

STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, MI 49417
616-846-8315

CITY OF HOLLAND,

Plaintiff/Counter-Defendant,

and

CITY OF WYOMING,

Plaintiff,

v

**OPINION AND ORDER ON
MOTIONS FOR SUMMARY
DISPOSITION**

File No. 14-3899-CK

GRAND RIVER CONSTRUCTION, INC.,

Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

Hon. Jon A. Van Allsburg

and

**HARTFORD ACCIDENT AND INDEMNITY
COMPANY, and PREIN & NEWHOF, INC.,**

Defendants,

v

ALLIED MECHANICAL SERVICES, INC.,

Third-Party Defendant.

At sessions of said court held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan,
on the 31st day of May, 2016

PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE



"14003899CK"

This case arises from the following background information.¹

The cities of Holland and Wyoming entered into an Emergency Interconnect Agreement signed April 29, 2011, which provided for the construction of an interconnection between their potable water systems to be used in the event of an emergency. The agreement indicated that Holland was to take the lead in the construction of the interconnect facility.

The City of Holland, through its Board of Public Works (Holland), entered into a service contract with P&N [Prein & Newhof, Inc.] for the design of the interconnect facility. Some months later, Holland entered into a construction contract for the interconnect facility with Grand River [Grand River Construction, Inc.]. P&N issued plans, specifications, and drawings for construction. The drawings issued for construction dated June 23, 2011, showed the elevation of the Wyoming water main to which the system was going to connect to be 5'6" higher than the actual location of the existing pipe. Grand River bid the project on the basis of this erroneous information. It was awarded the contract, which had a construction start date of January 3, 2012 and a Substantial Completion date of October 1, 2012.

The discrepancy in elevation was discovered on January 25, 2012. On January 30, P&N issued Bulletin No. 1, which summarized the modifications necessary to accommodate the actual elevation of the water main and asked Grand River to provide pricing for the changes to the work. The original plans contemplated a 30" ductile iron pipe travelling horizontally from the Wyoming high pressure pipe through the foundation wall of the interconnect building. After passing through the wall, the pipe was to connect to a 30" x 24" reducing 90 degree elbow. That elbow would be connected to a short riser pipe that penetrated the floor of facility and connected to a 24" 90 degree elbow.

Grand River's subcontractor Allied [Allied Mechanical Services, Inc.] put these plans out to bid by material suppliers and learned that the 30" x 24" reducing elbow was not available from domestic suppliers. Bulletin 1 did not change the elbow specifications. It showed that the 30" high pressure pipe would not penetrate the foundation wall but would, instead, be attached to the 30" x 24" reducing 90 degree elbow more than five feet further underground. A much longer riser pipe would extend vertically to penetrate the floor of the facility.

Allied submitted Shop Drawings for Specification Section 11.2.1.3 Ductile Iron, on March 9, 2012, which showed the use of a reducer fitting instead of a reducing joint. Allied included the following note:

Note: a 30" x 24" reducing MJ 90 was not available in domestic [s]ources so a 30" MJ 90 and a 30" x 24" SEB reducer is supplied.

¹ On March 31, 2015, this Court issued its opinion and order rejecting plaintiffs' previous motion for summary disposition. As a part of that opinion, this Court provided the background information for this case reiterated at the beginning of this opinion.

P&N responded to Shop Drawing 28 on March 23 by approving the use of the 30" x 24" SEB reducer in lieu of the 30" x 24" MJ reducing 90 degree bend. It also raised several issues requiring additional information. P&N's notes included a statement that "Mega-Lugs shall be utilized" and asked that the Shop Drawing be revised and resubmitted. Allied resubmitted the Shop Drawings on March 29, 2012, and, in its response, included an assurance that it would use Megalugs. P&N approved Shop Drawing No. 28A "as noted" on March 29, 2012.

After the interconnect facility was constructed, the piping was tested in April and May 2012, and again in March 2013, and passed the tests. On September 6, 2013, shortly after all of the parties had signed the Certificate of Substantial Completion, a leak occurred at the underground joint because the Megalug allegedly separated from the riser 30" x 24" reducer fitting. The interconnect system was not immediately shut down and an estimated 20 million gallons of water leaked under and into the interconnect facility, leading to its collapse. [Opinion and Order on Motion for Partial Summary Disposition, March 31, 2015, 2-4.]

On August 27, 2014, plaintiffs Holland and Wyoming filed their complaint against defendants Grand River, P&N, and Hartford Accident and Indemnity Company [Hartford] (Complaint for Declaratory Relief and Money Judgment and Jury Demand, August 27, 2014). Plaintiffs raised five claims: (1) that Grand River breached its contract with Holland through a series of actions leading to the destruction of the interconnect facility and because Grand River did not replace the facility, did not maintain builder's risk insurance and other insurances, and did not reimburse plaintiffs for their costs and fees as required under the contract (Complaint, pages 7-11); (2) Grand River breached its warranty as stated in its contract with Holland because its work was defective and it failed to correct and replace the defective work, the property and land damaged by the defective work, and compensate plaintiffs for claims, costs, losses, and damages incurred as a result of the defective work (Complaint, pages 11-13); (3) Hartford, the issuer of Grand River's performance bond, breached the terms of the performance bond by failing to perform Grand River's obligations under Grand River's contract with Holland (Complaint, pages 14-15); (4) P&N breached its contract with Holland by failing to comply with various requirements under the contract (Complaint, pages 15-16); and (5) plaintiffs were entitled to declaratory judgment against Grand River because Grand River was responsible for the failure of the underground joint (Complaint, pages 16-17).

On October 24, 2014, Allied was joined to this action after Grand River and Hartford filed their third-party complaint against Allied (Grand River and Hartford's Answer to Complaint, Affirmative Defenses, Counterclaim, and Third-Party Complaint, October 24, 2014). Grand River and Hartford claimed that Allied breached an agreement with Grand River that it would indemnify and defend Grand River from the claims raised by plaintiffs (Grand River and Hartford's Answer, pages 44-46), and that Allied breach an agreement with Grand River for the construction of the interconnect facility (Grand River and Hartford's Answer, pages 46-47).

On March 31, 2015, plaintiffs' declaratory judgment claim was dismissed by the trial court (Opinion and Order on Motion for Partial Summary Disposition, 8; Stipulation and Order to Amend Opinion and Order, June 24, 2015, 2). On July 27, 2015, plaintiffs filed their first amended complaint, which primarily reflected the dismissal of their declaratory judgment claim (First Amended Complaint for Money Judgment and Jury Demand, July 27, 2015).

On January 18, 2016, plaintiffs moved the trial court for summary disposition pursuant to MCR 2.116(C)(10) on several grounds (Plaintiffs' Motion for Summary Disposition, January 18, 2016). Plaintiffs argue that (1) Grand River breached its contract with Holland when it allowed the builder's risk policy required under the contract to lapse (Plaintiffs' Brief in Support of Motion for Summary Disposition, January 18, 2016, 15-17); (2) Grand River breached its contract with Holland when it proposed using the Megalug restraint with a plain end reducer fitting without verifying and determining the suitability of using those materials (Plaintiffs' Brief, 18-20); (3) Grand River breached its contract with Holland when it failed to replace the interconnect facility after Grand River's work was found to be defective (Plaintiffs' Brief, 20-22); (4) P&N breached its contract with Holland when it approved the use of the plain end reducer fitting with the Megalug restraint despite a manufacturer's warning against that application of the Megalug restraint (Plaintiffs' Brief, 22-23); and (5) Hartford breached its performance bond, which required it to perform Grand River's contractual obligations if Grand River failed to perform its obligations under its contract with Holland (Plaintiffs' Brief, 24-25).

On March 4, 2016, Grand River and Hartford moved the trial court for summary disposition pursuant to MCR 2.116(C)(10) on three grounds (Grand River and Hartford's Motion for Summary Disposition Directed at Plaintiffs, March 4, 2016). Grand River and Hartford argue that (1) plaintiffs waived their claims against them under the contract between Holland and

Grand River (Brief in Support of Grand River and Hartford's Motion for Summary Disposition, March 4, 2016, 6-12); (2) Wyoming lacks standing because it is not a party to the contract between Holland and Grand River or to Hartford's performance bond (Grand River and Hartford's Brief for Summary Disposition, 12-14)²; and (3) plaintiffs cannot establish the causation element of their breach of contract claim against Grand River (Grand River and Hartford's Brief for Summary Disposition, 14-19).

Standard of Review

Summary disposition may be granted under MCR 2.116(C)(10) if "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

The moving party under MCR 2.116(C)(10) has the "initial burden to support his motion with affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted." *Grandberry-Lovette v Garascia*, 303 Mich App 566, 581; 844 NW2d 178 (2014). After the moving party fulfills that burden, the burden shifts to the nonmoving party. *Id.* "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Nuculovic*, 287 Mich App at 61-62.

² Grand River and Hartford subsequently dropped this claim.

Analysis

Whether Grand River Breached Its Contract By Allowing Its Builder's Risk Policy to Lapse

“A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach.” *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). “[C]ausation of damages is an essential element of any breach of contract action” *Id.* “To recover in a breach of contract action, a plaintiff must prove that the defendant’s breach was the proximate cause of the harm the plaintiff suffered. In other words, the breach must be the most direct, natural, and foreseeable cause of the plaintiff’s harm.” *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 254; 792 NW2d 781 (2010) (citations omitted). The “but for” test of causation also applies to damages arising from a breach of contract claim. *Miller-Davis Co*, 495 Mich at 178-179.

Additionally, to the extent the resolution of plaintiffs’ arguments necessitates the construction of the contracts at issue in this case,

In interpreting a contract, it is a court’s obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties’ intent as a matter of law. However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties. [*In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) (citations omitted).]

“A contract is ambiguous when two provisions irreconcilably conflict with each other, or when a term is equally susceptible to more than a single meaning.” *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) (quotations and citations omitted). However, “[i]f the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous.” *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008), quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

Plaintiffs argue that Grand River’s contract with Holland required it to maintain builder’s risk insurance until Holland made the final payment on the project to Grand River. Plaintiffs

argue that the evidence shows that while Grand River initially purchased builder's risk insurance, Grand River allowed that insurance to expire, breaching the contract. (Plaintiffs' Brief, 15-17.)

Paragraph 1.2 of the insurance specifications document portion of the contract between Grand River and Holland provided in regard to property insurance required by the contract:

1.2.1 IN GENERAL. To protect *against physical loss and damage to the Work*, temporary buildings, falsework, and materials and equipment, Contractor shall obtain and keep in force during the entire period of the Contract between Owner and Contractor without interruption, at its own expense, the following insurance:

1.2.2. Builder's Risk

Contractor shall purchase and maintain property insurance upon the Work at the Site in the amount of the full replacement cost thereof. Contractor shall be responsible for any deductible or self-insured retention. This insurance shall:

- a. include the interests of Owner, Contractor, Subcontractors, Engineer, and [others as identified in 1.3.2] and the officers, directors, partners, employees, agents and other consultants and subcontractors of any of them, each of whom is deemed to have an insurable interest and shall be listed as a named insured, additional insured or loss payee;
- b. be written on a *Builder's Risk "all-risk" policy* form that shall at least *include insurance for physical loss and damage to the Work*, temporary buildings, falsework, and materials and equipment and *shall insure against at least the following perils or causes of loss*: fire, wind, lightning, mold, mildew, extended coverage, theft, vandalism, and malicious mischief, earthquake, *actual and constructive collapse*, debris removal, demolition occasioned by enforcement of Laws and Regulations, *water damage*, flooding and such other perils or causes of loss as may be specifically required by these Insurance Specifications;
- c. include an endorsement extending coverage to provide insurance against risks not covered under the basic policy. "Extended coverage" is a term used in the insurance business. *All basic insurance policies have exclusions* – specific loss causalities that are not covered by the insurance company. *An Extended Coverage (EC) policy or endorsement is required to cover any such exclusions*;
- d. include expenses incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers and architects);
- e. cover materials and equipment that is in place, stored at the job site, stored elsewhere, or in transit at the risk of the insureds;

- f. allow for partial utilization of the Work by Owner;
- g. include testing and startup;
- h. *be maintained in effect until final payment is made* unless otherwise agreed to in writing by Owner, Contractor, and Engineer with 30 days written notice to each other loss payee to whom a certificate of insurance has been issued [Insurance Specifications, 1.2., attached as Exhibit 3d to Plaintiffs' Brief. (Emphasis added.)]

“Work” under Paragraph 1.01.A.50 of the general conditions of the contract between Holland and Grand River was defined as:

[t]he *entire construction* or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such *construction*, and furnishing, installing, and incorporating all materials and equipment into such *construction*, all as required by the Contract Documents. [General Conditions of Construction Contract between Grand River and Holland, 1.01.A.50, attached as Exhibit 3a to Plaintiffs' Brief (emphasis added).]

Regarding when “final payment” would be due, Paragraph 14.07.C.1 of the general conditions provided that:

Thirty days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer's recommendation, including but not limited to liquidated damages, will become due and will be paid by Owner to Contractor. [General Conditions of Construction Contract between Grand River and Holland, 14.07.C.1, attached as Exhibit 3a to Plaintiffs' Brief.]

Before the “Application for Payment” could be presented to Holland under the contract between Holland and Grand River, P&N was required make a final inspection and Grand River was required to complete all corrections identified by P&N during the final inspection (General Conditions of Construction Contract between Grand River and Holland, 14.06.A, 14.07.A.1, attached as Exhibit 3a to Plaintiffs' Brief). Additionally, Paragraph 6.03.A of the contract between Holland and Grand River provided that “[u]pon final completion and acceptance of the Work in accordance with Paragraph 14.07 of the General conditions, Owner shall pay the remainder of the contract Price as recommended by Engineer as provided in said Paragraph 14.07” (Suggested Form of Agreement Between Owner and Contractor for Construction Contract, September 26, 2011, 6.03.A, attached as Exhibit 3 to Plaintiffs' Brief).

Accordingly, under the portions of the contract between Grand River and Holland discussed above, Grand River was required to maintain a “Builder’s Risk ‘all-risk’ policy” that insured against “actual and constructive collapse,” and “water damage” of the “entire construction” of the interconnect facility “until final payment [was] made.” Final payment could not be made until after P&N’s final inspection and Grand River’s completion of all corrections identified by P&N during the final inspection. Additionally, to the extent a “basic insurance” policy excluded “specific loss casualties,” Grand River was required to obtain an “Extended Coverage” policy to cover those exclusions.

Here, Grand River obtained a builder’s risk insurance policy through Hartford, and in 2012, that policy was extended through November 15, 2012 (Hartford Insurance Extension, October 5, 2012, attached as Exhibit 26 to Plaintiffs’ Brief), and again through December 31, 2012 (Hartford Insurance Extension, November 15, 2012, attached as Exhibit 27 to Plaintiffs’ Brief). However, Stanley Buell, Grand River’s major shareholder, testified that at the end of 2012, Grand River talked with its insurance agent and decided that because it considered the interconnect facility complete, builder’s risk insurance was no longer required (Buell Depo, 4, 10). Grand River decided not to renew its builder’s risk insurance for that reason (Buell Depo, 10-11).

