.

Q. What did she say?

A. She just complained about her butt hurting. ... And was [complaining] about how they didn't salt again.... (Ex. 1-D, p 37.)

Moreover, Yarmouth/Kramer's representative, Ron Dipaola, acknowledged that W&D was generally not responsible for salting services:

Q. Do you know what the de-icing policy was for the main roads that was to be implemented by W&D?

A. We did not salt unless we told them to actually. Unless the complex decided they needed salt down, we didn't salt, we just plowed.

Q. So it was on request?

A. Correct. (Ex. 1-E, p 32.)

Despite this record, Yarmouth/Kramer first moved for summary disposition on its indemnity claim against W&D on August 15, 2012 (by way of an MCR 2.116(I)(2) request, in response to W&D's Motion for Summary Disposition). At that time, the trial court held that questions of fact precluded summary disposition in favor of either party. In its November 14, 2012 Opinion and Order, the trial court explained:

In support of its motion on Defendants' third party claims, W&D avers it is entitled to summary disposition, contending that pursuant to its contract with Defendants, it was only required to remove snow. Because Plaintiff fell on ice rather than snow, it is not required to indemnify Defendants. In support of its contention, W&D relies upon Plaintiff's deposition testimony in which she testified that she fell on ice. (See Plaintiff's deposition transcript at

37-38.) However, ... the photographs marked by Plaintiff during her deposition appear to show that the area of the incident contained both snow and ice. Accordingly, at best, *a genuine issue of material fact exists as to what caused Plaintiff to fall. Consequently, a genuine issue of material fact also exists as to whether the indemnification provision in the contract between Defendants and W&D will be triggered...* (Ex. 1-G, pp 5-6, emphasis added.)

And as to Yarmouth/Kramer's breach of contract claim, the trial court held:

W&D also contends that it is entitled to summary disposition of Defendants' breach of contract claims on the basis that even if it were found to have breached the contract by failing to list Yarmouth/Kramer as additional insured parties under W&D's insurance policy, Defendants would not be able to establish damages where Plaintiff fell on ice rather than snow. However, for the reasons discussed above, a genuine issue of material fact exists as to whether Plaintiff fell on snow or ice. Accordingly, W&D's motion for summary disposition must likewise be denied on this basis. (Ex. 1-G, p 6.)

Eight months later, on June 18, 2013, Yarmouth/Kramer again sought summary disposition on its indemnity claim against W&D. This renewed motion did not identify any intervening discovery that would have required the lower court to re-evaluate its November 14, 2012 holding. (See Ex. 1, p 1.) Rather, Yarmouth/Kramer were essentially bringing an untimely Motion for Reconsideration of that portion of the November 14, 2012 Opinion and Order dealing with the indemnity claim.

In response to this motion, W&D cited the aforementioned testimony which indicated that Plaintiff fell on ice rather than snow, and that ice would have been Yarmouth/Kramer's responsibility. W&D also argued that the breach of contract claim (regarding the insurance requirement) had been waived:

Third-Party Plaintiffs state that W&D Landscaping never provided an insurance certificate as described in this paragraph, because no such certificate ever existed. However, it is clear that Kramer-Triad nonetheless paid W&D Landscaping's invoices and that

Yarmouth Commons allowed W&D Landscaping to continue working on the site, at least from the date of the contract's effective date (November 1, 2008) through the date of Ms. Spigner's accident (February 4, 2011). In other words, the Third-Party Plaintiffs ignored W&D Landscaping's non-compliance with the "additional insured" clause for two years and three months. Through this conduct, the insurance requirement has been waived. (Ex. 1, pp 9-10.)

At a hearing on July 22, 2013, the trial court denied Yarmouth/Kramer's motion, essentially holding that the same fact questions which precluded summary disposition on November 14, 2012 remained unresolved.¹ Later, after the Court of Appeals granted W&D's Application for Leave to Appeal relative to the premises liability issues, Yarmouth/Kramer filed this Cross-Appeal, relative to their third-party claims.

The Court of Appeals addressed Yarmouth/Kramer's Cross-Appeal as follows:

On appeal, the Association and Kramer-Triad contend that these indemnification provisions were triggered because Spigner's claims arose from a slip and fall in an area plowed by W&D Landscaping. However, a plain reading of the indemnification provision shows that a claim must be more than tangentially related to W&D Landscaping's performance under the contract in order to trigger the indemnification provision. W&D Landscaping only has a duty to defend and indemnify the Association and Kramer-Triad when there is a claim "based upon, or arising out of, damage or injury" that was "caused by or sustained in connection with" W&D Landscaping's performance of the contract or caused by a condition that W&D Landscaping created through its performance of the contract. Thus, the mere fact that Spigner filed a claim for personal injuries that she suffered after falling in an area that W&D Landscaping agreed to plow was insufficient by itself to trigger the indemnification provision; there needed to be evidence that W&D Landscaping's performance (or failure to perform) had some causal relationship to Spigner's claim, either by directly causing the injury, by being the occasion for the injury, or by creating the condition that led to the injury, before W&D Landscaping would have an obligation to defend and indemnify.

