S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RYAN C. LYNN,

Plaintiff,

v

DETROIT EDISON,

Defendant/Cross Plaintiff-
Appellee/Cross Appellee,

and

COMCAST CABLEVISION OF TAYLOR, INC.,

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

and

LAPP INSULATOR CO.,

Defendant,

and

COMMUNICATION CONSTRUCTION GROUP,
INC.,

Third Party Defendant-Appellant,

and

ROYAL INSURANCE COMPANY OF
AMERICA a/k/a GLOBE INDEMNITY CO.,

Third Party Defendant,

and

UNPUBLISHED
May 23, 2006

No. 258942
Wayne Circuit Court
LC No. 99-903498-NO

FEDERAL INSURANCE CO.,

Third Party Defendant-Cross Appellee.

COMCAST CABLEVISION OF TAYLOR,

Plaintiff/Counter Defendant-Appellee/Cross Appellant,

v

ROYAL INSURANCE COMPANY OF AMERICA a/k/a GLOBE INDEMNITY CO.,

Defendant,

and

FEDERAL INSURANCE CO.,

Defendant-Cross Appellee,

and

COMMUNICATIONS CONSTRUCTION GROUP, INC.,

Defendant/Counter Plaintiff-Appellant,

and

AMERICAN & FOREIGN INSURANCE,

Defendant/Cross Appellee.

No. 258943
Wayne Circuit Court
LC No. 00-020276-CK

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In these consolidated cases involving contractual indemnity and insurance coverage, third-party defendant Communication Construction Group, Inc. (CCG) appeals by right the trial court's grant of certain motions for summary disposition and the denial of other motions, which

imposed sole liability on CCG for $3,150,000 in settlement contributions[1] in the underlying personal injury action. We affirm in part, reverse in part, and remand for further proceedings.

I

These consolidated actions arise out of a personal injury accident in which plaintiff was severely injured while working on a utility pole owned by Detroit Edison. Plaintiff was employed by CCG, a subcontractor of Comcast, and was injured while servicing cable lines for Comcast on a portion of the utility pole that Comcast had leased from Edison. Plaintiff suffered severe injuries when a power line insulator manufactured by defendant Lapp Insulator Company failed, causing the power line to fall unto plaintiff.

Before the accident, Comcast had entered into an agreement to indemnify Edison. The agreement required Comcast to indemnify Edison for any damages arising out of Comcast's use of the utility poles, except damages that were the result of the sole negligence of Edison. CCG in turn, had executed a broad agreement to indemnify Comcast.[2]

The third party insurance defendants are all the insurers of named insured CCG.[3] American and Foreign Insurance ("A & F") is CCG's primary carrier, and Federal Insurance Company ("Federal") provides excess coverage based on the coverage provisions of A & F's policy.

Plaintiff sued Edison and Lapp Insulator. Edison, in turn, filed a claim against Comcast; and Comcast, in turn, filed an action against CCG. In addition, Comcast filed a complaint for declaratory judgment against CCG's insurers, seeking a declaration that Comcast was covered as an additional insured under CCG's insurance policies.

The parties settled the underlying action with defendants' agreement to pay plaintiff the following amounts: Lapp Insulator, $1,100,000; Edison, $1,712,500; Comcast, $856,250; and CCG, $581,250 and waiver of its worker's compensation lien of $275,000. This appeal concerns the trial court's resolution of the parties' claims amongst each other on the basis of the indemnity and insurance contracts.

Issuing a 33-page opinion, the trial court concluded that (1) Comcast was required to indemnify Edison on the basis that the actions of Comcast and its insurer, Sentry Insurance, in the underlying action violated the duty to defend Edison, and, therefore, Comcast was estopped

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[1] An additional $1.1 million was contributed by defendant Lapp Insulator Company, which is a nonparty in this appeal.

[2] For ease of reference, this opinion refers to the Pole and Conduit Use Agreement between Edison and Comcast, as the "Pole Use Agreement" (PUA), and refers to the Management Construction Agreement between Comcast and CCG as the "Upgrade Agreement" (UA).