However, it was not until September 4, 2013, that a certificate of substantial completion of the interconnect facility was issued (Certificate of Substantial Completion, September 4, 2013, attached as Exhibit 17 to Plaintiffs’ Brief).³ There is no documentary evidence that substantiates that final payment was made by September 6, 2013, the time of the interconnect facility’s collapse. Thus, from the end of 2012 through the time of the collapse, Grand River was in breach of the portion of its contract with Holland requiring it to maintain builder’s risk insurance.

³ Grand River and Hartford argue that the interconnect facility was substantially complete on August 9, 2013, the date Grand River initially executed the certificate of substantial completion. However, Paragraph 14.04 of the general conditions of the contract between Holland and Grand River provided that while Grand River could notify Holland and P&N of substantial completion, both Holland and P&N were also required to accept the interconnect facility as substantially complete before P&N could issue Grand River a certificated of substantial completion (General Conditions of Construction Contract between Grand River and Holland, 14.04, attached as Exhibit 3a to Plaintiffs’ Brief). Holland did not accept the interconnect facility as substantially complete until September 4, 2013 (Certificate of Substantial Completion).

Nevertheless, Grand River argues that there was no causation of damages in this case because any failure on its part to maintain a builder's risk policy was irrelevant because, even if such a policy existed at the time of the interconnect facility's collapse, plaintiffs would not be entitled to coverage under the policy. In support of that argument, Grand River relies on provisions from the builder's risk policy it purchased from Hartford until the end of 2012.

As noted by Grand River, the builder's risk coverage form included with its builder's risk policy with Hartford indicated that "covered property" under the policy included "[b]uildings and structures . . . in the course of construction" (Builder's Risk Coverage Form, 1, included with Insurance Documents Between Hartford and Grand River, attached as part of Exhibit 19 to Grand River and Hartford's Brief in Opposition to Plaintiffs' Summary Disposition Motion). However, the builder's risk coverage form explicitly excluded losses resulting from "[a]ny earth movement" or from "[c]ollapse relating to earth movement or flood" (Builder's Risk Coverage Form, 4-5). "Earth movement" under the builder's risk coverage form was defined as "any earth movement, including but not limited to earthquake, landslide, mudflow, erosion, contraction or expansion, subsidence, any movement of the earth resulting from water combining with ground or soil, and any other shifting of earth, all whether or not combined with flood or volcanic eruption" (Builder's Risk Coverage Form, 4). Additionally, the builder's risk coverage form explicitly excluded losses from "[w]ear and tear, rust, corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself" (Builder's Risk Coverage Form, 5). Based on these provisions of the builder's risk coverage form within its policy with Hartford, Grand River argues that the collapse of the interconnect facility would not have been covered by its builder's risk insurance policy with Hartford because (1) the collapse of the interconnect facility was caused by the soil supporting the facility washing out because of the leaking water, (2) the collapse of the interconnect facility was caused by latent defects in the facility that resulted in the leaking water, which resulted in the collapse of the facility, and (3) the collapse of the interconnect facility did not occur "in the course of construction" because the facility was substantially completed on September 4, 2013 (Certificate of Substantial Completion).

Plaintiffs respond to Grand River's arguments by correctly noting that under Paragraph 1.2.2.b of the general conditions portion of the contract between Grand River and Holland, the

builder's risk insurance policy Grand River was supposed to obtain was required to insure against physical loss and damage to the interconnect facility caused by "actual and constructive collapse" and "water damage," and that under Paragraph 1.2.2.c of the general conditions, Grand River was required to obtain an "Extended Coverage" endorsement to remove all exclusions from coverage (Plaintiffs' Reply to Grand River's and Allied's Responses to Plaintiffs' Motion for Summary Disposition, March 4, 2016, 5-6). Accordingly, not only did Grand River breach its contract with Holland by allowing the builder's risk policy to lapse, the builder's risk policy it initially obtained was itself a breach of its contract with Holland. And, again, the plain and ordinary meaning of the portions of the contract Grand River and Holland discussed above required that Grand River maintain builder's risk insurance until final payment that insured against the type of "actual and constructive collapse" and "water damage" that actually occurred in this case.

Additionally, Grand River argues that the builder's risk coverage form included with its builder's risk policy with Hartford indicated that coverage under that policy would end when "[t]he structure is accepted by the purchaser" (Builder's Risk Coverage Form, 7). The interconnect facility was accepted by Holland as substantially complete on September 4, 2013 (Certificate of Substantial Completion), and Grand River argues that under the builder's risk coverage form, Hartford would not have covered the collapse of the facility that occurred on September 6, 2013. However, again, under the portions of the contract between Grand River and Holland discussed above, Grand River was required to maintain a "Builder's Risk 'all-risk' policy" "until final payment [was] made." Accordingly, the builder's risk policy Grand River initially obtained through Hartford was again a breach of its contract with Holland.

In sum, the undisputed facts show that as a part of Grand River's contract with Holland, it was required to maintain builder's risk insurance until final payment that insured against "actual and constructive collapse" and "water damage," Grand River breached this portion of its contract, and, as a result, after the interconnect facility collapsed in this case as a result of leaking water, plaintiffs were deprived of coverage under the contractually required builder's risk insurance. Thus, the elements of a breach of contract related to the builder's risk insurance are met in this case. *Miller-Davis Co*, 495 Mich at 178. Because the facts are undisputed in regard to this issue, there is no genuine issue of material fact. And, because plaintiffs are entitled to

judgment as a matter of law, grant of summary disposition under MCR 2.116(C)(10) to plaintiffs in regard to this issue is appropriate. *Nuculovic*, 287 Mich App at 61.

Whether Grand River and P&N Breached Their Contracts with Holland Regarding the Use of a Megalug Restraint

Holland⁴ argues that Grand River's contract with Holland required it to determine and verify that proposed materials for the facility were suitable. Holland argues that despite that contract provision, Grand River failed to do anything to verify and determine the suitability of using the plain end riser 30" x 24" reducer fitting with the Megalug series 1100 restraint in this case, resulting in the failure of the underground joint. (Plaintiffs' Brief, 18-20.) Similarly, Holland argues that P&N's contract with Holland required it to review Grand River's shop drawing regarding the use of the Megalug restraint, and that it breached its contract by failing to do so (Plaintiffs' Brief, 22-23).

a. Grand River's Contractual Obligations Regarding the Use of the Megalug Restraint

Paragraph 6.17.C. of the general conditions portion of the contract between Grand River and Holland provided that Grand River follow the following procedures regarding the submittal of shop drawings:

1. Before submitting each Shop Drawing or Sample, Contractor shall have:
 - a. reviewed and coordinated each Shop Drawing or Sample with other Shop Drawings and Samples and with the requirements of the Work and the Contract Documents;
 - b. determined and verified all field measurements, quantities, dimensions, specified performance and design criteria, installation requirements, materials, catalog numbers, and similar information with respect thereto;
 - c. *determined and verified the suitability of all materials* offered with respect to the indicated application, fabrication, shipping, handling, storage, assembly, and installation pertaining to the performance of the Work; and

⁴ While plaintiffs raise this argument jointly in their brief, as discussed *supra*, Wyoming lacks standing to raise breach of contract claims against Grand River and Hartford beyond the promises made to it regarding the builder's risk insurance and warranty.

- d. determined and verified all information relative to Contractor's responsibilities for means, methods, techniques, sequences, and procedures of construction, and safety precautions and programs incident thereto.
2. Each submittal shall bear a stamp or specific written certification that Contractor has satisfied Contractor's obligations under the Contract Documents with respect to Contractor's review and approval of that submittal.
3. With each submittal, Contractor shall give Engineer specific written notice of any variations that the Shop Drawing or Sample may have from the requirements of the Contract Documents. This notice shall be both a written communication separate from the Shop Drawings or Sample submittal; and, in addition, by a specific notation made on each Shop Drawing or Sample submitted to Engineer for review and approval of each such variation. [General Conditions of Construction Contract between Grand River and Holland, 6.17.C, attached as Exhibit 3a to Plaintiffs' Brief (emphasis added).]

Additionally, Paragraph 6.17.D of the general conditions portion of the contract between Grand River and Holland provided that P&N would review Grand River's shop drawings using the following procedures:

1. Engineer will provide timely review of Shop Drawings and Samples in accordance with the Schedule of Submittals acceptable to Engineer. *Engineer's review and approval will be only to determine if the items covered by the submittals will, after installation or incorporation in the Work, conform to the information given in the Contract Documents and be compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.*
2. Engineer's review and approval will not extent to means, methods, techniques, sequences, or procedures of construction (except where a particular means, method, technique, sequence, or procedure of construction is specifically and expressly called for by the Contract Documents) or to safety precautions or programs incident thereto. The review and approval of a separate item as such will not indicate approval of the assembly in which the item functions.
3. Engineer's review and approval shall not relieve Contractor from responsibility for any variation from the requirements of the Contract Documents unless Contractor has complied with the requirements of Paragraph 6.17.C.3 and Engineer has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Shop Drawing or Sample. *Engineer's review and approval shall not relieve Contractor from responsibility for complying*

with the requirements of Paragraph 6.17.C.1. [General Conditions of Construction Contract between Grand River and Holland, 6.17.C and D, attached as Exhibit 3a to Plaintiffs' Brief (emphasis added).]

Accordingly, the plain and ordinary language of Paragraph 6.17.C.1 of the general conditions portion of the contract between Grand River and Holland provided that before submitting a shop drawing, Grand River was required to have “determined and verified the suitability of all materials offered with respect to the indicated application . . . pertaining to the performance of the Work.” And, while P&N was required to review and approve the shop drawing, under Paragraph 6.17.D.1 of the general conditions that review and approval was “only to determine if the items covered by the submittals will, after installation or incorporation in the Work, conform to the information given in the Contract Documents and be compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.” Also, Paragraph 6.17.D.3 explicitly provided that any review and approval of the shop drawing P&N performed would not relieve Grand River “from responsibility for complying with the requirements of Paragraph 6.17.C.1,” which included the requirement that Grand River determine and verify the suitability of all materials.

Grand River and Hartford argue that interpreting Paragraph 6.17.C.1 of the general conditions as requiring that Grand River have “determined and verified the suitability of all materials offered with respect to the indicated application [covered by a shop drawing] . . . pertaining to the performance of the Work” creates a conflict with another contractual provision. Specifically, Grand River and Hartford note that Paragraph 6.21.A of the general conditions provided that Grand River “shall not be required to provide professional services in violation of applicable law,” and argue that interpreting Paragraph 6.17.C.1 of the general conditions as requiring that Grand River provide professional design services regarding the suitability of materials when it submitted a shop drawing would result in the violation of MCL 339.2011 and MCL 339.601, provisions of the Michigan occupational code, MCL 339.101, *et seq.* (Grand River and Hartford's Brief in Opposition to Plaintiffs' Summary Disposition Motion, March 4, 2016, 13-14.)

The term “suitable” is defined in Paragraph 1.02.B of the general conditions portion of the contract between Grand River and Holland:

B. *Intent of Certain Terms or Adjectives:*

1. The Contract Documents include the terms “as allowed,” “as approved,” “as ordered,” “as directed” or terms of like effect or import to authorize an exercise of professional judgment by Engineer. In addition, the adjectives “reasonable,” “*suitable*,” “acceptable,” “proper,” “satisfactory,” or adjectives of like effect or import are used to *describe an action or determination of Engineer as to the Work*. It is intended that such exercise of professional judgment, action, or determination will be *solely to evaluate, in general, the Work for compliance with the information in the Contract Documents and with the design concept of the Project as a functioning whole as shown or indicated in the Contract Documents* (unless there is a specific statement indicating otherwise). [General Conditions of Construction Contract between Grand River and Holland, 1.02.B, attached as Exhibit 3a to Plaintiffs’ Brief (emphasis added).]

Thus, to the extent Paragraph 6.17.C.1 of the general conditions required that before submitting a shop drawing, Grand River was required to have “determined and verified the suitability of all materials offered with respect to the indicated application . . . pertaining to the performance of the Work,” that paragraph appears, based on Paragraph 1.02.B of the general conditions, to have required Grand River to engage in an action or determination normally assigned to P&N as the engineer in this case regarding compliance with Contract Documents and with the design concept of the project.

Regarding the delegation of professional design services, Paragraph 6.21 of the general conditions portion of the contract between Grand River and Holland provides:

- A. Contractor will not be required to provide professional design services *unless such services are specifically required by the Contract Documents for a portion of the Work* or unless such services are required to carry out Contractor’s responsibilities for construction means, methods, techniques, sequences and procedures. *Contractor shall not be required to provide professional services in violation of applicable law.*
- B. *If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of Contractor by the Contract Documents, Owner and Engineer will specify all performance and design criteria that such services must satisfy. Contractor shall cause such services or certifications to be provided by a properly licensed professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings*

and other submittals prepared by such professional. *Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to Engineer.*

- C. Owner and Engineer shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided Owner and Engineer have specified to Contractor all performance and design criteria that such services must satisfy.
- D. Pursuant to this Paragraph 6.21, Engineer's review and approval of design calculations and design drawings will be only for the limited purpose of checking for conformance with performance and design criteria given and the design concept expressed in the Contract Documents. Engineer's review and approval of Shop Drawings and other submittals (except design calculations and design drawings) will be only for the purpose stated in Paragraph 6.17.D.1.
- E. Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents. [General Conditions of Construction Contract between Grand River and Holland, 6.21, attached as Exhibit 3a to Plaintiffs' Brief (emphasis added).]

Therefore, Paragraph 6.21.A of the general conditions provided that Grand River could be required to provide professional design services if "such services [we]re specifically required by the Contract Documents for a portion of the Work." Additionally, Paragraph 6.21.B recognized that Grand River's shop drawings might, in some cases, contain work comprised of professional design services, in which case Grand River was to have those professional design services be performed by a licensed professional. Paragraph 6.21.B of the general conditions was supplemented by Paragraph 6.21.B of the supplementary conditions portion of the contract between Grand River and Holland, which provided that "All drawings, calculations, specifications, certifications, Shop Drawings and other submittals submitted under this provision shall be sealed by the appropriate professional licensed in the state or states where the project is located" (Supplementary Conditions of Construction Contract between Grand River and Holland, 6.19.A, attached as Exhibit 3b to Plaintiffs' Brief).

MCL 339.2011 provides:

(1) Except as otherwise provided in subsection (2), the state or a county, city, township, village, school district, or other political subdivision of this state shall not engage in the construction of a public work involving the practice of

architecture or professional engineering unless all of the following requirements are met:

(a) The plans and specifications and estimates have been prepared by a licensed architect or licensed professional engineer.

(b) The review of the materials used and completed phases of construction is made under the direct supervision of a licensed architect or licensed professional engineer.

(c) Each survey of land on which the public work has been or is to be constructed is made under the supervision of a licensed professional surveyor.

(2) This section does not apply to a public work for which the contemplated expenditure for the completed project is less than \$15,000.00.

MCL 339.601(1) provides that “[a] person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation.” Grand River and Hartford argue that because Grand River was not a licensed professional engineer, an interpretation of Paragraph 6.17.C.1 of the general conditions as requiring that Grand River provide professional design services in the form of determining the suitability of materials when it submitted a shop drawing would violate the occupational code and therefore conflict with the express language of Paragraph 6.21.A.