¹ Although Yarmouth/Kramer assert that this ruling "was not elaborative" (Yarmouth/Kramer's Application, p 6), this criticism is misleading since the lower court was addressing these issues for a *second time*, with no intervening factual development.

Here, Spigner testified that she fell after she slipped on some ice in front of her mailbox. There was, however, no evidence that the Association requested W&D Landscaping to salt or otherwise de-ice the areas in front of the mailbox stands. Therefore, on this evidence, a reasonable jury could conclude that W&D Landscaping's performance of its snow removal services had no causal relationship to Spigner's injuries. And, if the jury made that finding, W&D Landscaping would have no obligation to defend or indemnify the Association or Kramer-Triad.

On the other hand, there was evidence from which a reasonable jury could conclude that W&D Landscaping failed to clear the snow from the mailbox stand at issue sufficient to provide access to the postal service and that this failure had a causal relationship to Spigner's injuries. Spigner's boyfriend testified that there was a bank of snow obstructing the mailbox such that he could not have driven close enough to the mailbox to allow access. Consistent with that testimony, Spigner testified that she had to lean toward the mailbox in order to open it and retrieve her mail. From this, a reasonable jury could find that Spigner could have safely accessed the mailbox from the Jeep had it not been for W&D Landscaping's failure to properly clear the snow from the mailboxes. That is, it could find that the failure to clear the mailboxes caused Spigner to try and access her mailbox on foot, which in turn led to her slip and fall.

In addition, although it appears that W&D Landscaping plainly breached its contractual obligation to add the Association and Kramer-Triad as additional named insureds under its CGL policy, in order to be entitled to recover for this breach, the Association and Kramer-Triad would have to show that, had W&D Landscaping included them as additional named insureds, W&D Landscaping's insurer would have provided them with a defense under the facts present in this case. Because the Association and W&D Landscaping did not present or discuss evidence that might establish this fact, they failed to establish that they were entitled to judgment as a matter of law on this claim....

There was a question of fact as to whether W&D Landscaping's performance of the snow removal contract had a causal relationship to Spigner's claims; therefore, the trial court did not err when it concluded that there was a question of fact as to whether W&D Landscaping had to defend and indemnify the Association and Kramer Triad. Similarly, because the Association and W&D Landscaping did not present evidence to establish that, but for W&D Landscaping's failure to name them as additional

insureds under its CGL policy, W&D Landscaping's insurer would have provided them with a defense, the trial court did not err when it denied their motion for summary disposition on their breach of the contractual obligation to name them as additional insureds.... (Ex. E attached to Yarmouth/Kramer's Application, pp 9-10.)

Although the Court of Appeals decision was 2-1 on the premises liability issues, the dissenting judge expressed no disagreement with the majority's holding that Yarmouth/Kramer was not entitled to summary disposition on its claims against W&D. (See Ex. E attached to Yarmouth/Kramer's Application, Judge Kelly's dissent.)

STANDARD OF REVIEW

There are two standards of review applicable to the instant Application for Leave to Appeal. The first standard of review relates to whether the Application should be granted. MCR 7.302(B) sets out specific criteria for the granting of an application for leave to appeal to this Court. This rule states, in relevant part, that an application to this Court "must show" at least one of the following: "(3) the issue involves legal principles of major significance to the state's jurisprudence; [or] ... (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice...." MCR 7.302(B). Argument II of Yarmouth/Kramer's Application does not satisfy either of these criteria. As explained in more detail below, the denial of Yarmouth/Kramer's Motion for Summary Disposition was completely in accord with, if not mandated by, established summary disposition standards. See *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634, 638 (2013) (when reviewing a summary disposition ruling under MCR 2.116(C)(10), "we must ask whether a genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed ... would leave open an issue upon which reasonable minds might differ.").