[3] Royal Insurance Company of America and Globe Indemnity Company are parties named in the proceedings below only in conjunction the interests of American and Foreign Insurance as primary insurers of CCG, and they are not involved in this appeal.

from asserting the sole negligence of Edison as an exception to the otherwise broad agreement to indemnify Edison; (2) CCG was required to indemnify Comcast, both for Comcast's payment to plaintiff and Comcast's obligation to reimburse Edison, notwithstanding CCG's argument that the alleged sole negligence of Edison relieved it of its broad agreement to indemnify Comcast; and (3) the insurers of CCG were not liable on their insurance contracts because the insurance coverage was for tort liability for bodily injury and the obligations of CCG and Comcast were based on their contract obligations under the indemnity agreements. The trial court also dismissed CCG's claim of implied indemnity against Edison. CCG filed a claim of appeal, and Comcast filed a cross appeal.[4]

II

This Court reviews de novo the grant or denial of a motion for summary disposition. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). Motions for summary disposition under MCR 2.116(C)(8) test the legal sufficiency of a complaint. *Id*. All well-pleaded allegations must be accepted as true and construed in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion must be granted if no factual development could possibly justify recovery. *Id*.

Summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). A motion under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.*; *Grand Trunk W R, Inc v Auto Warehousing Co,* 262 Mich App 345, 349-350; 686 NW2d 756 (2004). The court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.* at 350.

> A party opposing a motion for summary disposition has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. "'Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.'"
>
> The proper interpretation of a contract is also a question of law that this Court reviews de novo. Indemnity contracts are construed in accordance with the general rules for construction of contracts. Where the terms of a contract are unambiguous, their construction is a matter of law to be decided by the court. [*Id*. (citations omitted).]

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[4] Because the underlying action and the declaratory action were consolidated in the trial court, the appeals are separately docketed. Docket No. 258942 reflects the appeal of the underlying action. Docket No. 258942 reflects the appeal of the declaratory action.

If an indemnity contract is ambiguous, the intent of the parties is a question for the trier of fact. *Badiee, supra* at 351. An indemnity contract must be construed strictly against the drafter and against the indemnitee; however, the contract must also be construed to give effect to the intention of the parties. *Id*. at 352.

III

Contrary to CCG's argument on appeal, and Comcast's argument on cross-appeal, we find no error in the trial court's ruling that Comcast was estopped from claiming a defense of sole negligence or gross negligence in response to Edison's claim for indemnity based on the PUA. Accordingly, the parties' claims of error concerning sole negligence and gross negligence are irrelevant.

Although the rules governing contractual indemnity are derived primarily from insurance and construction cases, the duty to defend under contractual indemnity law and insurance law is not the same. "Where parties have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined from the language of the contract." *Grand Trunk W R, supra* at 353. A "duty to defend" expressed in a contract for indemnity is determined by the terms of the contract, and, thus, is generally coincident with the duty to indemnify. *Id*.

In the area of insurance law, however, the duty to defend and the duty to indemnify are separate and distinct. *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 506; 362 NW2d 767 (1984); see also *Grand Trunk W R, supra* at 353. The duty to defend is broader than the duty to indemnify. An insurer's duty to defend extends to those cases in which the allegations in the complaint filed against the insured "*even arguably* come within the policy coverage." *Illinois Employers Ins, supra* at 506, quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980) (emphasis in original). As a general rule, any doubt regarding the extent of coverage must be resolved in the insured's favor. *Illinois Employers Ins, supra* at 506.

In this case, the fact situation is complicated by the joint undertaking of Edison's defense by Comcast and Sentry, the contractual indemnitor and its insurer, which may be viewed as having differing defense obligations under the above principles. Nonetheless, Sentry's actions with regard to Edison's defense were taken on behalf of Comcast, and Comcast did not repudiate Sentry's handling of the defense or otherwise distinguish its duty from that of Comcast's. Comcast should not now be heard to complain that its duty to defend was separate, distinct, and more limited, than Sentry's duty to defend.

The indemnity agreement between Edison and Comcast under the PUA, Article XI C, states:

> [COMCAST] shall indemnify, protect, defend, and save harmless EDISON from and against any and all claims and demands for damages to property and injury or death to persons … which may arise out of or [be] caused by the erection, maintenance, presence, use or removal of said attachments or by the proximity of the respective cables, wires, and appurtenances of EDISON, [COMCAST] and other authorized users, or by an act of [COMCAST] on or in the vicinity of EDISON'S poles, except [COMCAST] will not be liable under this

> clause for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of EDISON as required under Public Act 165 of 1966 [MCL 691.991]. In addition, [COMCAST] shall indemnify, protect, defend and hold harmless EDISON against any and all claims, demands and liabilities of whatsoever nature arising out of this Agreement.