However, Sidney Holwerda, the senior project manager with Allied assigned to the construction of the interconnect facility who created Shop Drawing 28, the shop drawing at issue in this case, was a professional engineer licensed by the state of Michigan (Deposition of Sidney J. Holwerda, July 14, 2015, 5, 7-8). Also, John Fernandez, the project manager with Grand River assigned to the construction of the interconnect facility who submitted Shop Drawing 28 to P&N, was a professional engineer licensed by the state of Michigan (Fernandez Depo, 5, 8-9, 18, 20). Thus, there is no indication that interpreting Paragraph 6.17.C.1 of the general conditions as requiring that Grand River provide professional design services regarding the suitability of materials when it submitted a shop drawing required Grand River to “provide professional services in violation of applicable law” in violation of Paragraph 6.21.A. Rather, to the extent that Paragraph 6.17.C.1 required Grand River to provide professional design services, it appears that those professional design services in this case were provided by a professional engineer in conformity with Michigan law. Further, Holwerda’s and Fernandez’s actions on behalf of Allied

and Grand River complied with Paragraph 6.21.B of the general conditions portion of the contract between Grand River and Holland and Paragraph 6.21.B of the supplementary conditions, which required that Grand River have licensed professionals perform professional design services when such services were required for the submission of a shop drawing and that a licensed professional seal shop drawings submitted to P&N. Thus, Grand River and Hartford's argument that Paragraph 6.17.C.1 of the general conditions conflicted with Paragraph 6.21.A of the general conditions is meritless.

In sum, the plain and ordinary language of Paragraphs 1.02.B, 6.17.C.1, and 6.21.A indicate that Grand River was required to provide professional design services in the form of determining and verifying "the suitability of all materials offered with respect to the indicated application . . . pertaining to the performance of the Work" when it submitted a shop drawing. As discussed below, Grand River failed to comply with its contract with Holland when it submitted Shop Drawing 28 regarding the use of the Megalug restraint in this case.

b. P&N's Contractual Obligations Regarding the Use of the Megalug Restraint

On January 11, 2011, Holland and P&N contracted for P&N to provide engineering consulting services to Holland regarding the construction of the interconnect facility (Service Contract Between Holland and P&N, January 11, 2011, attached as Exhibit 1 to Grand River and Hartford's Brief in Support of Grand River and Hartford's Motion for Summary Disposition). Article 11.2 provided that "[t]he documents constituting the contract between the Consultant [P&N] and the Owner [Holland] shall include the following: . . . 11.2.3) Request for Proposals (RFP) dated March 17, 2010 consisting of 15 pages" (Service Contract Between Holland and P&N, 3). Holland's March 17, 2010 request for proposals indicated that the "Construction Phases Services" P&N were required to provide as a part of role as the engineer for the interconnect facility project was included "[r]eview of submittals (shop drawings, samples, material data sheets, testing reports, operation and maintenance manuals, etc.) for conformance with the design drawings and specifications" (Request for Proposals for Water System Improvements Engineering Services, 5). Thus, P&N was contractually obligated to review shop drawings submitted by Grand River for "conformance with the design drawings and specifications." As discussed below, P&N breached this contractual obligation when it approved Grand River's Shop Drawing 28.

c. Grand River and P&N's Breach of Contract

Here, Holwerda testified that as a subcontractor for Grand River, Allied was responsible for the underground piping entering the interconnect facility and the aboveground piping within the facility (Holwerda Depo, 17). Holwerda testified that from the time of 2010, he worked on water projects for Wyoming, Michigan, St. Joseph, Michigan, and South Haven, Michigan (Holwerda Depo, 13). Holwerda used Megalug joint restraints around 80 percent of the time with these projects (Holwerda Depo, 14). Holwerda did not remember using a Megalug joint restraint with a plain end fitting before the interconnect facility project (Holwerda Depo, 15).

Holwerda testified that the original plans required the use of a 90-degree "30 by 24-inch" elbow fitting that would reduce the water flow into the interconnect facility (Holwerda Depo, 19-20, 123). However, Holwerda was required to use only domestically produced parts because the project was funded by the "revolving fund," and no United States manufacturer who bid on supplying the materials for the project was able to provide that type of elbow fitting (Holwerda Depo, 19-20, 27). Holwerda testified that as an alternative to the reducer 90-degree elbow fitting, on March 9, 2012, Allied submitted Shop Drawing 28, which recommended using an elbow fitting that did not reduce the water flow, and then attaching to that elbow fitting a plain end reducer fitting with a Megalug restraint (Holwerda Depo, 31, 38, 55, 141).

The documentary evidence submitted by the parties includes a March 9, 2012 shop drawing [Shop Drawing 28] created by Allied and submitted by Grand River seeking to replace the 30" x 24" reducer elbow that was not available from domestic suppliers with a 30" x 30" 90 degree elbow and a riser 30" x 24" reducer fitting attached with a EBAA Megalug 1100 joint restraint (Grand River Shop Drawing, March 9, 2012, 1, attached as Exhibit 12 to Plaintiffs' Brief). That submitted shop drawing included a brochure from EBAA Iron Sales, Inc., regarding the Megalug 1100 joint restraint it produced (Grand River Shop Drawing, March 9, 2012, attached as Exhibit 12 to Plaintiffs' Brief). The "Important Notes" section of the EBAA Megalug Series 1100 brochure indicated that "[t]he Series 1100 Megalug should not be used on plain end fittings" (EBAA Megalug Series 1100 Brochure, 5, attached as Exhibit 6 to Allied's Brief in Response to Plaintiffs' Motion for Partial Summary Disposition, February 19, 2016).

Holwerda testified that Allied chose to use the Megalug restraint because it was the least expensive option (Holwerda Depo, 25). Holwerda testified that he did not investigate the use of the plain end riser 30" x 24" reducer fitting with the Megalug restraint before submitting the shop drawing (Holwerda Depo, 55-56). Instead, Holwerda believed that deciding what to do with the elbow joint reducer was P&N's responsibility as the design engineer (Holwerda Depo, 42). Holwerda acknowledged that he did not read the important notes section of the brochure (Holwerda Depo, 55). Holwerda admitted that Allied's policy was not to use materials in a manner not recommended by a manufacturer (Holwerda Depo, 145). Holwerda testified that if he had read the manufacturer's warning regarding the use of the Megalug restraint with a plain end fitting, he probably would have recommended the full encasement of the Megalug restraint and the plain end fitting in concrete (Holwerda Depo, 146-147). Holwerda also testified that he did not know if the "Important Notes" section of the EBAA Iron Work's brochure was legible in the copy he sent to Grand River with his submittal (Holwerda Depo, 54-55).

Fernandez acknowledged that he sent Shop Drawing 28 to P&N on March 9, 2012 (Fernandez Depo, 18, 20). Fernandez testified that he did not do any investigation or research into the appropriateness or suitability of using plain end riser 30" x 24" reducer fitting with the Megalug restraint (Fernandez Depo, 21).

On March 29, 2012, P&N approved Allied's use of the 30" x 30" 90 degree elbow and a riser 30" x 24" reducer fitting attached with a EBAA Megalug 1100 joint restraint (P&N Approval of Shop Drawing, March 29, 2012, 1, attached as Exhibit 13 to Plaintiffs' Brief).

Catherine Prein, a professional engineer licensed by the state of Michigan and a project manager assigned to the construction of the interconnect facility during the course of her employment with P&N, testified that she reviewed Allied and Grand River's Shop Drawing 28 (Catherine Depo, 5, 49-50). Catherine reviewed the brochure contained with the shop drawing, but the page of the brochure containing the "Important Notes" section was a dark copy that Catherine could not read (Catherine Depo, 50). Catherine could not remember whether the words "Important Notes" were visible on the copy of the brochure she printed (Catherine Depo, 110). Catherine did not communicate with Grand River about obtaining a legible "Important Notes" section, nor did Catherine attempt to obtain the Important Notes section through other means (Catherine Depo, 51, 89). Catherine testified that if she had seen the manufacturer's

warning within the “Important Notes” section of the manufacturer’s brochure, she would not have approved the use of the Megalug joint restraint with a plain end fitting (Catherine Depo, 65-66). Catherine acknowledged that the Megalug restraint was not recommended for use with the plain end of a fitting (Catherine Depo, 26). Catherine admitted that P&N did not check all of the details regarding the Megalug restraint and instead relied on Allied and Grand River’s submittal (Catherine Depo, 53).

Mark Prein, a professional engineer licensed with the state of Michigan and the overall project manager with P&N actively involved in the design of the interconnect facility, testified that if he had read the warning within the documents submitted with the shop drawing that the Megalug restraint “should not be used” with “plain end fittings,” he would not have approved the use of the plain end reducer fitting with the Megalug restraint (Mark Depo, 5, 8, 75-76). Mark testified that Catherine should have obtained a legible copy of the Megalug important notes (Mark Depo, 126-127). Mark acknowledged that Grand River and Allied would not have been able to use the Megalug restraint without P&N’s approval (Mark Depo, 76-77).

Accordingly, the contract between Grand River and Holland and the facts surrounding the submission of Shop Drawing 28 indicate that when Grand River submitted the shop drawing without doing any investigation or research into the appropriateness or suitability of using the plain end riser 30” x 24” reducer fitting with the Megalug restraint, it breached its contract with Holland. Additionally, the contract between P&N and Holland and the facts surrounding P&N’s approval of Shop Drawing 28 indicate that when P&N approved the shop drawing without fully reviewing the shop drawing submitted by Grand River for “conformance with the design drawings and specifications,” it breached its contract with Holland.⁵

⁵ In its response to Grand River and Hartford’s motion for summary disposition, P&N argues that under Paragraph 6.20.A of the supplementary conditions portion of the contract between Grand River and Holland, Grand River agreed to indemnify it against claims and damages arising out of the destruction of the interconnect facility caused by Grand River’s negligent actions (P&N’s Response to Grand River and Hartford’s Motion for Summary Disposition, May 16, 2016, 3-4). However, P&N’s indemnification argument goes to the issue of damages, which is not at issue in the context of Holland’s and Grand River and Hartford’s motions for summary disposition pursuant to MCR 2.116(C)(10).

d. Causation Related to Grand River's and P&N's Breach of Contract

Again, “[t]o recover in a breach of contract action, a plaintiff must prove that the defendant’s breach was the proximate cause of the harm the plaintiff suffered. In other words, the breach must be the most direct, natural, and foreseeable cause of the plaintiff’s harm.” *Chelsea Inv Group LLC*, 288 Mich App at 254 (citations omitted). The “but for” test of causation also applies to damages arising from a breach of contract claim. *Miller-Davis Co*, 495 Mich at 178-179.

Regarding causation, Holland argues that Grand River’s failure to investigate or research the appropriateness or suitability of using the plain end riser 30” x 24” reducer fitting with the Megalug restraint and P&N’s failure to review Grand River’s shop drawing led to the use of the restraint with the fitting, which led to the failure of the underground joint, which led to the destruction of the interconnect facility (Plaintiffs’ Brief, 19-20, 22-23). Grand River, Hartford, and Allied argue that any breach on Grand River’s part related to a failure to determine and verify the suitability of using the plain end riser 30” x 24” reducer fitting with the Megalug restraint was not the proximate cause of the damages Holland suffered after the underground joint that failed in this case. Specifically, Allied argues that Holland cannot establish that its damages were proximately caused by the separation of the 30” x 30” 90 degree elbow and the riser 30” x 24” reducer fitting because, while the Megalug literature warned against using the restraint with a plain end fitting, it does not necessarily follow that the system failed for the same reason that the literature contained the warning. Allied and Grand River and Hartford argue that the separation of the elbow and the reducer fitting could have been caused by a transient water pressure wave. Also, Allied argues that P&N’s negligence was the intervening or supervening cause of the system failure. (Allied’s Brief in Response to Plaintiffs’ Motion for Partial Summary Disposition, 16-22.) Grand River and Hartford argue that plaintiffs made a conscious decision to run 20 million gallons of water through the system under pressure, and that, therefore, plaintiffs were the direct and proximate cause of the damages to the interconnect facility. Based on that argument, Grand River and Hartford argue this Court should grant summary disposition to them. (Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion, 3-6.) Additionally, the parties raised arguments during oral

argument regarding evidence that the separation of the elbow and the reducer fitting was caused by missing or untightened bolts on the Megalug restraint.

In regard to Allied's, Grand River's, and Hartford's theory that a transient water pressure wave (a spike in water pressure) caused the separation of the underground joint, Mark Prein testified that if the valves located at the interconnect facility were closed too quickly, a transient wave could result (Mark Depo, 133). Alternatively, Mark also testified that if a water pump was started, it could also create a transient wave (Mark Depo, 138). Mark testified that he designed the piping system to handle 200 pounds per square inch (psi) of operating water pressure (Mark Depo, 18). Mark decided that a 300 psi surge rating was appropriate for the project (Mark Depo, 22). Mark based his decisions regarding the appropriate psi ratings in part on a simulation concerning peak pressures on the Wyoming water system on the upstream side of the OCV valve located at the interconnect facility. Mark's simulation found that a transient wave of approximately 220 psi would occur, assuming that the OCV valve was closed over a period of six minutes. (Mark Memorandum Regarding Holland BPW Interconnect Surge Analysis, February 16, 2011, 2, attached as a part of Exhibit 4, Grand River and Hartford's Arguments on Motions for Summary Disposition.)⁶ Mark testified that the Megalug restraint was rated for a 250 psi working pressure and that the restraint was sufficient for use with the interconnect facility (Mark Depo, 22-23). Wyoming typically ran water through their pipes at 170 psi (Holwerda Depo, 87).⁷

Robert Kenney, a professional engineer who was a principal for Engineering Systems Inc., testified that a transient wave started at the time the high pressure pump one valve was opened at 5:21:37 a.m. on September 6, 2013 (Deposition of Robert Kenney – Volume III, May 2, 2016, 117, attached as Exhibit 2 to Allied's Supplemental Brief in Response to Plaintiffs'

⁶ To aid the court during oral arguments on May 20, 2016, Grand River and Hartford provided the court with a binder full of excerpted evidence, some of which was newly presented to the court at that time.

⁷ The court notes that Holland attaches four graphs regarding water pressure readings during the early morning hours of September 6, 2013 (Water PSI Readings, September 6, 2013, attached as Exhibits 29, 30, 31, and 32, to Plaintiffs' Brief).⁷ Holland argues that the graphs show that none of the "pressure readings at the Facility or nearby show a pressure reading that reached 200 psi," that the "sensor at the Joint read a maximum of about 170 psi during the hours before the failure," and that the "sensors around it read a maximum of about 150 psi during the hours before the failure" (Plaintiffs' Brief, 24).