The second standard of review relates to the actual decision of the court below. The Circuit Court denied Yarmouth/Kramer's Motion for Summary Disposition, which had been brought pursuant to MCR 2.116(C)(10),² and the Court of Appeals affirmed that denial. A trial court's decision to grant or deny a motion for summary disposition under this subpart is reviewed on appeal *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A court must be "liberal in finding a genuine issue of material fact." *Marlo Beauty v Farmers Ins*, 227 Mich App 309, 320; 575 NW2d 324 (1998). See also *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008)

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² Although Yarmouth/Kramer's June 18, 2013 motion cited only (C)(10), proper mechanism for a plaintiff to obtain summary disposition is through MCR 2.116(C)(9). However, motions brought under this subpart are substantively the same as those brought under (C)(10), except that they are brought by the plaintiff instead of the defendant. See *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 133-134; 662 NW2d 758 (2003).

ARGUMENT

I. THE LOWER COURTS CORRECTLY FOUND THAT QUESTIONS OF FACT PRECLUDED SUMMARY DISPOSITION IN FAVOR OF YARMOUTH/KRAMER ON THEIR CLAIM FOR INDEMNITY, WHERE W&D'S DUTIES UNDER SNOW REMOVAL CONTRACT WERE LIMITED TO THE REMOVAL OF SNOW AND NOT ICE, WHERE A QUESTION OF FACT REMAINS AS TO WHETHER MS. SPIGNER SLIPPED ON SNOW OR ICE, AND WHERE THERE ARE FACTS INDICATING THAT YARMOUTH/KRAMER MAY HAVE WAIVED THE INSURANCE REQUIREMENT.

“A right to indemnification can arise from an express contract, in which one of the parties has clearly agreed to indemnify the other.” *Martin v City of East Lansing*, 249 Mich App 288, 291; 642 NW2d 700 (2001), citing *Langley v Harris Corp*, 413 Mich 592, 596; 321 NW2d 662 (1982). “Indemnity relates to the obligation of one person or entity to make good a loss another has incurred while acting for its benefit or at its request.” *Langley, supra* at 595. Our Supreme Court recently set forth the rules governing interpretation of indemnification agreements in *Zahn v Kroger Co of Mich*, 483 Mich 34, 40-41; 764 NW2d 207 (2009):

An Indemnity Contract is to be construed in the same fashion as other contracts. ... The extent of the duty must be determined from the language of the contract, itself. ... All contracts, including indemnity contracts should be construed to ascertain and give effect to the intentions of the parties and should be interpreted to give a reasonable meaning to all of its provisions. ... This court has generally observed that if the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning. ... Courts may not make a new contract for parties under the guise of a construction of the contract, if doing so will ignore the plain meaning of words chosen by the parties.... (Citations omitted.)

“Thus, an unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument.” *Daimler Chrysler Corp v G Tech Professional Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003). As this

Court recently reiterated in *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 173; 848 NW2d 95 (2014):

An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation. In the construction context, indemnity clauses between general contractors (indemnitees) and subcontractors (indemnitors) are common, with general contractors and subcontractors ultimately liable to the project owner. Michigan law provides contracting parties with broad discretion in negotiating the scope of indemnity clauses. The only legal restriction upon indemnity in the subcontractor context is the prohibition on indemnification against the “sole negligence” of the contractor, which is not at issue here.

Any dispute about the plain and ordinary meaning of an indemnity contract’s terms must be resolved in favor of the putative indemnitor – in this case, W&D. This is because of the longstanding principle that an indemnity contract is construed strictly against the party who is seeking indemnity – in this case, Yarmouth/Kramer. See *Pritts v JI Case*, 108 Mich App 22, 29; 310 NW2d 261 (1981), where this Court noted that “[i]ndemnity contracts are construed most strictly against ... the party who is the indemnitee.” See also *Skinner v DME Corp*, 124 Mich App 580, 585; 335 NW2d 90 (1983), where this Court similarly noted that “[a]n express indemnity contract is construed strictly against ... the indemnitee; the indemnitor’s obligation to indemnify the indemnitee must be described clearly and unambiguously.” And finally, see *Fireman’s Fund v General Electric*, 74 Mich App 318, 324; 253 NW2d 748 (1977): “It is also clear, however, that such clauses [indemnity clauses] are construed most strictly against ... the party who is the indemnitee....”

Construing the indemnity contract narrowly against the Yarmouth/Kramer, there is at least a question of fact as to whether Ms. Spigner slipped on snow (which would trigger W&D’s

contractual obligations) or ice (which would not trigger W&D's duties). As this Circuit Court noted when it considered this issue the first time:

In support of its motion on Defendants' third party claims, W&D avers it is entitled to summary disposition, contending that pursuant to its contract with Defendants, it was only required to remove snow. Because Plaintiff fell on ice rather than snow, it is not required to indemnify Defendants. In support of its contention, W&D relies upon Plaintiff's deposition testimony in which she testified that she fell on ice. (See Plaintiff's deposition transcript at 37-38.) However, ... the photographs marked by Plaintiff during her deposition appear to show that the area of the incident contained both snow and ice. Accordingly, at best, *a genuine issue of material fact exists as to what caused Plaintiff to fall. Consequently, a genuine issue of material fact also exists as to whether the indemnification provision in the contract between Defendants and W&D will be triggered....* (Ex. 1-G, pp 5-6, emphasis added.)