It is undisputed that after Lynn filed his claim against Lapp and Edison, Edison sought indemnification from Comcast under the above agreement and tendered the defense to Comcast. Sentry accepted the tender of defense in August 1999, but in November 2002, after having conducted the defense through Edison's attorney, Michael Hutchinson, for more than two years, Sentry withdrew its defense on behalf of Comcast.

The trial court concluded that where Comcast's agent, Sentry, waited more than a year to assert a coverage defense, and even indicated a willingness to indemnify after acknowledging the defense of sole negligence, Comcast is estopped from asserting defenses on the contract, i.e., defenses of sole negligence and gross negligence. We agree.

The general rule is that if an insurer unjustifiably violates the duty to defend, the insurer is bound by any good faith, reasonable settlement made by the insured in an action brought against him by the injured party. *Detroit Edison, supra* at 144. An insurer has two options in response to a tender of defense:

> It can undertake the defense with notice to the insured that it is reserving the right to challenge its liability on the policy. The second alternative for the insurer is to repudiate liability, refuse to defend and take its chances that there will be a showing that there is no coverage for the insured's liability. [*Van Hollenbeck v Ins Co. of North America,* 157 Mich App 470, 480; 403 NW2d 166 (1987), quoting *Detroit Edison Co, supra* at 145.]

However, an insurer with a duty to defend may be estopped from denying coverage if, with knowledge or means of ascertaining a defense, the insurer participates in the defense of the insured for an unreasonable time and fails to provide timely notice of intent to disclaim liability. *Meirthew v Last,* 376 Mich 33, 39; 135 NW2d 353 (1965); *Multi-States Transport, Inc v Michigan Mut Ins Co,* 154 Mich App 549, 553-554; 398 NW2d 462 (1986). Moreover, notice of a reservation of rights that is vague and uncertain, is legally insufficient because the lack of a specific reference to the basis of the reservation of rights, e.g., a specific policy clause, suggests bad faith. *Meirthew, supra* at 38.

Edison tendered its defense based on Comcast's agreement to indemnify Edison under the PUA. In response, in a letter to Hutchinson on August 16, 1999, Sentry stated that the contract between Edison and Comcast required Comcast to defend and indemnify Edison for losses arising out of cable operations on Edison's poles unless Edison was found to be solely negligent. Further, Edison's "[t]ender of the claim was rejected as investigation revealed a potential for sole negligence on Detroit Edison." However, the letter stated that Edison had since filed a third-party complaint against Comcast alleging breach of contract and seeking common law and contractual contribution and indemnity, and thus Sentry would conditionally accept the tender of defense:

> On behalf Comcast, we have requested Detroit Edison dismiss the breach of contract allegation. We will then accept the tender of defense and indemnification of Detroit Edison in this matter. We are asking that you defend both Detroit Edison and Comcast in the Lynn lawsuit.

The letter also requested that Hutchinson pursue a third-party complaint against CCG alleging breach of contract and seeking contractual indemnity and contribution, and a declaratory judgment action against CCG's insurer.

Following Sentry's August 1999 letter, Edison dismissed its third-party complaint against Comcast as requested, and thereafter Sentry directed the defense of Comcast and Edison through Hutchinson. Contrary to Comcast's assertions, Sentry and Comcast did not merely pay the defense costs.[5]

Subsequently, after a joint defense of Comcast and Edison had been in place for more than two years, Sentry tendered back the defense and indemnification to Edison for all claims relative to the Lynn case in a November 2, 2000 letter to Edison from the Sentry claims specialist. Given the joint defense strategy demanded by Sentry and Comcast after accepting Edison's tender of defense, and Sentry's control of the defense and instructions regarding assigning fault to parties other than Comcast, the trial court properly estopped Comcast, who acted jointly with Sentry, from denying liability for indemnity on the basis of sole negligence or gross negligence.

Any argument that estoppel should not apply because Edison was not prejudiced is without merit given the joint defense for more than two years. The presumption of prejudice is not rebutted under these circumstances. Sentry had the option of accepting Edison's tender of defense with a reservation of rights concerning the issue of sole negligence, which would have put Edison on notice that a conflict of interest remained between Comcast and Edison. Instead, Sentry accepted the tender of defense acknowledging that it had already investigated the sole negligence defense.