Motion for Partial Summary Disposition on Liability, May 20, 2016). Kenney testified that it took that wave 1.4 minutes to travel through Wyoming's water system to Wyoming water facilities at Gazon and then back to the underground joint (Kenney Depo, 120-121, Volume III, attached to Allied's Supplemental Brief). Kenney testified that the pressure associated with the transient wave would be a maximum of 170 psi in the worst case scenario (Kenney Depo, 121, Volume III, attached to Allied's Supplemental Brief). The pressure of the transient wave would be in addition to the water pressure that previously existed in the water system (Kenney Depo, 121, Volume III, attached to Allied's Supplemental Brief). Kenney testified that the separation of the underground joint occurred within seconds of 5:23:12 a.m. on September 6, 2013 (Kenney Depo, 114, Volume III, attached to Allied's Supplemental Brief).

Thus, Kenney's testimony indicates that the separation of the joint coincided with a transient wave travelling through the water system. However, the highest pressure Kenney observed at the pump discharge from high speed pump 1 after the pump was turned on was 237.3 psi (Surge Analysis, City of Wyoming Metering Station, 6, attached as Exhibit 3 to Allied's Supplemental Brief). The highest pressure observed at the OCV valve under the interconnect facility immediately before the joint separation was 141.3 psi (Surge analysis, 4). Both pressures were well below the 300 psi surge rating that guided Mark's design of the interconnect facility (Mark Depo, 22). Further, Kenney testified that the transient wave was relatively minor based on the distances for the wave to travel and the pressure increases (Kenney Depo, 114, Volume III, attached to Allied's Supplemental Brief). Kenney testified that the transient wave was so small, amounting to a difference of a few psi, that the wave could not have caused the separation of the joint (Kenney Depo, 132, Volume III, attached to Allied's Supplemental Brief). Further, Kenney testified that if the underground joint had been installed correctly, it should have easily handled even the "maximum transient wave" (Kenney Depo, 132, Volume III, attached to Allied's Supplemental Brief). Accordingly, the parties have not presented evidence that a transient wave caused the separation of the joint at issue in this case.

Allied also argues that P&N's negligence was the intervening and supervening cause of the system failure. A proximate cause "operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Helmus v Mich Dep't of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999).

“An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was ‘reasonably foreseeable.’ ” *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). “When a defendant’s negligence enhances the likelihood that the intervening act will occur, the act is reasonably foreseeable, and the defendant remains liable.” *Ross v Glaser*, 220 Mich App 183, 193; 559 NW2d 331 (1996).

Allied argues that P&N’s act of failing to read the Megalug important notes was the intervening and supervening cause of the system failure. However, while P&N’s failure to read the Megalug important notes was one reason the Megalug restraint was used in this case, “it is well-established that there can be more than one proximate cause contributing to an injury.” *O’Neal v St John Hosp & Med Ctr*, 487 Mich 485, 496-497; 791 NW2d 853 (2010). Additionally, as discussed above, without Grand River (and Allied) submitting Shop Drawing 28 without doing any investigation or research into the appropriateness or suitability of using the plain end riser 30” x 24” reducer fitting with the Megalug restraint, P&N would not have been placed in the position of reviewing a shop drawing that recommended the use the plain end riser 30” x 24” reducer fitting with the Megalug restraint. Again, “[w]hen a defendant’s negligence enhances the likelihood that the intervening act will occur, the act is reasonably foreseeable, and the defendant remains liable.” *Ross*, 220 Mich App at 193. Therefore, P&N’s failure to read the Megalug important notes was reasonably foreseeable, *id.*, and not an intervening cause that broke the chain of causation in this case and relieved Grand River and Allied of liability. *McMillian*, 422 Mich at 576.⁸

Regarding Holland’s argument that the use the plain end riser 30” x 24” reducer fitting with the Megalug restraint was the cause of the separation of the underground joint, Kenney, a professional engineer who was a principal for Engineering Systems Inc., testified that the Megalug restraint was the failure point and that the use of the restraint was an inappropriate application of the restraint in this case (Deposition of Robert Kenney, Volume I, December 22, 2015, 100, attached as Exhibit 21 to Plaintiffs’ Brief). Kenney based that opinion on the

⁸ Similarly, Grand River and Hartford argue that there can be only one proximately cause and that because plaintiffs argue that both Grand River and P&N were proximate causes, plaintiffs’ claim against Grand River and Hartford should be dismissed. However, there may be more than one proximate cause of a harm. *O’Neal*, 487 Mich at 496-497.

“important note” found in the EBAA brochure regarding the Megalug restraint (Kenney Depo, Volume I, 100-101, attached to Plaintiffs’ Brief). Kenney testified that components could have separated because of the potential incompatibility of the plain end reducer fitting and the Megalug restraint (Kenney Depo, 100-101, Volume I, attached to Plaintiffs’ Brief). However, Kenney did not know what specific conditions prompted EBAA to include its warnings in its literature (Kenney Depo, Volume I, 81, 89, attached as Exhibit 31 to Allied’s Brief in Response to Plaintiffs’ Motion for Partial Summary Disposition).⁹

Ross Smith, a licensed professional engineer who was hired by Gallagher Basset to investigate the cause of the interconnect facility collapse and who is listed as an expert witness for Allied, testified that according to the literature provided by the EBAA, the Megalug restraint should be used with a plain end pipe, rather than a plain end fitting (Smith Depo, 24). Smith explained that there were subtle metallurgical differences between a plain end pipe and a plain end fitting (Smith Depo, 23-24, 57-58). Smith testified that, based on the literature provided by the EBAA, it was inappropriate to use the Megalug restraint with the plain end fitting in this case (Smith Depo, 24-25).

Smith concluded that an “inappropriate design change during construction” that used a “wedge action restraining gland [the Megalug restraint] connecting to a plain end ductile iron fitting,” was the primary cause of the joint failure in this case (Smith Depo, 21-22). Smith explained that the plain end of the riser 30” x 24” reducer fitting nested into the wider portion of the 30” x 30” 90 degree elbow (Smith Depo, 22). Because the reducer fitting and the elbow were not attached together themselves, a Megalug restraint was used to hold them together (Smith Depo, 22-23). Smith testified that the Megalug included “wedges” designed to grip a pipe or fitting, and that scrape marks on the plain end fitting after joint failure indicated that the Megalug wedges slid along the surface of the plain end reducer fitting (Smith Depo, 80-81). Smith concluded that the primary cause of the joint separation was the inappropriate use of the Megalug restraint with the plain end reducer fitting (Smith Depo, 177-178).

Holwerda inspected the piping and discovered that the fitting and the elbow joint had come apart (Holwerda Depo, 89). Holwerda saw that the Megalug restraint had “done its job”

⁹ The court notes that there is no evidence in the record regarding why EBAA included its warning against the use of the Megalug restraint with a plain end reducer fitting.

because there were 20 imprints where the wedges of the Megalug had imprinted themselves into the body of the fitting (Holwerda Depo, 89). Holwerda observed there were 20 tracks where the 20 wedges of the Megalug had been dragged off the fitting (Holwerda Depo, 89-90). Holwerda testified that the Megalug had popped off the fitting “like the cork out of a bottle” (Holwerda Depo, 90).

Therefore, there is documentary evidence that (1) Grand River submitted Shop Drawing 28 without doing any investigation or research into the appropriateness or suitability of using the plain end riser 30” x 24” reducer fitting with the Megalug restraint, (2) P&N approved the shop drawing without fully reviewing the shop drawing submitted by Grand River for “conformance with the design drawings and specifications,” (3) the “Important Notes” section of the EBAA Megalug Series 1100 brochure submitted with the shop drawing indicated that “[t]he Series 1100 Megalug should not be used on plain end fittings,” (4) the Megalug restraint was actually used with the plain end riser 30” x 24” reducer fitting, (5) the Megalug restraint slid off the plain end fitting, (6) the underground joint separated, and (7) water leaked from the separated joint. Thus, if there was no other evidence regarding the cause of the separated joint, it would be appropriate to conclude that Grand River’s and P&N’s breach of contract was the most direct, natural, and foreseeable cause of the underground joint’s separation and the leak of water under the interconnect facility. *Chelsea Inv Group LLC*, 288 Mich App at 254. Additionally, the evidence above is evidence that the use of the Megalug restraint was the “but for” cause of the leak of water under the interconnect facility. *Miller-Davis Co*, 495 Mich at 178-179.

However, there is other evidence regarding why the joint separated. Smith testified that the Megalug restraint employed in this case used T-bolts for the attachment of the restraint to a pipe. Smith testified that the T-bolts used with the Megalug restraint needed to be tightened to a specific torque rating, and that using a torque wrench was the simplest way to ensure the proper amount of torque was achieved. (Smith Depo, 52, 54-56.) Additionally, Smith testified that the Megalug included wedges designed to grip a pipe or fitting. The wedge nuts were supposed to be tightened until the wedges gripped and the nuts broke off. Smith explained that the break-off design of the Megalug wedge nuts was a foolproof way to ensure that the wedges were tightened (Smith Depo, 52, 80-81). [An excellent video depicting and explaining the installation of a 1100 series Megalug restraint can be found at <http://www.ebaa.com/documents/installation-videos.>]

Timothy Rose, the foreman with Allied who was assigned a supervisory role during the construction of the interconnect facility, testified that he did not have experience with loosening or tightening a Megalug joint restraint assembly (Deposition of Timothy Rose, September 23, 2015, 9-13). Rose acknowledged that the bolts used with the Megalug restraint were not tightened using a wrench with a torque setting (Rose Depo, 15). Rose testified that the Megalug restraint was hand-tightened with a plain ratchet wrench (Rose Depo, 22).

On April 13, 2012, Allied tested the piping it had installed for the interconnect facility (Rose Depo, 23). At the time of the test, the installed piping moved noticeably (Rose Depo, 23-24). On April 16, 2012, Allied straightened the piping (Rose Depo, 26). Rose testified that Allied's protocol dictated that the joints of the piping be checked for bolt tightness, but Rose did not remember if that occurred (Rose Depo, 26). After the piping was straightened, Allied was not asked to retest the piping (Rose Depo, 27).

Holwerda acknowledged that after a test on April 13, 2012, water leaked from Allied's piping and that the flange above the floor in the interconnect facility attached to the piping was no longer plumb (Holwerda Depo, 69-70). Holwerda told Rose to straighten the riser pipe entering the facility [which was connected to the elbow joint, the plain end reducer, and the Megalug restraint] (Holwerda Depo, 71). Holwerda instructed Rose to loosen the T-bolts on the Megalug, straighten the pipe out, and then tighten the T-bolts (Holwerda Depo, 137). Holwerda instructed Rose not to touch the wedge bolts on the gland of the Megalug restraint (Holwerda Depo, 137, 140). A SkyTrak was used to move the riser pipe to straighten it because the pipe was too heavy to use anything else (Holwerda Depo, 73, 75). Holwerda also testified that he told Rose to retest the piping after the riser pipe was straightened (Holwerda Depo, 72). Holwerda acknowledged that there was no record that retest occurred (Holwerda Depo, 76). Holwerda was also not aware of whether anyone from Allied examined the elbow joint or the Megalug restraint after the riser pipe was straightened (Holwerda Depo, 73).

Kerry Blouin, an Allied employee, testified that he did not recall any work to retighten the joint after a SkyTrak was used to straighten the pipe (Deposition of Kerry L. Blouin, September 23, 2015, 4-5, 12, attached to Plaintiffs' Brief in Opposition of Grand River and Hartford's Summary Disposition Motion).

Jane Monroe, Planning Engineering Manager for Holland, affirmed that there was no record of testing the joint at issue in this case after its initial failed test and Allied's act of straightening the pipe (Affidavit of Jane Monroe, March 3, 2016, 1, attached as Exhibit 34 to Plaintiffs' Reply to Grand River's and Allied's Responses to Plaintiffs' Motion for Summary Disposition).

The investigative report prepared for Holland by Kenney indicated that the 30" by 30" elbow had separated from the 30" by 24" plain end reducing fitting (Holland's Investigative Report, December 18, 2015, 6, attached as Exhibit 14 to Grand River and Hartford's Brief in Opposition to Plaintiffs' Summary Disposition Motion). Eight of the 20 T-bolts and nine nuts were missing from the east side of the Megalug restraint between the plain end reducer fitting and the elbow (Holland's Investigative Report, December 18, 2015, 5, attached as Exhibit 14 to Grand River and Hartford's Brief in Opposition to Plaintiffs' Summary Disposition Motion). Kenney also found evidence that the T-bolts on the east side of the Megalug restraint had not been appropriately tightened (Holland's Investigative Report, 10).

Based on those findings, Kenney concluded that the cause of the joint failure was "due to the lack of nuts being tightened or never being installed on the T-bolts on the east side of the flanges between the 90-degree, 30-inch bend and the 30-inch plain end of the reducer prior to the final completion of the job" and that:

Even if all twenty bolts were installed and the nuts tightened properly, movement of the vertical pipe section laterally more than 1 degree after the Megalugs were tightened during construction indicates an inadequately supported pipe system, which should have been securely reconnected prior to subsequent construction and/or completion and could have resulted in loosened Megalug screws or wedges causing the Megalugs to lose their connection to the plain end of the reducer. [Holland's Investigative Report, 11.]

Thus, while Kenney also noted that "EBAA technical data states that the Megalugs are not recommended for use on plain end fittings, and thus should not have been used on the 30-inch plain end of the reducer" (Holland's Investigative Report, 11), the record indicates that Holland's own expert concluded that the installation of the Megalug restraint was faulty, and that faulty installation was the cause of the joint separation and ultimate collapse of the interconnect facility.

Kenney's conclusion is contradicted in the record. Holwerda testified that the missing bolts could be explained by the 20 million gallons of water that rushed past them for three hours (Holwerda Depo, 93, 94). Smith also opined that the bolts could have been loosened because of the conditions that existed after the joint separated (Smith Depo, 136-137). Additionally, in deposition testimony offered after he authored his report, Kenney backed away from his conclusion that nine of the bolts may not have been installed on the Megalug. Kenney testified that vibrations over a long period of time can cause bolts to self-loosen (Kenney Depo, 97, Volume III, attached to Allied's Supplemental Brief). Kenney testified that based on his observations, there was "obviously shifting going on between joints immediately above" the plain end reducer fitting secured by the Megalug restraint (Kenney Depo, 103-104, Volume III, attached to Allied's Supplemental Brief). Kenney testified that it was more likely that the bolts on the Megalug were tightened improperly because if eight bolts had never been attached to the Megalug, it would have been "odd" for the underground joint to pass a test of the interconnect facility water system (Kenney Depo, 147-148, Volume III, attached to Allied's Supplemental Brief).

However, drawing all reasonable inferences in favor of the defendants, there is an open issue regarding whether Grand River's and P&N's breach of contract caused the separation of the joint, or whether faulty procedure during installation of the Megalug restraint caused the separation of the joint. Accordingly, there is a genuine issue of material fact regarding causation, and Holland is not entitled to summary disposition as a matter of law under MCR 2.116(C)(10) regarding this issue. *Nuculovic*, 287 Mich App at 61.¹⁰

Grand River and Hartford argue that they are entitled to summary disposition pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2) because the damage to the interconnect facility was caused by plaintiffs' failure to timely shut down the facility after the leak was detected. As discussed below, this argument lacks merit.