In the motion that gave rise to this appeal, Yarmouth/Kramer did not identify any subsequent discovery that would have compelled the trial court to revisit its November 14, 2012 ruling. All of the evidence relied upon in Yarmouth/Kramer's June 18, 2013 motion (the testimony of Mr. Duda, the testimony of Ms. Spigner, and the photographs) had been disclosed through discovery months before the trial court made its November 14, 2012 ruling. Yarmouth/Kramer gave the trial court no reason to revisit its initial determination that there are unresolved questions of fact regarding whether the indemnity clause applies.

As outlined above, Plaintiff fell on ice. According to her testimony, no salting of the ice had occurred. It does not matter, for the purposes of the third-party claims, whether or not the mailbox area had been properly cleared of snow; Plaintiff testified that she was not touching the mailbox when she slipped and had taken a "couple" steps from the mailbox. This case is no different than if Plaintiff had slipped on ice in another spot in the roadway. She stated that ice caused her fall. Ice removal and salting was not W&D's responsibility and therefore Plaintiff's

injuries *were not* "caused by or sustained in connection with [W&D's] performance of the Contract or by conditions created thereby." (See Yarmouth/Kramer's Application, pp 3-4, quoting the Snow Removal Contract.)

The same questions of fact that precluded summary disposition on the indemnity claim also precluded summary disposition in Yarmouth/Kramer's favor on the breach of contract claim. As the trial court held the first time it considered this issue:

W&D also contends that it is entitled to summary disposition of Defendants' breach of contract claims on the basis that even if it were found to have breached the contract by failing to list Yarmouth/Kramer as additional insured parties under W&D's insurance policy, Defendants would not be able to establish damages where Plaintiff fell on ice rather than snow. However, for the reasons discussed above, a genuine issue of material fact exists as to whether Plaintiff fell on snow or ice. Accordingly, W&D's motion for summary disposition must likewise be denied on this basis. (Ex. 1-G, p 6.)

And the Court of Appeals affirmed on this point as follows:

...[A]lthough it appears that W&D Landscaping plainly breached its contractual obligation to add the Association and Kramer-Triad as additional named insureds under its CGL policy, in order to be entitled to recover for this breach, the Association and Kramer-Triad would have to show that, had W&D Landscaping included them as additional named insureds, W&D Landscaping's insurer would have provided them with a defense under the facts present in this case. Because the Association and W&D Landscaping did not present or discuss evidence that might establish this fact, they failed to establish that they were entitled to judgment as a matter of law on this claim....

There was a question of fact as to whether W&D Landscaping's performance of the snow removal contract had a causal relationship to Spigner's claims; therefore, the trial court did not err when it concluded that there was a question of fact as to whether W&D Landscaping had to defend and indemnify the Association and Kramer Triad. Similarly, because the Association and W&D Landscaping did not present evidence to establish that, but for W&D Landscaping's failure to name them as additional insureds under its CGL policy, W&D Landscaping's insurer would

have provided them with a defense, the trial court did not err when it denied their motion for summary disposition on their breach of the contractual obligation to name them as additional insureds.... (Ex. E attached to Yarmouth/Kramer's Application, pp 9-10.)

Moreover, Yarmouth/Kramer waived the insurance requirement by paying W&D's invoices, and by allowing W&D to continue working on the site.³ The "additional insured" clause relied upon by Third-Party Plaintiffs states:

Contractor [W&D Landscaping] shall have its insurance company furnish Kramer-Triad ... with an original proof of insurance certificate, naming both Kramer-Triad ... and [Yarmouth Commons] Association as "Additional Insured," directly by U.S. Mail. ... No invoice payments will be issued to the Contractor [W&D Landscaping] without the existence of a current insurance certificate, meeting all requirements stated in this Contract.... (See Ex. 1, p 9; Ex. C attached to Yarmouth/Kramer's Application, p 8.)