Comcast's claim that estoppel should not apply because Comcast and Sentry only learned of the sole negligence defense after undertaking Edison's defense because Edison secreted the crucial facts is unpersuasive. There is no showing that Edison was obligated to provide information to Comcast and Sentry concerning Edison's negligence or breached a duty in failing to divulge this information.

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[5] Sentry issued specific instructions to Hutchinson concerning defense strategies. As the trial court noted, an internal Sentry email sent August 21, 2000, by the claims specialist who authored the August 1999 letter, instructed another Sentry employee to "call off your defense attorney on apportioning any liability to Comcast for their failure to notify Edison of work being done." The email identified "we" with "Comcast" in parentheses and stated that Edison should not be defending "themselves" at the expense of Comcast, and that Edison instead should continue to place blame on Lapp or the employer, CCG, as the at-fault parties. Comcast's claim that it merely paid the bills for Hutchinson's services is disingenuous, at best.

As the trial court noted, and as Comcast argues on cross-appeal against CCG's insurers, where an insurer's duty to defend involves a conflict of interest, it engenders an obligation to provide independent counsel. Comcast and Sentry failed to acknowledge any conflict of interest, relied instead on a joint defense by Hutchinson with direction from Sentry, and Comcast therefore is wholly responsible for its own waiver of any defenses to indemnity.

Moreover, given the facts in this case, we do not find the defenses of sole negligence or gross negligence viable. As noted above, Sentry and Comcast premised their defense strategy on attributing liability for Lynn's claims to Lapp or CCG, which undermines any claim that Lynn's injuries resulted from the sole negligence of Edison. Further, Lapp has clearly assumed a share of the fault for the injury. Comcast and CCG have failed to show a triable issue of fact concerning sole negligence.

Likewise, given the standard for gross negligence, they have failed to show a triable issue of fact concerning gross negligence. The standard for gross negligence requires a showing of willful and wanton misconduct. "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Boumelhem v BIC Corp,* 211 Mich App 175, 187; 535 NW2d 574 (1995), quoting *Burnett v City of Adrian*, 414 Mich 448, 45; 326 NW2d 810 (1982).

CCG's remaining challenges to the trial court's ruling are without merit. In particular, any argument that Edison holds a monopoly on the use of its utility poles and that Edison used that monopoly to extract an unreasonable contract lacks merit given that both parties to the agreement are sophisticated business entities. Comcast cannot avoid its liability for indemnity on the ground that the PUA is unenforceable because it is essentially an adhesion contract.

Accordingly, the trial court did not err in concluding that Comcast was obligated to indemnify Edison for its settlement with Lynn. The court properly granted Edison's motion for summary disposition.

IV

CCG argues that the trial court erred in determining that CCG was obligated to indemnify Comcast for its payments to settle the underlying lawsuit and related defense costs, and for Comcast's liability to indemnify Edison. Although the UA provides for broad indemnity, we conclude that the agreement does not encompass "upstream indemnity," such that CCG is automatically liable for Comcast's voluntary contractual indemnity to Edison. However, the language does encompass indemnity liability for Lynn's claims against Comcast, and thus CCG is liable for indemnification with respect to Comcast's settlement with Lynn.

CCG argues that the trial court erred in holding CCG liable for Comcast's contractual indemnity of Edison, particularly since liability was based on estoppel. Although the language of the UA is of the broadest nature, we conclude that the language does not encompass liability for upstream indemnity.

The indemnification provision of the UA, section 15.1, between Comcast and CCG provides:

> CONTRACTOR shall indemnify, defend and hold harmless OWNER, its employees and agents, from and against:
>
> * * *
>
> b. All claims, liability, fines, penalties, damages, losses, costs, expenses, action, suits, judgments and executions (including but not limited to attorneys' fees) arising from or in connection with: a) the Work; b) the entry upon or possession of a work site by CONTRACTOR; c) The acts or omissions of CONTRACTOR, any Subcontractor or the agents, employees, invites (sic) of CONTRACTOR or any other person for whom CONTRACTOR or any Subcontractor is responsible. . . .

With regard to insurance, the UA further provides in Exhibit D, section 1.7:

> The CONTRACTOR shall, at its sole cost and expense, indemnify, save, hold harmless and defend the OWNER, its employees, servants, and agents against any and all liens, charges, claims, demands, suits, actions, fines, penalties, losses, cost (including, but not limited to, legal fees and court costs), judgements (sic), injuries, liabilities, and damages in law or equity, of any and every kind and nature whatsoever (whether caused by or arising out of any act of omission or commission, or any negligence of the OWNER, its officers, servants, agents, employees), arising out of or in any way connected with the construction, installation, maintenance, condition, or dismantling of the SYSTEM or the CONTRACTOR'S failure to comply with Federal, State, or local law or regulation. CONTRACTOR shall indemnify owner against subcontractor wages or benefits.