¹⁰ Grand River and Hartford raise a series of suggestions regarding faulty construction methods that might also explain the collapse of the interconnect facility. Those suggestions include that a lack of sand caused the collapse, that a lack of a seep collar caused the collapse, that the design change caused the collapse, that the lack of encasement in concrete caused the collapse, and that the lack of thrust blocks caused the collapse. In the light of its conclusion that a genuine issue of material fact exists regarding the cause of the separation of the joint, the court need draw no conclusion regarding these arguments.

A message log regarding the interconnect facility during the morning of September 6, 2013, indicates that by 4:50 a.m. “differential pressure alarms” sounded regarding “HS [pump] #3.” By 5:16 a.m., HS pump #3 had “tripped” and began shutting down. At 5:21 a.m., there was “[s]till good demand” and the “[f]lows/pressures were stable,” and the operator of the facility, Calvin Matz (Deposition of Calvin Matz, June 24, 2015, 6, attached as Exhibit 25 to Grand River and Hartford’s Brief in Support of Grand River and Hartford’s Motion for Summary Disposition), turned on “HS [pump] #1.” By 5:23 a.m., there were “[l]ow plant discharge pressure/high flow alarms.” By 5:25 a.m., there were “[m]ajor issues” because there was “low PSI coming out of plant,” and the water flow was “showing over 116MGD [million gallons per day] out the door.” At that point, HS pumps 1, 8, and 9 were on. Matz suspected a break in the water main, and “[c]hecked HS pump room & pipe gallery. No water found.” By 6:00 a.m., it was confirmed that there was a “[m]ajor break at Holland Interconnect building. Water coming out of doors.” (Interconnect Facility Log, September 6, 2013, 1-2, attached as Exhibit 12 to Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion.)

At approximately 6:00 a.m., Wyoming employee Rick Velderman told Matz that there was water coming out of the interconnect facility (Matz Depo, 82). Around the same time, Matz increased the flow from low service pumps so that the system could be maintained because water was being lost in the system (Matz Depo, 86, 88). Matz testified that he could not remember whether he chose to increase the flow from the low service pumps before or after Velderman told him that water was coming out of the interconnect facility (Matz Depo, 89). Matz testified that after he learned that water was leaking from the interconnect facility around 6:00 a.m., he did not personally do anything to stop the flow of water into the facility (Matz Depo, 93-94). Matz explained that his responsibility was to keep the water pressure in the distribution system up for the “safety of the public” and for the purpose of “water quality” (Matz Depo, 94).

An email memorandum written by Velderman regarding plaintiffs’ efforts at the interconnect facility on September 6, 2013, indicated that by 7:20 a.m., the “North 30 valve” was closed, and that by 7:35 a.m. the “South 30 valve” was closed, but that the closure of those valves did not make a difference in the water flowing out of the facility. By 7:35 a.m., the south side of the roof of the facility was “partially down and the garage doors were blown off.” By 8:30 a.m., the “42” line valve at 152nd and Ransom” was closed and by 8:45 a.m. the “36” line

valve that is north of the Holland building” was closed. By 8:55 a.m., the “42 line valve . . . in front of the Holland building” was closed. At that point, the water flow into the facility was stopped. (Memo Regarding Holland Interconnect Timeline for September 6, 2013, 1, attached as Exhibit 13 to Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion.)

Holwerda testified that Wyoming typically ran water through its pipes at 170 psi (Holwerda Depo, 87). Holwerda testified that 20 million gallons of water flowed out of the leaking pipe during the three hours after the underground joint separated (Holwerda Depo, 94). Holwerda testified that it was reasonable to think that the interconnect facility would start to collapse after the piping started to leak (Holwerda Depo, 90). Additionally, the investigative report prepared for Holland indicated that the separation of the elbow from the plain end reducer fitting was so significant that “the large water leak volume caused the soil under the building foundation to wash out, thus causing the building footings and floor slab to collapse” (Holland’s Investigative Report, December 18, 2015, 11, attached as Exhibit 14 to Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion). The water leak washed away the soil beneath the foundation of the interconnect facility (Smith Depo, 92).

However, regarding why it took so long to stop the leak of water at the interconnect facility, Matz testified that the pumps related to the interconnect facility could have been shut off at 5:23 a.m., but that the information known at that time did not warrant that action (Deposition of Calvin Matz, June 24, 2015, 85-86, attached as Exhibit 17 to Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion). Matz explained that the demand the morning of September 6, 2013, was extremely high (Matz Depo, 86). Additionally, the investigative report prepared for Holland indicated that in ideal conditions, it would have taken a minimum of 60 to 90 minutes to isolate the water flowing to the interconnect facility (Holland’s Investigative Report, December 18, 2015, 6, attached as Exhibit 14 to Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion).

Velderman testified that when the operator suspects a leak, the protocol is to check inside the facility where the pumps are located. If no leak is detected in the facility, the operator calls for help to investigate the source of the leak. The operator must continue pumping to keep the system charged for the purpose of avoiding contamination of the water system. (Deposition of

Rick Velderman, June 25, 2015, 31-34, attached as Exhibit 35 to Plaintiffs' Reply to Grand River's and Allied's Responses to Plaintiffs' Motion for Summary Disposition.) The operator of the interconnect facility followed this protocol in this case (Velderman Depo, 38-39). Holwerda acknowledged that if Wyoming shut off the pumps after the pipe break, contamination of the water supply would have been possible (Holwerda Depo, 88-89).

Robert Veneklasen, the operations supervisor for the Wyoming Water Treatment Plant, affirmed that Matz followed normal protocol when he left the pumps running to keep the water system pressurized (Affidavit of Robert Veneklasen, April 4, 2016, 21, attached as Exhibit 39 to Plaintiffs' Brief in Opposition of Grand River and Hartford's Summary Disposition Motion). Veneklasen explained that it was required that the water system be kept under pressure to avoid contamination of the water system, to serve customers, and to prevent a back flow of water into the interconnect facility because most of the water distribution system to Wyoming was at a higher elevation than the interconnect facility (Veneklasen Affidavit, 22). Veneklasen supported this affirmation by attaching the American Water Works Association (AWWA) standards regarding disinfecting water mains that indicated that maintaining positive pressure in a leaking pipe would prevent contamination (AWWA Standard – Disinfecting Water Mains, February 1, 2015, 15, attached as Exhibit 39-C to Plaintiffs' Brief in Opposition of Grand River and Hartford's Summary Disposition Motion).

Veneklasen affirmed that the delay in closing all of the valves to the interconnect facility was caused by the early-morning darkness, which created uncertainty as to where the leak occurred; a decision to close a valve between a 5,000,000 gallon storage reservoir and the facility to preserve the integrity of the treated water stored in the reservoir; the number of valves to the facility; the length of time needed to close each valve (approximately 20 minutes); and unsafe conditions surrounding the valves located a few feet in front of the facility because of the force and high volume of water flowing out of the facility (Veneklasen Affidavit, 30-33, 35).

Therefore, there is evidence that the 3-1/2 hour interval between the leak and the stop of the water flow into the facility was a part of a normal protocol put in place to prevent water contamination for public safety. Additionally, there is evidence that a significant delay in stopping the flow of water into the facility would be expected, even in ideal conditions.

However, regardless of the reasonableness of the speed at which plaintiffs stopped the flow of water into the interconnect facility, that is irrelevant to Grand River's liability for breach of contract. The essence of Grand River and Hartford's argument is that plaintiffs should have mitigated their damages by shutting the pumps related to the interconnect facility, and that their failure to timely do so was the sole cause of their damages. In *Unibar Maint Servs, Inc v Saigh*, 283 Mich App 609, 625; 769 NW2d 911 (2009), the defendants argued that the plaintiff failed to establish proximate cause in regarding to its negligence, misrepresentation, and fraud claims because the plaintiff "should have mitigated its damages" and "its failure to do so was the 'sole' cause of its damages." The Michigan Court of Appeals rejected that argument, holding that "[a] failure to mitigate may contribute to the harm a person suffers, but it is not the ultimate cause of the harm." *Id.* at 625-626. The Court of Appeals held that the defendants' act of selling nonexistent insurance services to the plaintiff was the proximate cause of the plaintiff's harm, regardless of any failure to mitigate the damages from that act. *Id.* at 626. Here, as discussed above, there is a genuine issue of material fact regarding whether Grand River's and P&N's breach of contract caused the underground joint's separation, or whether faulty installation of the Megalug restraint and the underground joint was the most direct, natural, and foreseeable cause of the underground joint's separation and the leak of water under the interconnect facility. *Chelsea Inv Group LLC*, 288 Mich App at 254. Thus, breach of contract or faulty installation was the proximate cause of plaintiffs' damages, *id.*, regardless of any failure on plaintiffs' part to mitigate those damages. *Unibar Maint Servs, Inc*, 283 Mich App at 625-626.

Further, to the extent that the 3-1/2 hour interval between the leak and the stop of the water flow into the facility could be considered an intervening cause, plaintiffs' decision to protect the public's safety by engaging in a protocol that increased the total amount of water that leaked under the interconnect facility was both desirable and reasonably foreseeable under the circumstances. Therefore, any delay in plaintiffs' stop of the water flow into the facility because of the protocol to protect public safety was reasonably foreseeable and not an intervening cause that broke the chain of causation in this case and relieved Grand River of liability. *McMillian*,

422 Mich at 576. Grand River and Hartford are not entitled to summary disposition pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2).¹¹

Allied argues that imposing liability on it as Grand River's subcontractor regarding Grand River's submission of Shop Drawing 28 would violate the *Spearin* doctrine as established by *United States v Spearin*, 248 US 132; 39 S Ct 59; 63 L Ed 166 (1918). The United States Supreme Court held in *Spearin* that if a "contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Id.* at 136. The *Spearin* Court also held that an owner's responsibility "is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work . . ." *Id.*

In *LW Kinnear, Inc, v Lincoln Park*, 260 Mich 250, 257-258; 244 NW 463 (1932), the Michigan Supreme Court relied upon the *Spearin* doctrine in addressing the issue of liability regarding the repeated collapse of the sewer at issue in that case. The Michigan Supreme Court held that if "the collapse of the sewer resulted 'from the design, type and specifications' of the sewer, then the loss must be borne by" the city that commissioned the construction of the sewer. *Id.* at 258. The Michigan Supreme Court remanded the case for a new trial regarding that issue. *Id.* at 260.

In this case, however, the original plans required the use of a 90-degree "30 by 24-inch" elbow fitting that would reduce the water flow (Holwerda Depo, 19-20, 123). The idea to replace to reducer elbow fitting with a plain end riser 30" x 24" reducer fitting with the Megalug restraint originated with Allied and was submitted in Shop Drawing 28 by Grand River. Thus, this is not a case where Allied was bound by plans and specifications prepared by plaintiffs to

¹¹ MCR 2.116(I)(2) provides that a trial court may grant summary disposition to a party opposing a motion for summary disposition "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." "The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). As discussed above, the record provided to this Court does not entitle Grand River and Hartford to judgment as a matter of law as is necessary for the grant of summary disposition under MCR 2.116(I)(2). *Id.*

use the Megalug restraint with the plain end riser 30” x 24” reducer fitting as required for the application of the *Spearin* doctrine. *Spearin*, 248 US at 136.

Whether Grand River Breached Its Contract by Failing to Honor Warranty

Plaintiffs also argue that under Grand River’s contract, it warranted that its work would be free of defects for one year after substantial completion. Plaintiffs argue that on September 6, 2013, Grand River’s work was found to be defective because the underground joint separated because the use of the plain end reducer fitting with the Megalug restraint was unsuitable under the contract. (Plaintiffs’ Brief, 20-22.)

Paragraph 6.19 of the general conditions portion of the contract between Grand River and Holland created a warranty and guarantee on Grand River’s part regarding the interconnect facility:

- A. Contractor warrants and guarantees to Owner that all Work will be in accordance with the Contract Documents and will not be defective. Engineer and its officers, directors, members, partners, employees, agents, consultants, and subcontractors shall be entitled to rely on representation of Contractor’s warranty and guarantee.
- B. Contractor’s warrant and guarantee hereunder excludes defects or damage caused by:
 - 1. abuse, modification, or improper maintenance or operation by persons other than Contractor, Subcontractors, Suppliers, or any other individual or entity for whom Contractor is responsible; or
 - 2. normal wear and tear under normal usage. [General Conditions of Construction Contract between Grand River and Holland, 6.19, attached as Exhibit 3a to Plaintiffs’ Brief.]

Regarding the correction or removal of defective work, Paragraph 13.06.A of the general conditions portion of the contract between Grand River and Holland provided:

Promptly after receipt of written notice, Contractor shall correct all defective Work, whether or not fabricated, installed, or completed, or, if the Work has been rejected by Engineer, remove it from the Project and replace it with Work that is not defective. Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or removal (including

but not limited to all costs of repair or replacement of work of others). [General Conditions of Construction Contract between Grand River and Holland, 13.06.A, attached as Exhibit 3a to Plaintiffs' Brief.]

Additionally, regarding the relevant period for the correction of defective work, Paragraph 13.07.A of the general conditions provided:

If within one year after the date of Substantial Completion (or such longer period of time as may be prescribed by the terms of any applicable special guarantee required by the Contract Documents) or by any specific provision of the Contract documents, any Work is found to be defective, or if the repair of any damages to the land or areas made available for Contractor's use by Owner or permitted by Laws and Regulations as contemplated in Paragraph 6.11.A is found to be defective, Contractor shall promptly, without cost to Owner and in accordance with Owner's written instructions:

1. repair such defective land or areas; or
2. correct such defective Work; or
3. if the defective Work has been rejected by Owner, remove it from the Project and replace it with Work that is not defective, and
4. satisfactorily correct or repair or remove and replace any damage to other Work, to the work of others or other land or areas resulting therefrom. [General Conditions of Construction Contract between Grand River and Holland, 13.07.A, attached as Exhibit 3a to Plaintiffs' Brief.]

Additionally, Paragraph 6.19.A of the supplementary conditions portion of the contract between Grand River and Holland provided that:

Contractor's warranty and guaranty that all Work will be in accordance with the Contract Documents and will not be defective includes but is not limited to all materials and equipment incorporated into the Work. Unless a longer duration is required by the Project Specifications, Contractor's warranty and guaranty that all Work will be in accordance with the Contract Documents and will not be defective will extend for at least one year from the date of substantial completion. [Supplementary Conditions of Construction Contract between Grand River and Holland, 6.19.A, attached as Exhibit 3b to Plaintiffs' Brief.]

Further, Paragraph 1.26 of the project specifications documentation portion of the contract between Grand River and Holland reiterated that "[t]he Contractor shall warranty and guarantee all equipment and work for one year from the dates of substantial completion. Greater warranty duration and/or scope may be required by the project specifications. All warranties shall jointly

benefit the City of Holland and the City of Wyoming.” (Project Specifications, 1.26, attached as Exhibit 3c to Plaintiffs’ Brief.)

Accordingly, Paragraph 6.19 of the general conditions required Grand River to warrant and guarantee that all “Work” be “in accordance with the Contract Documents” and not “defective.” Paragraph 13.06.A. of the general conditions required Grand River to promptly correct all “defective Work” after it received written notice. Paragraph 13.07.A of the general conditions required correction of “defective Work” within one year of Substantial Completion. Paragraph 6.19.A of the supplementary conditions required Grand River to warranty and guarantee for “at least one year from the date of substantial completion” that “all Work,” including “all materials and equipment incorporated into the Work” be free of defect and be “in accordance with the Contract Documents.” And, Paragraph 1.26 of the project specifications required that Grand River warranty and guarantee “all equipment and work for one year from the dates of substantial completion.”