Although W&D failed to provide such a certificate, Yarmouth/Kramer nonetheless paid W&D's invoices, and Yarmouth/Kramer allowed W&D to continue working on the site, at least from the date of the contract's effective date (November 1, 2008) through the date of Ms. Spigner's accident (February 4, 2011). In other words, Yarmouth/Kramer ignored W&D's non-compliance with the "additional insured" clause *for two years and three months*. Through this conduct, the insurance requirement has been waived. Under Michigan law, it is well established that a party who benefits from conditions precedent in a contract may waive them. *Collins v Collins*, 348 Mich 320, 327-328; 83 NW2d 213 (1957); *H J Tucker & Associates, Inc v Allied Chucker and Engineering, Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999); *Bissel v Edison*, 9 Mich App 276; 156 NW2d 623 (1967).

³ Although W&D raised this argument below in response to Yarmouth/Kramer's Motion for Summary Disposition (Ex. 1, pp 9-11), neither the trial court nor the Court of Appeals found it necessary to address it. However, that would not be a bar to this Court's consideration of W&D's waiver argument, should this Court find it necessary to do so. See *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011).

Where a term of contract has been waived, a breach for failure to perform that term of the contract is also waived; and, therefore, no breach of contract damages may be awarded. *Gates v Detroit & Mackinac Railway Co*, 147 Mich 523, 535; 111 NW 101 (1907). As this Court explained in *Wildley v Fractional School District*, 25 Mich 419, 425 (1872): “Variances may have been treated by both parties as immaterial at the time, should not afterward be held to be departures from the contract; and what was then regarded as substantial compliance with the terms, should be held a performance in law.” More recently, in *H J Tucker & Associates*, 234 Mich App at 564, the Court of Appeals defined “waiver” as “proof of express language of agreement or inferably by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance.” (Emphasis added.)

In *Bissel*, 9 Mich App at 279, the plaintiff brought an action on services that it rendered to defendant in furnishing fill through dredging operations. The defendant filed a counterclaim alleging that the plaintiff breached his contract, which forced the defendant to perform part of plaintiff’s work. *Id.* The plaintiff defended the breach of contract claim by showing that the defendant had recognized that the plaintiff could not perform some terms of the contract and allowed the plaintiff to perform as he was capable. *Id.* This Court held that this was proof of “declarations, acts and conduct of defendant which are inconsistent with the purpose to exact strict performance which constitutes a waiver.” *Id.* at 287.

Yarmouth/Kramer’s actions – allowing W&D to work pursuant to the Snow Removal Contract for two years and three months and paying W&D’s invoices during that time – demonstrate a “voluntary relinquishment of a known [contractual] right.” *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008).

CONCLUSION AND REQUEST FOR RELIEF

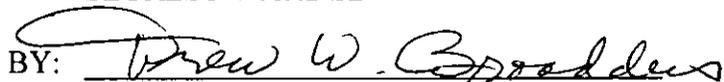
W&D concurs in the relief requested in Argument I of Yarmouth/Kramer's Application, for reasons explained in W&D's own Application for Leave to Appeal to this Court, filed on October 27, 2014, which has been assigned Case No. 150327.

However, W&D denies that Argument II of Yarmouth/Kramer's Application – dealing with Yarmouth/Kramer's alleged entitlement to indemnity from W&D – presents any issues that warrant this Court's review. Questions of fact precluded summary disposition in favor of Yarmouth/Kramer on its third-party claims. Indeed, the motion that gave rise to this appeal was essentially an untimely motion for reconsideration of the November 14, 2012 Opinion and Order, which explained that the question of whether Plaintiff fell on snow or ice had to be resolved before W&D's alleged indemnity and insurance obligations could be ascertained. Yarmouth/Kramer did not identify any new facts when it moved for summary disposition eight months after that ruling. Moreover, as to the breach of contract claim, Yarmouth/Kramer has failed to address the waiver argument raised by W&D below.

For these reasons, Third-Party Defendant-Appellant/Cross-Appellee W&D Landscaping respectfully requests that this Honorable Supreme Court GRANT Yarmouth/Kramer's Application as to Argument I, but DENY Yarmouth/Kramer's Application as to Argument II.

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Dated: November 25, 2014

INDEX OF EXHIBITS

Exhibit 1	W & D 's Response to Yarmouth/Kramer's Second Motion for Summary Disposition
Exhibit 1-A	Plaintiff's Complaint
Exhibit 1-B	Yarmouth/Kramer's Third-Party Complaint
Exhibit 1-C	Excerpts from Plaintiff's deposition
Exhibit 1-D	Excerpts from Terry Wadowski's deposition
Exhibit 1-E	Excerpts from Ron Dipaola's deposition
Exhibit 1-F	Snow Removal Contract
Exhibit 1-G	Opinion and Order of November 14, 2012

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