Finally, the UA in section 15.2 states with regard to indemnification:

> CONTRACTOR'S legal liability to OWNER for any of the matters contained herein, including, without limitation the indemnification obligation set forth in this paragraph 15, shall not be limited by the insurance policies required hereunder or the recovery of any amount thereunder.

The trial court concluded that the broad language of the indemnification provision required CCG to indemnify Comcast for its settlement with Lynn. The court observed that in agreeing to indemnify Comcast, CCG agreed to "indemnify, defend and hold harmless" Comcast from "[a]ll claims, liability . . . damages, losses, costs . . . (including but not limited to attorneys' fees) arising from or in connection with . . . the Work." Moreover, CCG agreed to indemnify Comcast for "all claims . . . arising from or in connection with . . . the entry upon or the possession of a work site by" CCG. The court reasoned that the fact that Lynn was at the accident site because he was doing work for CCG is sufficient to show that he was injured in a manner "arising from or in connection with . . . the Work" and that the claim arises from the entry of CCG, contractor, upon the work site.

We find no error in the court's general reasoning and conclusion. The language of the agreement encompasses CCG's indemnification and defense of Lynn's claims against Comcast. Any requirement of a "causal connection" between Lynn's injuries and CCG's work does not alter the above analysis and does not preclude a conclusion that Lynn's injuries are encompassed under the language of the UA. See *People v Johnson*, ___ Mich ___; ___ NW2d ___ (Docket No. 127525, issued March 23, 2006) slip op, p 5 ("arising out of" is generally defined to suggest a causal connection between two events of a sort that is more than incidental).

However, we disagree with the trial court's further conclusion that the broad language of the UA indemnification provision required that CCG indemnify and defend Comcast for its contractually assumed liability to Edison under the PUA. Despite the broad language in the UA regarding indemnification, the indemnity owed by CCG is not without limitation. Indemnification pertains only to claims arising from or in connection with the work, the entry upon or possession of a work site by CCG, or the acts or omissions of CCG. Likewise, under the insurance provision, the obligation to indemnify and defend Comcast pertains to liability "arising out of or in any way connected with the construction, installation, maintenance, condition, or dismantling of the SYSTEM . . . ." We agree with CCG that Comcast's liability for Edison's settlement with Lynn arises out of Comcast's contractual liability for indemnification, not the work undertaken by CCG. The liability is not connected with the work under the UA. Absent Comcast's voluntary contractual agreement with Edison, liability for Edison's contribution would not be attributed to CCG because is unconnected to CCG's conduct or performance under the UA. Moreover, the circumstances of this case, in which Comcast was found liable based not necessarily on its contractual indemnity obligation to Edison, but instead on the basis of a breach of its duty to defend Edison, is further reason to preclude any implicit assumption of third-party contractual liability in an indemnity agreement.

The language of the indemnity agreement between Comcast and CCG is broad, but nevertheless is unambiguously limited to the nature of the subcontract work being performed by CCG, and does not encompass Comcast's indemnity liability assumed under a contract with a third party. The trial court erred in passing through to CCG, Comcast's liability for Edison's settlement with Lynn.

V

CCG argues that any express indemnity in this case does not preclude CCG's implied indemnity claim against Edison. We disagree. CCG's action for implied indemnity fails because CCG is not seeking indemnity for passive negligence or vicarious liability. CCG is seeking indemnity on the basis of CCG's contractual liability.

"An implied contract of indemnity or common-law indemnity may arise when the wrongful act of one person results in the imposition of liability on another." 18 Michigan Law & Practice, Indemnity, § 4, p 370.

> Michigan recognizes an implied agreement as an identifiably separate area of indemnity law relating to allocation of responsibility for loss. Also known as common-law indemnity, it is an equitable doctrine that developed as an exception to the harsh rule that tortfeasors were not entitled to apportion damages or shift liability between themselves through contribution or indemnification. Common-

> law indemnity is only available to compensate a party held vicariously liable to another through no fault of his or her own. Under an implied agreement, whenever the wrongful act of one person results in liability that is imposed on another, the latter may have indemnity from the person actually guilty of the wrong. A party who settles a claim without a judgment may not seek indemnification from an alleged common-law indemnitor. Similarly, an indemnitee who is found not liable cannot obtain indemnification from an alleged common-law indemnitor. A party whose liability is based on an indemnification contract may not seek common-law indemnification from a third party, because the liability does not arise by operation of law. [*Id*., pp 370-372.]