Again, “work” under Paragraph 1.01.A.50 of the general conditions portion of the contract between Grand River and Holland is defined in relevant part as “[t]he entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents” (General Conditions of Construction Contract between Grand River and Holland, 1.01.A.50, attached as Exhibit 3a to Plaintiffs’ Brief). Regarding the contractual definition of “defective,” in the general conditions portion of the contract between Grand River and Holland, the word “defective,” when modifying the word “work” in the contract,

refers to Work that is unsatisfactory, faulty, or deficient in that it:

- a. does not conform to the Contract Documents; or
- b. does not meet the requirements of any applicable inspection, reference standard, test, or approval referred to the in the Contract Documents; or
- c. has been damaged prior to Engineer’s recommendation of final payment (unless responsibility for the protection thereof has been assumed by Owner at Substantial Completion in accordance with Paragraph 14.04 or 14.05). [General Conditions of Construction Contract between Grand River and Holland, 1.02.D, attached as Exhibit 3a to Plaintiffs’ Brief.]

Here, the portion of the definition of “defective” at issue is Paragraph 1.02.D.a of the general conditions, which refers to work that does not conform to the Contract Documents.

“Contract Documents” are “[t]hose items so designated in the Agreement. . . . Approved Shop Drawings, other Contractor submittals, and the reports and drawings of subsurface and physical conditions are not Contract Documents” (General Conditions of Construction Contract between Grand River and Holland, 1.02.A.12). The “Agreement” is the “written instrument which is evidence of the agreement between Owner and Contractor covering the Work” (General Conditions of Construction Contract between Grand River and Holland, 1.02.A.2). The “Suggested Form of Agreement Between Owner and Contractor for Construction Contract” provided that “Contract Documents” included “This Agreement,” (Suggested Form of Agreement Between Owner and Contractor for Construction Contract, 9.01.A.1), and the agreement “generally described” the work to be performed in this case thusly:

Water system improvements at the Wyoming Water Treatment Plant (WTP) and the Holland Water Treatment Plant (WTP) in Ottawa County, Michigan. This project addresses the construction the [sic] Wyoming Valve & Meter Station at the Wyoming WTP site and the addition of a transfer pump and associated improvements at the Holland WTP.

Including adequate material, equipment, labor, and supervision to complete the specified work, which also includes surface restoration, testing, inspection, and placing the systems in operation with necessary appurtenances. [Suggested Form of Agreement Between Owner and Contractor for Construction Contract, 1.01.]

Accordingly, Paragraph 1.01.A.50 of the general conditions provided that the “entire construction,” i.e. the interconnect facility as a whole, constituted “work” and Paragraph 1.02.D of the general conditions provided that such work would be defective if the work did not conform to the Contract Documents. And, because Paragraph 1.01 of the Suggested Form of Agreement provided that Holland was contracting for a “complete” interconnect facility with operational systems, the “entire construction” of the interconnect facility would be “defective” if its systems were not operational.

Here, as discussed *supra*, the interconnect facility reached substantial completion on September 4, 2013, but by September 6, 2013, the underground joint had separated and the facility had ceased to operate. Grand River and Hartford argue that because the pre-collapse condition of the underground joint conformed to the “Contract Documents,” Grand River’s work on the underground joint was not “defective” (Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion, 17-18). However, again, Paragraph 6.19.A of the

supplementary conditions required Grand River to warranty and guarantee for “at least one year from the date of substantial completion” that “all Work,” including “all materials and equipment incorporated into the Work” be free of defect and be “in accordance with the Contract Documents,” and Paragraph 1.26 of the project specifications required that Grand River warranty and guarantee “all equipment and work for one year from the dates of substantial completion.” Adopting Grand River and Hartford’s argument that it was sufficient for the underground joint to merely conform to the “Contract Documents” at one point in time would render the contractual warranty and guarantee for “one year” from substantial completion nugatory, which is impermissible under Michigan law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Thus, regardless of the fact that the work Grand River performed may have conformed to the Contract Documents at one point, Grand River’s warranty extended to cover the nature of its work as of September 6, 2013. And, after the collapse of the interconnect facility on that date, the interconnect facility’s systems were no longer operational, which rendered Grand River’s “work” “defective” because the work did not conform the requirement in the “Contract Documents” that the facility be operational.

Grand River and Hartford also note that Paragraph 6.19.B of the general conditions portion of the contract between Grand River and Holland excluded defects or damage caused by the improper operation of the interconnect facility, and argue that because “the sole cause of the damage to the facility was Plaintiffs [sic] conscious decision to run 20 million gallons of highly pressurized water through the facility over the course of four hours all while knowing there were problems and admitting having the ability to shut the system down,” damages from that operation of the facility are excluded (Grand River and Hartford’s Brief in Opposition to Plaintiffs’ Summary Disposition Motion, 19-20). The court recognizes that as discussed *supra*, there is evidence that plaintiffs’ employees knew that there was a leak as early as 5:25 a.m. on September 6, 2013. Further, there is evidence that the pumps related to the interconnect facility could have been shut off at that time, and that instead it took until 8:55 a.m. for the water flow into the facility to be fully stopped. But, there is also evidence that the 3-1/2 hour interval between the leak and the stop of the water flow into the facility was a part of a normal protocol put in place to prevent water contamination for public safety. As discussed above, any delay in plaintiffs’ stop of the water flow into the facility because of the protocol to protect public safety was reasonably foreseeable and not an intervening cause that broke the chain of causation in this

cause and relieved Grand River of liability. *McMillian*, 422 Mich at 576. Additionally, there is evidence that a significant delay in being able to stop the flow of water into the facility was expected, even in ideal conditions. And, the parties have provided no evidence that plaintiffs' response to the leak at the interconnect facility constituted an improper operation of the interconnect facility such that the exclusion in Paragraph 6.19.B of the general conditions portion of the contract between Grand River and Holland would apply.

Further, there is no indication in the record that plaintiffs improperly operated the interconnect facility before the leak began. As discussed above, Kenney testified that a transient pressure wave started at the time Wyoming started the high pressure pump one valve moments before the leak began. However, there is no evidence that Wyoming's operation of that pump was improper, and the transient wave produced water pressures well below the 300 psi surge rating that guided the design of the interconnect facility.

In sum, Grand River's warranty extended to cover the defective nature of the interconnect facility on September 6, 2013, because there is no indication that plaintiffs improperly operated the interconnect facility. Based on the documentary evidence provided to this Court, Grand River's refusal to honor its warranty constitutes a breach of its contractual warranty. Further, Grand River's refusal to honor its warranty is the proximate cause of at least some financial harm to plaintiffs because that financial harm is the direct, natural, and foreseeable result of Grand River's refusal to honor its warranty. *Chelsea Inv Group LLC*, 288 Mich App at 254. There is no genuine issue of material fact related to the elements of a breach of contract concerning Grand River's refusal to honor its warranty. *Miller-Davis Co*, 495 Mich at 178. Because plaintiffs are entitled to judgment as a matter of law, grant of summary disposition under MCR 2.116(C)(10) to plaintiffs in regard to this issue is appropriate. *Nuculovic*, 287 Mich App at 61.

The court notes that Grand River and Hartford argue that Grand River was absolved from responsibility for defects and damages under the *Spearin Doctrine*, discussed *supra*. However, as discussed above, the original plans required the use of a 90-degree "30 by 24-inch" elbow fitting that would reduce the water flow (Holwerda Depo, 19-20, 123). The idea to replace the reducer elbow fitting with a plain end riser 30" x 24" reducer fitting with the Megalug restraint originated with Allied and was submitted in Shop Drawing 28 by Grand River. Thus, this is not a case where Grand River was bound by plans and specifications prepared by plaintiffs to use the

Megalug restraint with the plain end riser 30" x 24" reducer fitting as required for the application of the *Spearin* doctrine. *Spearin*, 248 US at 136.

Whether Plaintiffs' Claims Against Grand River and Hartford Were Waived Under Grand River's Contract with Holland

Despite the analysis above, Grand River and Hartford argue that they are entitled to summary disposition regarding plaintiffs' claims against them because Holland waived its claims against them under Paragraph 5.07 of the general conditions portion of the contract between Holland and Grand River (Brief in Support of Grand River and Hartford's Motion for Summary Disposition, March 4, 2016, 6-12). Paragraph 5.07 of the general conditions portion of the contract between Grand River and Holland provided in relevant part that:

A. Owner and Contractor intend that *all policies purchased in accordance with Paragraph 5.06* will protect Owner, Contractor, Subcontractors, and Engineer, and all other individuals or entities identified in the Supplementary Conditions as loss payees (and the officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of them) in such policies and will provide primary coverage for all losses and damages caused by the perils or causes of loss covered thereby. All such policies shall contain provisions to the effect that in the event of payment of any loss or damage the insurers will have no rights of recovery against any of the insureds or loss payees thereunder. *Owner and Contractor waive all rights against each other and their respective officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them for all losses and damages caused by, arising out of or resulting from any of the perils or causes of loss covered by such policies and any other property insurance applicable to the Work;*

B. *Owner waives all rights against Contractor, Subcontractors, and Engineer, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them for:*

1. loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss or damage to Owner's property or the Work caused by, arising out of, or resulting from fire or other perils whether or not insured by Owner; and

2. *loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire or other insured peril or cause of loss covered by any property insurance maintained on the completed Project or part thereof by Owner during partial utilization pursuant to Paragraph 14.05, after Substantial Completion pursuant to Paragraph 14.04, or after final payment pursuant to Paragraph 14.07.* [General Conditions of Construction Contract

between Grand River and Holland, 5.07, attached as Exhibit 3a to Plaintiffs' Brief (emphasis added).]

Accordingly, the plain language of Paragraph 5.07.A of the general conditions provided that Holland waived "all rights" against Grand River for damages caused by "perils or causes of loss" covered by (1) "such policies" "purchased in accordance with Paragraph 5.06" or by (2) "any other property insurance applicable" to the interconnect facility. The plain language of 5.07.B.2 provided that Holland waived "all rights" against Grand River for damages caused by "fire or other insured peril or cause of loss" that was covered by "any property insurance maintained" regarding the interconnect facility by Holland as "Owner."¹²

As an initial matter, Grand River and Hartford do not argue that there were damages caused by "perils or causes of loss" that were covered by policies "purchased in accordance with Paragraph 5.06." The court notes that while Holland was initially required to purchase and maintain property insurance in the form of a builder's risk policy under Paragraph 5.06 of the general conditions portion of the contract between Grand River and Holland,¹³ Paragraph 5.06 of

¹² Plaintiffs argue that Paragraph 5.07 of the general conditions was replaced by Paragraph 1.2.2.i of the insurance specifications document portion of the contract between Grand River and Holland. However, that provision of the insurance specifications merely required that the builder's risk policy that Grand River was to provide "contain a waiver whereby Owner and Contractor waive all rights against each other . . . for all losses and damages caused by, arising out of or resulting from any of the perils or causes of loss covered by the policy" (Insurance Specifications, 1.2.2.i). That provision did not modify Paragraph 5.07 of the general conditions.

¹³ Paragraph 5.06 of the general conditions portion of the contract between Grand River and Holland provided in relevant part that:

A. Unless otherwise provided in the Supplementary Conditions, Owner shall purchase and maintain property insurance upon the Work at the Site in the amount of the full replacement cost thereof (subject to such deductible amounts as may be provided in the Supplementary Conditions or required by Laws and Regulations). This insurance shall:

1. include the interests of Owner, Contractor, Subcontractors, and Engineer, and any other individuals or entities identified in the Supplementary Conditions, and the officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of them, each of whom is deemed to have an insurable interest and shall be listed as a loss payee;

2. be written on a Builder's Risk "all-risk" policy form that shall at least include insurance for physical loss or damage to the Work, temporary buildings, falsework, and materials and equipment in transit, and shall insure against at least the following perils or causes of loss: fire, lightning, extended coverage, theft,

the general conditions was supplemented by Paragraph 5.06 of the supplementary conditions portion of the contract between Grand River and Holland, which provided that *Grand River* would be responsible for purchasing and maintaining property insurance pursuant to the insurance specifications portion of the contract between Grand River and Holland.¹⁴ As

vandalism and malicious mischief; earthquake, collapse, debris removal, demolition occasioned by enforcement of Laws and Regulations, water damage (other than that caused by flood), and such other perils or causes of loss as may be specifically required by the Supplementary Conditions.

3. include expenses incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers and architects);

4. cover materials and equipment stored at the Site or at another location that was agreed to in writing by Owner prior to being incorporated in the Work, provided that such materials and equipment have been included in an Application for Payment recommended by Engineer;

5. allow for partial utilization of the Work by Owner;

6. include testing and startup; and

7. be maintained in effect until final payment is made unless otherwise agreed to in writing by Owner, Contractor, and Engineer with 30 days written notice to each other loss payee to whom a certificate of insurance has been issued.

B. Owner shall purchase and maintain such equipment breakdown insurance or additional property insurance as may be required by the Supplementary Conditions or Laws and Regulations which will include the interests of Owner, Contractor, Subcontractors, and Engineer, and any other individuals or entities identified in the Supplementary Conditions, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them, each of whom is deemed to have an insurable interest and shall be listed as a loss payee.

C. All the policies of insurance (and the certificates or other evidence thereof) required to be purchased and maintained in accordance with this Paragraph 5.06 will contain a provision or endorsement that the coverage afforded will not be canceled or materially changed or renewal refused until at least 30 days prior written notice has been given to Owner and Contractor and to each other loss payee to whom a certificate of insurance has been issued and will contain waiver provisions in accordance with Paragraph 5.07. [General Conditions of Construction Contract between Grand River and Holland, 5.06.A, attached as Exhibit 3a to Plaintiffs' Brief.]

¹⁴ Paragraph 5.06 of the supplementary conditions portion of the contract between Grand River and Holland provided that:

SC-5.06.A Delete Paragraph 5.06.A in its entirety and insert the following in its place:

discussed *supra*, Paragraph 1.2 of the insurance specifications document portion of the contract between Grand River and Holland provided in regard to property insurance that Grand River would purchase and maintain property insurance in the form of a builder's risk policy, and Grand River breached that portion of the contract by failing to maintain that insurance. Thus, there were no damages caused by "perils or causes of loss" that were *covered* by policies "purchased in accordance with Paragraph 5.06" at the time of the collapse of the interconnect facility such that the waiver under Paragraph 5.07.A of the general conditions would apply in this case.

Thus, the parties' arguments center on whether there was any other "property insurance" in this case that covered the perils or causes of loss such that the waivers under Paragraphs 5.07.A or 5.07.B would bar plaintiffs' claims. Grand River and Hartford specifically argue that applicable property insurance existed in this case in the following forms: (1) Grand River's Commercial General Liability (CGL) policy, (2) Allied's CGL policy, (3) plaintiffs' property damage self-insurance retention, (4) insurance policies held by Holland and Wyoming, and (5) policies provided by P&N (Grand River and Hartford's Brief for Summary Disposition, 7-12).

Regarding Grand River's CGL policy, as of August 28, 2013, Grand River had a CGL policy covering the interconnect facility (Certificate of Liability Insurance, August 28, 2013,

A. Contractor shall purchase and maintain property insurance upon the Work as set forth in and required by the Insurance Specifications. The Insurance Specifications are part of the Contract Documents and are specifically incorporated by reference here.

SC-5.06.B Delete Paragraph 5.06.B in its entirety and insert the following in its place:

B. Contractor shall purchase and maintain equipment breakdown insurance and additional property insurance as required by the Insurance Specifications. The Insurance Specifications are part of the Contract Documents and are specifically incorporated by reference here.

SC-5.06.C Delete Paragraph 5.06.C in its entirety and insert the following in its place:

C. The policies of insurance required by this Paragraph 5.06 shall meet the requirements set forth in the Insurance Specifications. The Insurance Specifications are part of the Contract Documents and are specifically incorporated by reference here.

SC-5.06.D Delete Paragraph 5.06.D in its entirety.

SC-5.06.E Delete Paragraph 5.06.E in its entirety. [Supplementary Conditions of Construction Contract between Grand River and Holland, 5.06, attached as Exhibit 3b to Plaintiffs' Brief.]

attached as Exhibit 16 to Grand River and Hartford's Brief in Support of Grand River and Hartford's Motion for Summary Disposition). Grand River's CGL insurance policy provided Grand River \$2,000,000 in general aggregate coverage (Commercial Insurance Policy, September 18, 2013, attached as a part of Exhibit 17 to Grand River and Hartford's Brief in Support of Grand River and Hartford's Motion for Summary Disposition). The CGL coverage obligated Grand River's insurer to pay "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies" (Commercial General Liability Coverage Form for Grand River, September 18, 2013, 1, attached as a part of Exhibit 17 to Grand River and Hartford's Brief in Support of Grand River and Hartford's Motion for Summary Disposition).

The question then becomes, was Grand River's CGL policy "property insurance" under Paragraph 5.07? The term "property insurance" was not defined within the contract by the parties, so consulting Black's Law Dictionary is appropriate in this case. See *Travelers Prop Casualty Co of America v Peaker Services, Inc.*, 306 Mich App 178, 187; 855 NW2d 523 (2014). "Property insurance" is defined as "[a]n agreement to indemnify¹⁵ against property damage or destruction." *Black's Law Dictionary* (10th ed). In contrast, "commercial general-liability insurance" is defined as "[i]nsurance that broadly covers an insured's liability exposure, including products liability, tort liability, certain forms of contractual liability, and premises liability." *Black's Law Dictionary* (10th ed). Thus, property insurance indemnifies against property damage, while CGL insurance covers an insured's liability exposure. These dictionary definitions appear to be consistent with the intent of the parties in this case because Paragraph 1.1 of the insurance specifications document portion of the contract between Grand River and Holland listed a "Commercial General Liability Policy" as an insurance type that applied to the parties' liability, while Paragraph 1.2 listed "Builder's Risk" insurance as a type of insurance that applied to property (Insurance Specifications, 1.1 and 1.2, attached as Exhibit 3d to Plaintiffs' Brief in Support of Motion for Summary Disposition). Therefore, the fact that Grand River's CGL coverage obligated its insurer to pay "sums that [Grand River] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies,"

¹⁵ "Indemnify" is defined as "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default" "[t]o promise to reimburse (another) for such a loss" and "[t]o give (another) security against such a loss." *Black's Law Dictionary* (10th ed).

did not render that coverage “property insurance” under 5.07 of the general conditions portion of the contract between Grand River and Holland because the CGL coverage did not indemnify against property damage to the interconnect facility.

Regarding Allied’s CGL policy, Allied had a CGL policy that covered the project to construct the interconnect facility (Certificate of Liability Insurance, June 26, 2013, attached as Exhibit 18 to Grand River and Hartford’s Brief in Support of Grand River and Hartford’s Motion for Summary Disposition). The CGL coverage obligated Hartford as the insurer under the policy to pay “sums that [Allied] becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies” (Commercial General Liability Coverage Form for Allied, 1, attached as a part of Exhibit 43 to Plaintiffs’ Brief in Opposition of Grand River and Hartford’s Summary Disposition Motion). Because the CGL coverage obtained by Allied was identical to Grand River’s CGL coverage, the analysis above in regard to Grand River’s CGL policy also applies here, and the court concludes that Allied’s CGL coverage was not “property insurance” under 5.07 of the general conditions portion of the contract between Grand River and Holland because the CGL coverage did not indemnify against property damage to the interconnect facility.

Regarding plaintiffs’ self-insurance, under Holland and Wyoming’s contract, they were required to maintain insurance applicable to the interconnect facility, which included self-insurance retentions:

Holland and Wyoming shall each maintain or cause to be maintained comprehensive general liability insurance covering the use and operation of their respective water systems and the Interconnection Facilities. Such insurance may be provided by one or more insurance policies. All such policies of insurance shall be payable on an occurrence basis, and shall initially be in the amount of Five Million Dollars (\$5,000,000) per occurrence and Five Million Dollars (\$5,000,000) in the aggregate for bodily injury or death. In addition, Holland and Wyoming, respectively, shall each maintain or cause to be maintained an umbrella or excess liability coverage in the amount of not less than Three Million Dollars (\$3,000,000). The insurance, pursuant to this section, shall not have a deductible in excess of Twenty-Five Thousand Dollars (\$25,000) per occurrence unless approved in writing in advance by both parties. *Wyoming consents to a self-insurance retention of One Hundred Thousand Dollars (\$100,000) per claim for property damage and general liability presently administered by Holland. Holland consents to a self-insured retention of Five Hundred Thousand Dollars (\$500,000) per claim for property damage and general liability presently*

administered by Wyoming. [Wyoming Water System Emergency Interconnect Agreement, April 29, 2011, 11-12, attached as Exhibit 1 to Plaintiffs' Brief in Support of Motion for Summary Disposition (emphasis added)].

Thus, Wyoming was required to maintain a self-insurance retention of \$500,000 per claim for property damage and general liability, and Holland was required to maintain a self-insurance retention of \$100,000 per claim for property damage and general liability.

Holland maintained \$100,000 in self-insurance retention for loss of property and for general liability as a part of its all lines aggregate insurance policy with The Princeton Excess and Surplus Lines Insurance Company (Insurance Contract for Holland with The Princeton Excess and Surplus Lines Insurance Company as Insurer, Limits of Insurance, July 15, 2013, attached as Exhibit 19 to Grand River and Hartford's Brief in Support of Grand River and Hartford's Motion for Summary Disposition). Freda Velzen, the finance director for the Holland Board of Public Works, testified on behalf of Holland that the self-insurance was applied similarly to a "deductible" in the context of its all lines aggregate insurance policy (Velzen Depo, 10, 63-64, 66). Velzen clarified that Holland did not belong to a self-insurance plan or pool (Velzen Depo, 66).

Grand River and Hartford argue that Holland's self-insurance retention was property insurance in this case. In support of that proposition, they cite *State Industries, Inc v Twin City Fire Ins Co*, 158 Fed Appx 694, 695, 697 (CA 6, 2005), where the Sixth Circuit of the United States Court of Appeals held in the context of a plaintiff with self-insurance for product liability claims that "[i]nsureds with a self-insurance retention, such as [plaintiff], are their own primary carriers." Similarly, the Michigan Supreme Court has acknowledged that "the Court of Appeals has treated self-insurance as a form of insurance" in some contexts. *Jarrad v Integon National Ins Co*, 472 Mich 207, 219; 696 NW2d 621 (2005). The only example the *Jarrad* Court cited was *Allstate Ins Co v Ellassal*, 203 Mich App 548, 554; 512 NW2d 856 (1994), where the Michigan Court of Appeals held that self-insurance in the context of the no-fault act, MCL 500.3101 *et seq.*, was the functional equivalent of a commercial no-fault insurance policy.

The court finds no binding authority that would require a conclusion that Holland's self-insurance retention in this case was equivalent to an actual insurance policy. Nevertheless, assuming that Holland's self-insurance retention was insurance, it did not constitute property

insurance that covered the collapse of the interconnect facility. Because Holland's self-insurance retention was applied in the context of its all lines aggregate insurance policy, the self-insurance retention would not be applied under that policy unless the terms of the policy covered the collapse of the interconnect facility. The part of the all lines aggregate insurance policy that covered "direct physical loss of or damage to" Holland's property also explicitly excluded loss or damage caused "directly or indirectly" by "faulty, inadequate or defective" "[d]esign, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction" or "[m]aterials used in repair, construction, renovation or remodeling" (All Lines Aggregate Coverage Form, 15-16, attached as a part of Exhibit 19 to Grand River and Hartford's Brief in Support of Grand River and Hartford's Motion for Summary Disposition). As discussed above, the record indicates that the collapse of the interconnect facility was directly, or at least indirectly, caused by "faulty, inadequate or defective" materials used in construction of the facility or by faulty workmanship or construction. There is no evidence that improper operation of the facility caused its collapse. Thus, the part of the all lines aggregate insurance policy that covered "direct physical loss of or damage to" Holland's property did not cover the collapse of the interconnect facility, and Holland's self-insurance retention related to that part of the policy did not apply here.

The part of the all lines aggregate insurance policy that provided general liability coverage¹⁶ was not "property insurance" under 5.07 of the general conditions portion of the contract between Grand River and Holland because that coverage did not indemnify against property damage to the interconnect facility. Moreover, that portion of the policy specifically excluded general liability coverage for property Holland owned, rented, or occupied (All Lines Aggregate Coverage Form, 23), and the agreement between Wyoming and Holland for the construction of the interconnect facility provided that they would share joint ownership of the facility (Wyoming Water System Emergency Interconnect Agreement, 5). The part of the all lines aggregate insurance policy that provided general liability coverage did not cover the

¹⁶ "We will indemnify the insured for those sums which the insured becomes legally obligated to pay as 'ultimate net loss' because of 'bodily injury' 'property damage,' 'personal injury' or 'advertising injury,' arising out of the insured's activities" (All Lines Aggregate Coverage Form, 21).

collapse of the interconnect facility, and Holland's self-insurance retention related to that part of the policy did not apply.

Further, Wyoming is a member of a Michigan group self-insurance pool through the Michigan Municipal Risk Management Authority (MMRMA) (Letter to Wyoming from MMRMA's Counsel, February 17, 2016, 1, attached as an exhibit to Plaintiffs' Brief Opposing Grand River's Motion to Compel, May 4, 2016; Deposition of Curtis Holt, April 13, 2016, 7, attached as Exhibit 4 to Grand River and Hartford's Supplemental Brief in Support of Their Motion to Compel Discovery). Grand River and Hartford argue that there is "no question that Plaintiffs [sic] claims must be dismissed because the MMRMA provides coverage" for the collapse of the interconnect facility (Grand River and Hartford's Supplemental Brief in Support of Their Motion to Compel Discovery, May 6, 2016, 2).

Section 1.A.1 (covered causes of loss) of the property and crime document portion of Wyoming's coverage documents with the MMRMA provided that:

MMRMA will pay, on a per occurrence basis, for damages resulting from a covered cause of loss to covered property subject to all limitations or exclusions in this Coverage Document. Covered cause of loss means direct physical loss or damage from any cause, except those excluded in this Coverage Document. Covered property means property offered coverage by this Coverage Document. [MMRMA Property and Crime Coverage Document, March 2012, 2, attached as an exhibit to Plaintiffs' Brief Opposing Grand River's Motion to Compel, May 4, 2016.]

Section 3.A (member's newly acquired or constructed property) of the property and crime document portion of Wyoming's coverage documents with the MMRMA provided that:

MMRMA will pay for the actual cost to repair or replace any loss or damage to a covered property from a covered cause of loss subject to the limits of coverage for Member's Newly Acquired or Constructed Property stated in the Coverage Overview provided *the Member reports values to MMRMA within 180 days after the Member acquires the property*. If the property is not replaced, MMRMA will pay only the actual cash value of the property at the time of the loss. Member's Newly Acquired or Constructed Property *means the Member Buildings and Personal Property including Personal Property of Others as defined in Section 2 of this Coverage Document not yet reported to MMRMA*. [MMRMA Property and Crime Coverage Document, 10 (emphasis added).]

Here, P&N executed a certificate of substantial completion of the interconnect facility on September 4, 2013 (Certificate of Substantial Completion). On September 11, 2013, Wyoming provided the MMRMA with notice of a claim of loss regarding the interconnect facility (Claim of Loss Confirmation Letter, September 11, 2013, attached as an exhibit to Plaintiffs' Brief Opposing Grand River's Motion to Compel). Thus, it appears that the newly constructed interconnect facility was reported to the MMRMA within 180 days after Wyoming acquired the facility as necessary for the facility to be covered property under Wyoming's coverage documents with the MMRMA.

However, Section 5.K (exclusion for acts, or decisions, or planning, design, materials, or maintenance) of the property and crime document portion of Wyoming's coverage documents with the MMRMA provided that "[u]nder no conditions, circumstances, or set of facts will MMRMA pay for any loss resulting directly, indirectly, or consequentially from: Any such direct or indirect loss or damage caused by, resulting from, contributed to or made worse by acts or decisions or planning, design, materials or maintenance." (MMRMA Property and Crime Coverage Document, 23.) "Acts or decisions" was defined as "acts or decisions of any person, group, organization or governmental body, including the failure to act or decide" (MMRMA Property and Crime Coverage Document, 41). "Planning, design, materials, or maintenance" was defined as: "faulty, inadequate or defective: a. Planning, zoning, development, surveying, siting; b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; c. Materials used in repair, construction, renovations, remodeling, or maintenance; d. Of part or all of any property on or off the premises" (MMRMA Property and Crime Coverage Document, 42).

As discussed above, the record indicates that the collapse of the interconnect facility was directly, or at least indirectly, caused by "faulty, inadequate or defective" materials used in construction of the facility or by faulty workmanship or construction. There is no evidence that improper operation of the facility caused its collapse. Thus, Wyoming's membership in a

Michigan group self-insurance pool through the MMRMA did not *cover*¹⁷ the perils or causes of loss such that the waivers under Paragraphs 5.07.A and 5.07.B would bar plaintiffs' claims.

Grand River and Hartford next argue that "insurance policies held by Holland and Wyoming" cover the collapse of the interconnect facility. However, the only policy Grand River and Hartford specifically identify plaintiffs as having is a CGL policy held by Holland. Grand River and Hartford argue that Holland has not produced its CGL policy, and that, therefore, it would be appropriate for this Court to impose an inference that the contents of that policy would be unfavorable to plaintiffs. (Grand River and Hartford's Brief for Summary Disposition, 9.)

The court notes that "missing evidence gives rise to an adverse presumption only when the complaining party can establish intentional conduct indicating fraud and a desire to destroy evidence and thereby suppress the truth." *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005) (citation and quotation omitted). In this case, on February 23, 2016, Velzen testified that Holland maintained a CGL policy and promised to produce a copy of that policy (Velzen Depo, 54-55). Velzen testified that she was unaware of whether Holland made a claim against its CGL policy related to the collapse of the interconnect facility (Velzen Depo, 55). However, on April 4, 2016, Velzen completed an affidavit and affirmed that while she testified during her deposition that Holland had a CGL policy, she was mistaken because she was thinking of the general liability insurance portions of Holland's all lines aggregate insurance policy with Princeton Surplus Lines [discussed above] (Affidavit of Freda Velzen, April 4, 2016, 5-7, attached as Exhibit 40 to Plaintiffs' Brief in Opposition of Grand River and Hartford's Summary Disposition Motion). Accordingly, Velzen's retracted testimony is the only evidence

¹⁷ In the context of their brief opposing Grand River and Hartford's motion to compel, plaintiffs note that under MCL 124.6, Wyoming's membership in a Michigan group self-insurance pool through the MMRMA did not make the MMRMA "an insurance company or insurer under the laws of this state," and did not mean that MMRMA was doing "insurance business." This raises the question of whether MMRMA's statutorily assigned status as something other than an insurance provider would render the coverage provided to Wyoming through MMRMA's self-insurance pool something other than "property insurance" under Paragraph 5.07 of the general conditions portion of the contract between Grand River and Holland. While Michigan courts have not provided guidance on this issue, it appears that the law excludes MMRMA coverage, as a matter of public policy, from the definition of "insurance." In the context of the court's conclusion that coverage of the interconnect facility is excluded under Section 5.K of the property and crime document portion of Wyoming's coverage documents with the MMRMA, however, the court need draw no conclusion.

that Holland had a CGL policy, and there is no evidence of “intentional conduct indicating fraud and a desire to destroy evidence” in this case. Grand River and Hartford are not entitled to an adverse presumption against plaintiffs regarding the purported CGL policy. *Ward*, 472 Mich at 84.

Finally, Grand River and Hartford argue that damages to the interconnect facility were “likely covered under insurance policies provided by” P&N (Grand River and Hartford’s Brief for Summary Disposition, 10). Again, on January 11, 2011, Holland and P&N contracted for P&N to provide engineering consulting services to Holland regarding the construction of the interconnect facility (Service Contract Between Holland and P&N). Article 7 of Holland’s contract with P&N provided that “[t]his Agreement is subject to the insurance requirements outlined in the Request for Proposals dated March 17, 2010” (Service Contract Between Holland and P&N, 2). Article 11.2 also provided that “[t]he documents constituting the contract between the Consultant [P&N] and the Owner [Holland] shall include the following: . . . 11.2.3) Request for Proposals (RFP) dated March 17, 2010 consisting of 15 pages” (Service Contract Between Holland and P&N, 3).

Holland’s March 17, 2010 request for proposals for water system improvements engineering services included insurance specifications that would cover the project (Request for Proposals for Water System Improvements Engineering Services, Insurance Specifications, March 17, 2010, attached as Exhibit 23 to Grand River and Hartford’s Brief in Support of Grand River and Hartford’s Motion for Summary Disposition). Article 1, general provisions, provided:

Except as otherwise specified in this Agreement, the Consultant and its subcontractors will be required, at their own expense, to maintain in effect at all times during the performance of the Work insurance coverage with limits not less than those set forth below. It shall be the responsibility of the Consultant to maintain such insurance coverage and to endeavor to assure that its subcontractors are insured at all times as required herein. Failure of the Consultant to maintain coverage as required herein shall not relieve it of any contractual responsibility or obligation and shall constitute a breach of the Agreement.

* * *

Any insurance carried by the OWNER which may be applicable shall be deemed to be excess insurance and the Consultant’s insurance primary for all purposes despite any conflicting provision in the Consultant’s policies to the

contrary. [Request for Proposals for Water System Improvements Engineering Services, Insurance Specifications, 11.]

Article 3, “additional insured,” provided that “[g]eneral liability, auto, and umbrella insurance coverage furnished under this Agreement shall include the City of Wyoming, City of Holland, Holland Board of Public Works and their directors, officers, agents and employees shall be named as additional insureds with respect to the activities of the Consultant and its subcontractors” (Request for Proposals for Water System Improvements Engineering Services, Insurance Specifications, 12). Article 7, “comprehensive general liability,” provided:

This insurance shall be an “occurrence” type policy written in comprehensive form and shall protect the Consultant and the additional insureds against all claims arising from bodily injury, sickness, disease, or death of any person other than the Consultant’s employees or damage to property of the OWNER or others arising out of any act or omission of the Consultant or its agents, employees, or subcontractors.

If the Consultant's Work, or Work under its direction, requires blasting, explosive conditions, or underground operations, the comprehensive general liability coverage shall contain no exclusion relative to blasting, explosion, collapse or structures, or damage to underground property.

Article 8, “umbrella liability policy,” provided:

This insurance shall protect the Consultant and the additional insureds against all claims in excess of the limits provided under the employer’s liability, comprehensive automobile liability, and comprehensive general liability policies. The liability limits of the umbrella liability policy shall not be less than \$5,000,000. The policy shall be an “occurrence” type policy. (If the limits of the employer's liability, comprehensive automobile liability, and comprehensive general liability policies are each not less than \$5,000,000, a separate umbrella liability policy shall not be necessary.) [Request for Proposals for Water System Improvements Engineering Services, Insurance Specifications, 13-14.]

Accordingly, Holland’s contract with P&N required that P&N maintain CGL insurance and an umbrella liability policy that would provide additional liability coverage to P&N. However, those policies have not been provided to this Court. While Grand River and Hartford speculate that damages to the interconnect facility were “likely covered under insurance policies provided by” P&N (Grand River and Hartford’s Brief for Summary Disposition, 10), Grand River and Hartford have failed to meet their initial burden to provide documentary evidence in support of summary disposition on this ground. *Grandberry-Lovette*, 303 Mich App at 581.

Moreover, assuming P&N's CGL policy is similar to the policies maintained by Grand River and Allied, P&N's CGL coverage would not be "property insurance" under 5.07 of the general conditions portion of the contract between Grand River and Holland because the CGL coverage would not indemnify against property damage to the interconnect facility. And, an umbrella liability policy purchased by P&N in accordance with Article 8 of the request for proposals would merely provide additional liability coverage for P&N, and would not constitute "property insurance" under 5.07 of the general conditions portion of the contract between Grand River and Holland because the umbrella liability coverage would not indemnify against property damage to the interconnect facility.

In sum, Grand River and Hartford fail to provide documentary evidence of "property insurance" that covered the perils or causes of loss, such that the waivers under Paragraphs 5.07.A or 5.07.B of the general conditions of the contract between Holland and Grand River would bar plaintiffs' claims. Because Grand River and Hartford are not entitled to judgment as a matter of law, grant of summary disposition under MCR 2.116(C)(10) to them in regard to this issue is inappropriate. *Nuculovic*, 287 Mich App at 61.

Plaintiffs raise several alternative arguments regarding why, even if the waivers under Paragraphs 5.07.A and 5.07.B of the general conditions of the contract between Holland and Grand River apply, they do not bar recovery of damages in this case. First, plaintiffs note that Michigan caselaw provides that "one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007) (citations omitted). However, this rule does not apply here because while Grand River breached its contract with Holland as discussed *supra*, its arguments related to waiver are not an action against Holland for subsequent breach of contract or a failure to perform. Instead, Grand River and Hartford's arguments related to waiver under Paragraphs 5.07.A and 5.07.B of the general conditions of the contract between Holland and Grand River simply attempt to raise a defense against plaintiffs' claims against them.

Plaintiffs also argue that the doctrine of equitable estoppel applies to bar the application of the waivers under Paragraphs 5.07.A and 5.07.B of the general conditions. Equitable estoppel

may be applied to prevent “one party to a contract from enforcing a specific provision contained in the contract.” *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998).

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. [*West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998).]

Here, plaintiffs argue that equitable estoppel applies because Grand River was contractually required to maintain builder’s risk insurance, Grand River failed to maintain that insurance, Grand River did not inform plaintiffs that it allowed the insurance to lapse, and the builder’s risk insurance Grand River was supposed to maintain would have covered the collapse of the interconnect facility (Plaintiffs’ Brief in Opposition of Grand River and Hartford’s Summary Disposition Motion, 9-10). However, while Grand River’s apparent silence regarding its act of allowing the builder’s risk insurance to lapse may have intentionally or negligently induced plaintiffs to believe that the insurance was still active, there is no indication that plaintiffs acted on that belief. The waiver provisions under Paragraphs 5.07.A and 5.07.B of the general conditions of the contract between Holland and Grand River that plaintiffs argue Grand River and Hartford should be barred from enforcing were approved by Holland before Grand River allowed the builder’s risk insurance to lapse on December 31, 2012. For that reason, equitable estoppel does not apply in this case to bar the application of the waiver provisions under Paragraphs 5.07.A and 5.07.B of the general conditions. *West American Ins Co*, 230 Mich App at 310.

Finally, plaintiffs argue that any waiver does not apply to Grand River’s liability for its failure to maintain builder’s risk insurance (discussed *supra*) (Plaintiffs’ Brief in Opposition of Grand River and Hartford’s Summary Disposition Motion, 10). Again, the plain language of Paragraph 5.07.A of the general conditions provided that Holland waived “all rights” against Grand River for damages caused by “perils or causes of loss” covered by (1) “such policies” “purchased in accordance with Paragraph 5.06” or by (2) “any other property insurance applicable” to the interconnect facility. The plain language of Paragraph 5.07.B.2 provided that Holland waived “all rights” against Grand River for damages caused by “fire or other insured peril or cause of loss” that was covered by “any property insurance maintained” regarding the

interconnect facility. Accordingly, plaintiffs are correct that their claim, that Grand River breached the contract between it and Holland when it failed to maintain builder's risk insurance, is not barred by the plain language of the waiver provisions in Paragraphs 5.07.A and B of the general conditions of the contract because the "cause of loss" (failure to maintain builder's risk insurance) would not be covered by "property insurance" under Paragraphs 5.07.A and Paragraph 5.07.B.2.

Whether Hartford Breached Its Performance Bond

Plaintiffs argue that Hartford agreed to a performance bond which required it to perform Grand River's contractual obligations if Grand River did not perform them. Plaintiffs argue that because they are entitled to summary disposition regarding their claims against Grand River, there is no genuine issue of material fact that Hartford failed to perform under its performance bond. (Plaintiffs' Brief, 24-25.)

In *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 628; 839 NW2d 693 (2013), the Michigan Court of Appeals summarized Michigan law as it relates to a performance bond:

A performance bond assures completion of a project in the event of default by the general contractor. The performance bond contract is a suretyship contract, which involves a principal, an obligee, and a surety. A surety is one who undertakes to pay money or take any other action if the principal fails therein. The liability of a surety is limited by the scope of the liability of its principal and the precise terms of the surety agreement. [Citations and quotations omitted.]

"[A] surety is only liable for the amount of the performance bond." *Id.* at 629. The Court of Appeals also recognized that "MCL 129.201 provides that a performance bond must be provided by a principal contractor before construction can begin on any public building project exceeding \$50,000 in value." *Id.* at 628.

In this case, Grand River and Hartford contracted for Hartford to provide Grand River with a performance bond in the amount of \$1,290,000 (Performance Bond Between Grand River and Hartford, page 1, attached as Exhibit 5 to Plaintiffs' Brief). Paragraph 1 of the performance bond provided that if Grand River performed its contract with Holland, Hartford would have no obligation under the bond (Performance Bond Between Grand River and Hartford, 1). Paragraph

2 of the performance bond provided for the procedure Holland would need to follow to notify Hartford of Grand River's failure to perform its contract with Holland (Performance Bond Between Grand River and Hartford, 2). Paragraph 3 of the performance bond outlined Hartford's options after it was notified of Grand River's failure to perform its contract with Holland, including arranging for the completion of Grand River's contract with Holland and paying its liability to Holland under the performance bond (Performance Bond Between Grand River and Hartford, 3).

On May 9, 2014, Holland requested that Hartford perform on the performance bond it issued to Grand River (Request for Performance to Hartford, May 9, 2014, attached as Exhibit 23 to Plaintiffs' Brief). Rather than arrange for the completion of Grand River's contract with Holland or paying its liability to Holland under the performance bond, Hartford continues to deny that it is liable under the performance bond. Hartford argues that plaintiffs are not entitled to summary disposition against Grand River, and that, therefore, plaintiffs are not entitled to summary disposition against it under the terms of the performance bond. (Grand River and Hartford's Brief in Opposition to Plaintiffs' Summary Disposition Motion, 1 n 1.)

Hartford's argument is consistent with the legal principle that a surety's liability under a performance bond is limited by the scope of the principal's liability. *Northline Excavating, Inc*, 302 Mich App at 628. However, the court concludes above that plaintiffs are entitled to summary disposition against Grand River regarding its claims that Grand River breached its contract with Holland when it allowed the builder's risk policy required under the contract to lapse, and that Grand River breached its contract with Holland when it failed to honor its warranty after Grand River's work was found to be defective. As a result, the court concludes that Hartford is also liable for those claims under its performance bond. *Id*. Because there is no genuine issue of material fact regarding Hartford's liability under its performance bond regarding the two breach of contract claims described above and plaintiffs are entitled to judgment as a matter of law, summary disposition is appropriate under MCR 2.116(C)(10) regarding Hartford's liability for those breaches. *Nuculovic*, 287 Mich App at 62.

However, as discussed *supra*, there is a genuine issue of material fact regarding whether Grand River's breach of contract when it proposed using the Megalug restraint with a plain end reducer fitting without verifying and determining the suitability of using that material caused the

failure of the underground joint in this case. Accordingly, there remains a genuine issue of material fact regarding Hartford's liability for that breach. *Id.*

Conclusion

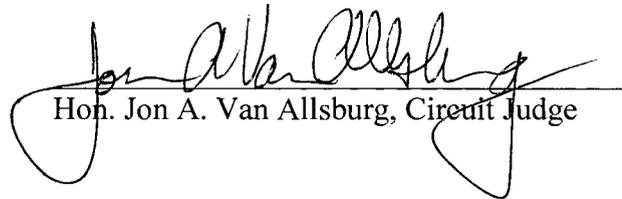
For the reasons stated above, the court denies Grand River and Hartford's motion for summary disposition pursuant to MCR 2.116(C)(10).

Additionally, this court grants plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10) on the grounds that Grand River breached its contract with Holland when it allowed the builder's risk policy required under the contract to lapse, Grand River breached its contract with Holland when it failed to replace the interconnect facility after Grand River's work was found to be defective, and Hartford breached its performance bond.

However, this court denies plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10) on the grounds that Grand River breached its contract with Holland when it proposed using the Megalug restraint with a plain end reducer fitting without verifying and determining the suitability of using those materials and that P&N breached its contract with Holland when it approved the use of the plain end reducer fitting with the Megalug restraint despite a manufacturer's warning against that application of the Megalug restraint because there is a genuine issue of material fact regarding whether those breaches were the proximate cause of plaintiffs' damages.

IT IS SO ORDERED.

Dated: May 31, 2016


Hon. Jon A. Van Allsburg, Circuit Judge