The trial court ruled that CCG's claim for implied indemnity failed in light of the express indemnity agreements, noting that parties are generally free to allocate indemnity as they wish, and, therefore, express agreements to indemnify supersede principles of implied indemnification.

Edison correctly argues that a claim of implied indemnity may not be pursued if liability exists on the basis of express indemnity. *Pritts v JI Case Co,* 108 Mich App 22, 37; 310 NW2d 261 (1981). CCG's claim of implied indemnity against Edison is premised on CCG's liability under its contract with Comcast. Accordingly, the express contract defeats any claims of implied indemnity.

Further, as Edison observes, common-law or implied indemnity requires that the party seeking indemnification be without fault, and its liability must arise by operation of law. *Id.* at 37; see also Michigan Law & Practice, *supra* at 370-374. CCG cites no authority in support of its arguments that it is entitled to pursue implied indemnification against Edison, i.e., because its liability arises by operation of law. An appellant may not merely announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Nor may an appellant merely give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). The trial court did not err in granting summary disposition of CCG's implied indemnity claim in favor of Edison.

VI

On cross-appeal, Comcast argues that the trial court failed to adhere to the requirements of MCR 2.116 in making its factual findings. We find Comcast's arguments concerning the court's factual findings without merit. To the extent that the challenged findings were dispositive of the issues, the court properly viewed the facts in the light most favorable to Comcast.

Comcast's arguments are repetitive of its arguments of the substantive issues and the court's dispositive rulings. As discussed above, the gross negligence/sole negligence challenge is irrelevant because the trial court properly found that Comcast was estopped from raising these defenses. Further, the record does not support Comcast's challenge to the findings concerning estoppel. As discussed above, Comcast is properly charged with Sentry's conduct concerning Edison's defense because Sentry was acting on behalf of Comcast, and Comcast at no point

disclaimed Sentry's actions. Other than the email, which we find properly attributed to Comcast as well as Sentry, the other alleged errors are not germane to the analysis or disposition of the outcome.

VII

Comcast argues that the trial court erred in applying the doctrine of equitable estoppel to Comcast, but not to Edison and the insurance defendants under the same undisputed facts. The court's application of estoppel principles was not inconsistent with respect to Edison's claim against Comcast or with respect to Edison. To the extent there was an inconsistency with respect to CCG's defense of Lynn's claims against Comcast, any error does not affect the outcome.

Comcast argues that by granting summary disposition to CCG and its insurers, A & F and Federal, that the trial court committed clear legal error by applying the same legal principle in a different manner, depending on which party was asserting it. Comcast advances a number of claims with respect to this issue, including a repetition of its argument above that the trial court erred in holding that Comcast was estopped from asserting the defenses of sole negligence and gross negligence because Comcast and Sentry breached the duty to defend Edison. As discussed above, we find no error in the court's estoppel ruling concerning Comcast and Sentry's defense of Edison.

Comcast also argues that because the CCG insurers breached their duty to defend Comcast in the same regard that the court found Sentry and Comcast to have breached the duty to defend Edison, the court erred in failing to estop CCG and its insurers from disclaiming liability to indemnify and defend Comcast for the claims against it. An insurer complies with the duty to defend when after a reservation of rights to contest its indemnity obligation, the insurer fully informs the insured of the nature of the conflict and selects independent counsel to represent the insured in the underlying litigation and the attorney is truly independent. *Central Michigan Bd of Trustees v Employers Reinsurance Corp,* 117 F Supp 2d 627, 634-635 (ED Mich, 2000); see also *Aetna Cas & Surety Co v Dow Chem Co,* 44 F Supp 2d 847, 860 (ED Mich, 1997).

As Comcast also notes, A & F initially conceded in writing that it owed at least a partial duty to defend and indemnify Comcast against the claims asserted by Lynn. To the extent that the insurers now argue on appeal that CCG has no duty to defend or indemnify Comcast for Lynn's claim, their arguments are contrary to their earlier position. However, even if CCG and its insurers breached a duty to defend Comcast with respect to its settlement with Lynn, given the conclusion above that CCG is liable for Comcast's settlement with Lynn and the associated defense costs, any issue of breach of the duty to defend is moot with respect to Comcast.

With regard to Comcast's claim for indemnity of its contractual obligation for Edison's claim, the respective insurers' duty to defend was not analogous, and thus the trial court's failure to apply estoppel to CCG's insurers was not inconsistent with its application of estoppel principles to Comcast and Sentry. The CCG insurers' conduct was not the equivalent of the actions by Sentry and Comcast. Unlike Comcast and Sentry, CCG's insurers did not withdraw their defense after unconditionally accepting the tender of defense as did Sentry and Comcast. From the outset, A & F disclaimed any obligation to indemnify or defend Comcast for its contractual liability to Edison. The June 26, 2000 letter to Comcast's attorney provides detailed

notice of A & F's position with regard to its reservation of rights and its disclaimer of liability. It was on that basis that Comcast rejected A & F's partial acceptance of the tender of defense. Accordingly, there was never any joint defense as there was in the Comcast-Edison situation, and no comparable basis for the application of estoppel. Moreover, estoppel cannot be used to obtain coverage where none exists. *Kirschner v Process Design Assoc, Inc,* 459 Mich 587, 593-594; 592 NW2d 707 (1999). Given our conclusion that no coverage exists for Comcast's claim with respect to Edison, estoppel cannot be applied to obtain coverage.

For the same reasons, we find no merit in Comcast's remaining argument that the court erred in failing to estop Edison from claiming any prejudice from Comcast's acceptance of its tender of defense. As discussed above, contrary to Comcast's argument, Edison cannot be viewed as having concealed crucial facts concerning its liability, to induce Comcast and Sentry to believe that the only issue was Edison's sole negligence and that such a finding was unlikely. The evidence established that Comcast and Sentry were aware of the defense of sole negligence at the time they accepted Edison's tender of defense, that they had investigated the defense, and nonetheless decided that the defense was without merit. Edison's conduct provides no basis for a claim of estoppel, particularly given that Edison complied with the conditions set forth by Comcast and Sentry for undertaking Edison's defense, including dismissing its third-party claim against Comcast and defending the Lynn litigation in accordance with Sentry's instructions.

VIII

Comcast argues that the court erred in granting summary disposition in favor of CCG's insurers because the insurance policies clearly and unambiguously provide coverage for the claims asserted against Comcast in the underlying action. Under the UA, and the A & F policy of insurance, CCG and its insurers had an obligation to indemnify and defend Comcast with respect to Lynn's claim against Comcast. However, no coverage is provided for Comcast's contractual indemnity of Lynn's claim against Edison.

As discussed above, we agree with Comcast's assertion that CCG's insurers, A & F, in particular, conceded that Lynn's claims against Comcast were covered under CCG's policy. Further, as discussed above, Lynn's claim against CCG is covered under the unambiguous language of the UA, and therefore, CCG and its insurers had a duty to defend Comcast with respect to this claim.

However, the trial court did not err in concluding that Edison's claim against Comcast was not covered under CCG's policies of insurance. The court reasoned that Comcast was not a named insured under the insurance policy and that Comcast's contractual liability to Edison did not fall under the exception to the exclusion for contractual liability, i.e., it was not an "insured contract."

Comcast is not a "named insured" under the policy at issue, nor is Edison, and thus the PUA is not an "insured contract." Comcast's argument that the UA is an insured contract and that it does not matter that the PUA is not also an insured contract is unavailing. Contrary to Comcast's argument, the notation "see endorsement" following the "named insured" identification of CCG clearly refers to the other named insureds on "Endorsement B," as noted by the trial court, which does not include Comcast. Accordingly, Comcast's contractual liability to Edison is not covered under the A & F policy. Because Federal's policy merely provides

excess coverage and "follows" the A & F policy provisions, the result is the same with respect to Federal.

Also contrary to Comcast's argument, the insurance policy is not ambiguous in regard to the "named insureds" or an "insured contract." The rule of construction requiring that the policy be construed in favor of coverage of the insured is inapplicable since no construction of the policy is necessary.

IX

In summary, with respect to CCG's liability for Comcast's contractual indemnity and the defense of Edison's claim against Comcast, the trial court erred in granting summary disposition in favor of Comcast. In all other respects, we affirm the trial court's decision concerning the parties' motions for summary disposition.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra