STATE OF MICHIGAN

COURT OF APPEALS

JORGE FERRER and KATHLEEN FERRER,

Plaintiffs,

v

COUNTY OF WAYNE,

Defendant/Third-Party Plaintiff,

and

WAYNE COUNTY AIRPORT AUTHORITY, successor in interest to WAYNE COUNTY,

Appellee,

and

WALBRIDGE ALDINGER CO.,

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

and

SA COMUNALE, INC.,

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

and

MAT FLEX, INC.,

Defendant/Cross-Defendant/Cross-Appellant,

and

RAPISTAN, INC.,

Defendant/Cross-Defendant,

UNPUBLISHED
July 1, 2014

No. 308921
Wayne Circuit Court
LC No. 99-923846-NZ

and

NORTHWEST AIRLINES,

Third-Party Defendant/Cross-Plaintiff/Appellee.

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Defendant, S.A. Comunale, Inc., appeals as of right the judgments against it entered in favor of Wayne County, Walbridge Aldinger Co., and Northwest Airlines. Defendant Mat Flex, Inc. and its successor in interest, Rapistan, Inc., appeal as of right the judgment entered in favor of S.A. Comunale against Mat Flex, Inc. on S.A. Comunale's cross-claim against Mat Flex, Inc. We vacate the trial court's award of attorney fees to Walbridge Aldinger Co. and affirm in all other respects.

This matter arises out of an incident in which plaintiff Jorge Ferrer ("Ferrer"), a Northwest Airlines pilot, was injured while traversing the International Terminal at Detroit Metropolitan Airport on December 24, 1998. On that date, a false fire alarm set off the terminal's fire suppression system, which consists of alarms, flashing lights, a sprinkler system, and the descent of fire doors. As one of the fire doors descended, it allegedly struck and injured Ferrer. Ferrer thus initiated suit against Wayne County. Relevant to the instant appeal, Ferrer also brought claims against Northwest Airlines ("NWA"), his employer; Walbridge Aldinger Co. ("Walbridge"), the primary contractor hired by NWA for the construction of the NWA addition of the building where the incident occurred; S.A. Comunale ("Comunale"), the subcontractor that designed, fabricated, and installed the fire suppression sprinkler system in the addition; and, Mat Flex, Inc. and its successor in interest, Rapistan, Inc. (hereafter "Mat Flex"), a subcontractor hired by Walbridge to install a baggage conveyor in the international terminal.

The theory of why the fire door descended changed somewhat throughout the litigation but it was ultimately believed that a fire suppression system sprinkler head became frozen due to cold air entering the international terminal building through a baggage conveyor opening at the exterior of the building. The freezing and subsequent thawing of the sprinkler head allegedly triggered a false fire alarm, setting the sprinklers off, which, in turn, caused the fire doors in the building to descend. Apparently, there is an electrical sensor system located within the pipes that carry water to the sprinkler system which monitors water flow. When a sprinkler begins to sprinkle water or if one of the pipes connected to the sprinklers ruptures, the sensor detects water flow and automatically sets off the fire responses. The freezing and thawing of the sprinkler head was alleged to have indicated water flow, which triggered the sensor and set off the fire responses, including the descent of fire doors.

Wayne County filed a third party complaint against NWA for indemnification. Wayne County and NWA each filed cross claims against Walbridge for contractual indemnification. Walbridge also filed cross-claims for contractual indemnification against Comunale and Mat

Flex, and Comunale filed a cross-claim against Mat Flex for equitable subrogation. Upon the parties' various motions for summary disposition, the trial court entered orders requiring Walbridge to indemnify NWA and NWA to indemnify Wayne County. Walbridge thus became the indemnitor of both NWA and Wayne County. The trial court thereafter entered an order requiring Comunale to indemnify Walbridge, Wayne County and NWA, and further ordered that Comunale must reimburse these parties for their attorney fees and costs expended in defending against the underlying action. The trial court additionally granted Walbridge's separate motion for summary disposition against Comunale for breach of contract and granted Walbridge's motion for summary disposition as to its claim for contractual indemnity from Mat Flex.

All parties to this appeal engaged in facilitation and each was able to reach a settlement with plaintiff, after which the trial court entered partial judgments in favor of Wayne County, Walbridge and NWA against Comunale.[1] Granting Comunale's application for leave to appeal, this Court remanded the matter back to the trial court to require Walbridge, NWA and Wayne County to demonstrate reasonableness of the settlements in accordance with controlling law. *Ferrer v Co of Wayne* unpublished opinion per curiam of the Court of Appeals dated June 16, 2005 (Docket No. 99-923846-NZ). At the conclusion of an evidentiary hearing, the trial court ruled that the settlements were reasonable. It thereafter granted Comunale's motion for summary disposition on its cross-claim against Mat Flex for equitable subrogation and ordered Mat Flex to share equally in the indemnification costs for which Comunale had previously been held responsible. The trial court entered separate judgments each in favor of NWA, Wayne County, and Walbridge against Comunale and another judgment in favor of Comunale against Mat Flex for one-half of the three judgments entered against Comunale.

I. Indemnification

On appeal, Comunale first contends that the trial court erred in granting summary disposition in favor of Walbridge, Wayne County, and NWA and requiring Comunale to indemnify them based upon the indemnity language in the Comunale-Walbridge subcontract. We disagree.

We review a grant of summary disposition de novo. *Peters v Dept of Corr*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30–31. We also review de novo issues of contract interpretation. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

This Court applies the same contract construction principles to indemnity contracts that govern any other type of contract. *Zahn v Kroger Co of Mich*, 483 Mich 34, 40; 764 NW2d 207

[1] All other parties not involved in this appeal having settled with plaintiff as well, plaintiff no longer had any claims pending.

(2009). A contract must be interpreted according to its plain and ordinary meaning. *St. Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). When the language of the contract is clear and unambiguous, interpretation is limited to the actual words used, and an unambiguous contract must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). 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 RR, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004).

If indemnity contracts are ambiguous, the trier of fact must determine the intent of the parties. *Badiee v Brighton Area Sch*, 265 Mich App 343, 351-52; 695 NW2d 521 (2005). "While it is true that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee, it is also true that indemnity contracts should be construed to give effect to the intentions of the parties." *Id*. at 351-352. The principle of construing an indemnity contract against the drafter, like any other contract, only applies where (1) an ambiguity exists and (2) all other means of construing the ambiguity have been exhausted. See *Klapp v United Insurance*, 468 Mich 459, 470-474; 663 NW2d 447 (2003).

At the time of summary disposition, plaintiff had alleged that a defect in the building, the overhead fire door, fire door protection system and/or its components caused the fire door to improperly descend upon plaintiff. Plaintiff alleged that Comunale had failed to properly design, manufacture, test, build and inspect the fire door, fire warning system and fire control system and breached warranties that the fire control system was fit for its intended purposes, free from defects, and of good quality. Plaintiff brought the same allegations against Walbridge.

The Walbridge-Comunale contract indemnification language at issue provides;

> ARTICLE XI – INDEMNITY: [Comunale] agrees to indemnify, defend and hold harmless [Walbridge] and the Owner and their agents and employees, from and against any claim, injury, damage, cost, expense or liability (including actual attorneys' fees), whether arising before or after completion of [Comunale's] Work caused by, arising out of, resulting from or occurring in connection with the performance of the Work or any activity associated with the Work, by [Comunale], its Sub-subcontractors, suppliers or their agents or employees, or from any activity of [Comunale], its Sub-subcontractors, suppliers or their agents or employees at the Site whether or not caused in part by the active or passive negligence or other fault of a party indemnified excepting only injury to person or damage to property caused by the sole negligence of party indemnified hereunder . . . .

According to Comunale, the language in the above indemnity provision means that Comunale agreed to indemnify and defend Walbridge not simply against a mere claim that an injury was casually related to Comunale's work, but for claims or injuries that were *actually* caused by, arose out of, resulted from or occurred in connection with its work. Comunale asserts that causal relation to its work is required to have been established before the indemnity/defend provision is triggered and that it was never established in this case.

However, Comunale's argument ignores the specific language in the indemnity provision. The provision provides that Comunale must indemnify Walbridge from and against any claim, injury, etc, "caused by arising out of, resulting from or occurring in connection with the performance of the Work or any activity associated with the Work . . . ." This broad language providing for indemnity for "any activity associated with" Comunale's work requires Comunale to indemnify Walbridge without regard to Comunale's fault; i.e., the claim or injury need not have actually been caused by, arose out of, resulted from or occurred in connection with Comunale's *performance* of its work, but need only have been caused by, arose out of, resulted from or occurred in connection with any activity *even associated with* Comunale's work. Comunale's work, under the contract, included providing the necessary labor, material, tools, equipment and supervision required to furnish and install fire protection including all required fire protection above conveyors.

Comunale admits that applicable code required that if, for whatever reason, a sprinkler head discharged, the fire suppression system would cause the fire door to descend. It is undisputed that a sprinkler head discharged on December 24, 1998, when there was no fire. There is speculation as to why the sprinkler head discharged, with the prevalent theory being that heating near the sprinkler head failed or was inadequate and allowed the sprinkler head to freeze, then thaw, sending water into the system, which would cause sensors to reflect a discharge of the system and, in turn, set off other fire suppression measures. No matter how the accident occurred, the sprinkler head somehow discharged in the absence of a fire by all accounts and thereby caused the fire door to descend. The claims and injuries of plaintiff would thus qualify as "arising out of, resulting from or occurring in connection with . . . any activity associated with the Work . . . ." or, in other words any activity associated with Comunale's furnishing and installing fire protection in the international terminal.

Fault may be a prerequisite to indemnity in some instances. For example, in *MSI Const Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995), a subcontractor entered into a contract with MSI, the construction manager, in which the subcontractor agreed to indemnify and hold harmless against all claims and damages "arising out of or resulting from the performance of the Subcontractor's work under this Subcontract . . . to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable . . . ." Thus, as this Court held, the subcontractor was liable to MSI for indemnification to the extent of its own negligence only, but was not required to indemnify MSI for MSI's negligence. That is not, however, what Comunale contracted for in this circumstance. Comunale did not limit its indemnification obligation to only those things for which it could be found at fault. Thus, it was not necessary that Comunale's fault be first established in order to trigger the indemnity provision or, as Comunale states it, that it first be established that the claim or injuries are *actually* caused by, arise out of, or result from its work. The indemnity provision at issue being much broader, the trial court did not err in granting summary disposition in favor of Wayne County, Walbridge and NWA and against Comunale for purposes of contractual indemnity based upon the Walbridge-Comunale subcontract.

Comunale further contends that the trial court failed to consider another provision in the parties' contract that conflicted with Article XI (the indemnity provision). However, Comunale did not raise that argument in the trial court or even in its first application for leave to appeal to

this Court. This Court will generally not consider issues raised for the first time on appeal and we will not do so in this instance. *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000).

II. Breach of Contract

Comunale next contends that the trial court erred in granting summary disposition in favor of Wayne County, Walbridge, and NWA and against Comunale for breach of contract and declaratory relief where no such cause of action was pleaded against Comunale. However, as indicated above, we find that the trial court properly applied the indemnity provision in the Walbridge-Comunale contract and that Comunale must therefore indemnify and defend Wayne County, Walbridge, and NWA. Thus, the issue of whether Comunale breached the Walbridge-Comunale contract by failing to obtain certain insurance to cover Wayne County, Walbridge and NWA is moot.

III. Jury Trial

Comunale next argues that the trial court committed reversible error by depriving it of its right to a jury trial on the issue of whether Wayne County, Walbridge, and NWA's settlements with plaintiff were reasonable. We disagree.

In a February 19, 2004, order, a panel of this Court remanded this case back to the trial court "for a hearing for a determination of the amount of money S.A. Comunale must reimburse Walbridge Aldinger, Wayne County and Northwest Airlines for their settlements of claims with plaintiffs and entry of a partial judgment reflecting that decision." *Ferrer v Co of Wayne*, unpublished order of the Court of Appeals, issued 2/19/04 (Docket No. 253764). This Court did not order that a jury trial be held on the issue. Likewise, when the trial court did not follow the applicable law in making such a determination, this Court again remanded the matter back to the trial court. *Ferrer v Co of Wayne* unpublished opinion per curiam of the Court of Appeals dated June 16, 2005 (Docket No. 99-923846-NZ). In that opinion, this Court determined that the trial court failed to carry out our prior directive that it hold a hearing for a determination of the amount of money Comunale must reimburse its indemnitees for their settlements of claims with plaintiffs and again remanded the matter "in order for the trial court to require Walbridge Aldinger, Wayne County, and Northwest to show reasonableness in accordance with *St. Luke's Hospital* [*v Giertz*, 458 Mich 448, 449; 581 NW2d 665 (1998)] and *Trim* [*v Clark Equip Co*, 87 Mich App 270, 277; 274 NW2d 33 (1978)]."

There is no language in this Court's June 16, 2005, opinion requiring a jury trial on the issue of reasonableness of the settlements. There is also nothing in this Court's directive for the "trial court to require Walbridge Aldinger, Wayne County, and Northwest to show reasonableness in accordance with *St. Luke's Hospital, supra*, and *Trim, supra*" that would suggest the necessity of a jury trial. While a jury trial was held in *Trim*, the trial was held on the issue of whether there was a contractual right to be indemnified in the first instance or a right to common law indemnification. The potential indemnitor contended that the entire indemnity provision of the contract was void and unenforceable and *additionally* argued that the indemnitee must show actual liability on its part to the plaintiff in the underlying dispute in order for it to recover on its contractual indemnity theory from the indemnitor. The jury was thus the

factfinder on the primary liability issue and the ancillary matter of what must be shown in order for recovery of a settlement.

In this matter, on the other hand, the trial court already ruled upon the liability issue of whether Walbridge had a contractual right to indemnity from Comunale, having resolved that issue in favor of Walbridge via a summary disposition order. As indicated in *Grand Trunk Western RR Inc*, 262 Mich App at 361, the fact that the claim may have been successfully defended (i.e., potential liability) is but a part of the reasonableness analysis and does not expand the analysis of the reasonableness of a settlement to include plenary consideration of liability issues in the underlying litigation. "To do so would contravene the policy of encouraging the settlement of lawsuits." *Id*. Contrary to Comunale's assertion, then, we do not read *Trim* as requiring a jury trial on the issue of reasonableness of a settlement where indemnification is at issue. Comunale has provided no authority to support its position that it was entitled to a jury trial on the issue of reasonableness.

Finally, the issue of reasonableness is more in line with an equitable decision. The ultimate resolution of the issue is not an award of money damages, but determination of whether the settlements already made were, under the circumstances, reasonable. There is no right to a jury trial where the relief sought is equitable in nature. *Comm'r of Ins v Advisory Bd of the Michigan State Accident Fund*, 173 Mich App 566, 586; 434 NW2d 433 (1988), and it would follow that there is no right to a jury trial when an equitable issue is to be resolved. See also, *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 53; 698 NW2d 900 (2005)(When a case involves both equitable issues and legal issues, it is appropriate for a jury to decide the factual issues relating to the damages claim and the court to decide the factual issues relating to the equitable claim.).

The trial court followed this Court's directives on remand when holding an evidentiary hearing to resolve the issue of reasonableness of the settlements and Comunale had no right to a jury trial on this issue.

IV. Evidence and Burdens of Proof at Evidentiary Hearing

Comunale next argues that the trial court erred in admitting the testimony of a case evaluator and facilitator and the affidavit of an attorney whom Comunale did not have the opportunity to cross-examine, into evidence at the evidentiary hearing. We review for an abuse of discretion a trial court's decision regarding the admission of evidence. *Barnett v Hidalgo*, 478 Mich 151, 158–159; 732 NW2d 472 (2007).

Comunale relies upon MCR 2.403(D)(4) for its position that the testimony of the case evaluator should have been excluded at the hearing. MCR 2.403(D)(4) provides, "A case evaluator may not be called as a witness at trial." As previously indicated, the hearing in this matter was just that-a hearing, and Comunale was not entitled to a trial. Comunale has not provided any support for its position that hearing testimony is also precluded under this rule and thus has established no basis for relief. Additionally, at the hearing on Comunale's motion in limine to preclude the testimony of the case evaluator at the evidentiary hearing, counsel for Comunale conceded the use of the word "trial" in MCR 2.403(D)(4) and withdrew its motion to preclude the evaluator's testimony based on that rule. A party may not claim error regarding an

issue on appeal where the party's lawyer previously deemed the action proper or otherwise acquiesced. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

Comunale is correct that copies of the parties' acceptances or rejections of the case evaluations are to be placed in a sealed envelope and, in a nonjury action, not revealed until the judge has rendered verdict. MCR 2.403(N)(4). This is because the case evaluation should not have any effect on the trial court's resolution of the merits of the case. *Schell v Baker Furniture Co*, 232 Mich App 470, 480; 591 NW2d 349 (1998). The trial judge here recognized as much, stating at the hearing on Comunale's motion in limine, "the rules [with] regard to non-disclosure of mediation or case evaluation have much to do with not influencing the trier of fact." The trial court also recognized that MCR 2.412 protects any statements made during the mediation process as confidential and thus excluded any statements made by attorneys to the case evaluator (and facilitator) or communications between the parties and counsel and any written submissions prepared by the attorneys. There is no indication that the case evaluation had any effect on the trial court's resolution of the merits of the case as it was not called upon to resolve the merits of the case after case evaluation or facilitation.

Comunale has also provided no authority for its position that the testimony of the facilitator in this matter was inadmissible. It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to rationalize the basis for his claims and then search for authority to either sustain or reject his position. *People v Kevorkian*, 248 Mich App 373, 388–389; 639 NW2d 291 (2001). In addition, in *Grand Trunk Western R.R., Inc*, 262 Mich App at 360-361, a panel of this Court referenced the trial court's reliance on a facilitation settlement to establish that the settlement was reasonable for purposes of indemnification. This Court specifically noted that, "Mediator [facilitator] agrees that this settlement is reasonable." *Id*. at 360. While it appears that the facilitator's statement was in written form, it is clear that the opinion of a facilitator is accepted as relevant, admissible evidence in determining whether a settlement is reasonable. The trial court did not abuse its discretion in allowing the testimony of the facilitator at the evidentiary hearing.

Comunale further objected to the admission of the affidavit of George DeGrood, attorney for another settling defendant, on the basis that it had no opportunity to cross-examine DeGrood with respect to his opinions regarding the reasonableness of the settlements. Notably, the trial court made a singular reference to this affidavit in its 11 page opinion resolving the reasonableness of the settlements, merely noting that "George DeGrood, counsel for Sims Varner and Associates (whose client paid $125,000 to settle) testified via affidavit that the $658,000 settlement was reasonable." Thus, were this affidavit admitted in an abuse of the trial court's discretion, it appears that the trial court's reliance on the affidavit, if at all, was negligible. "Evidentiary errors are not a basis for vacating, modifying, or otherwise disturbing a judgment unless declining to take such action would be inconsistent with substantial justice." *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001). There is likewise no basis to disturb the trial court's ruling that the settlements were reasonable where there is no indication that the admission of the affidavit, if in error, amounted to substantial injustice.

Comunale argues next that the trial court erred in not requiring Wayne County, Walbridge and NWA to show during the evidentiary hearing that they had actual or potential liability as required by this Court's June 16, 2005, directive.

The policy of Michigan is to encourage settlements of suits, because it benefits both parties and the public. *Trim*, 87 Mich App at 277. Where indemnification contracts are involved, if this policy is to be effective, the burden on the defendant who settles after a tender of the defense to the contractual indemnitor is refused must not be too heavy. *Id*. Thus, where an indemnitor denies liability and refuses to assume the defense of a claim under a contract of indemnity, the indemnitee, without waiving its right to indemnification, may enter into a good faith, reasonable settlement with the claimant. *Grand Trunk W RR, Inc*, 262 Mich App at 358-359. In that circumstance, the indemnitee need only show that it had potential liability and that the settlement amount was reasonably related to the liability exposure and the employee's injuries. *Id*.

Under *Trim*, 87 Mich App at 278, this Court held that reasonableness of a settlement:

> consists of two components which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. If the amount of the settlement is reasonable in light of the fact finder's analysis of these factors, the indemnitee will have cleared this hurdle. The fact that the claim may have been successfully defended by a showing of contributory negligence, lack of negligence or otherwise, is but a part of the reasonableness analysis and, therefore, subject to proof.
>
> If it is shown that this suit would have been successfully defended, the indemnitee will not recover. The burden of presenting evidence on this point is on the indemnitor, but the ultimate burden of persuasion remains with the indemnitee to show that the settlement was reasonable under all the circumstances. [internal citations omitted].

The fact that the claim may have been successfully defended by a showing of contributory negligence, lack of negligence or otherwise, is only part of the reasonableness analysis and does not include plenary consideration of liability issues in the underlying litigation. *Grand Trunk W RR, Inc*, 262 Mich App at 361.

As previously indicated, in a June 16, 2005, opinion, this Court determined that the trial court failed to carry out our prior directive that it hold a hearing for a determination of the amount of money Comunale must reimburse its indemnitees for their settlements of claims with plaintiffs and remanded the matter "in order for the trial court to require Walbridge Aldinger, Wayne County, and Northwest to show reasonableness in accordance with *St. Luke's Hospital, supra*, and *Trim, supra*." Thus, Wayne County, NWA, and Walbridge were all required to show potential liability to plaintiff and the probable amount of a judgment if the original plaintiff were to prevail at trial against each of them, balanced against the possibility that each of them would have prevailed.

The relevant settlements reached at facilitation were as follows:

> Wayne County in favor of plaintiff: $141,600

Walbridge in favor of plaintiff: $141,600.

NWA in favor of plaintiff: $75,000.00

At the evidentiary hearing, Walbridge, Wayne County, and NWA relied upon the testimony of the mediator in this matter, Leonard Schwartz, the facilitator in this matter, retired judge Michael Stacey, and documentary evidence including the report of plaintiff's expert economist, plaintiff's medical records, plaintiff's workers compensation file, and a report of an IME performed on plaintiff. Schwartz had mediated the case with two other mediators prior to facilitation and testified that the panel reached unanimous decisions in favor of plaintiff and against defendants (including Walbridge, Wayne County and NWA) for $800,000. Schwartz testified that he considered the potential liability of the parties in reaching the award amount, spoke to plaintiff, who was seeking $5 million, and all parties, and felt the award was reasonable. He further testified, as to Wayne County, that the issue of governmental immunity had not been resolved by the trial court and that he was aware the injury occurred in a public building so that an exception to governmental immunity was at issue.

Schwartz further testified that as to Walbridge, he recalls there having been some sort of opening that should not have been there which allowed cold air to enter the building and it had something to do with Walbridge's duties as a general contractor which would give rise to Walbridge's potential liability. Schwartz testified that he also recalls evidence that NWA or Walbridge caused the defect and he would not have put down the numbers he did in the mediation award if he did not believe these defendants did cause the defect. Schwartz affirmatively testified that the case evaluation, which was higher than the facilitation, was reasonable.

Judge Stacey, the facilitator in this matter, testified that his job was to have the parties settle the matter. He testified that in facilitating, he could not help but evaluate the case in some fashion and considered the liability of the parties in advising whether an offer was too low or whether a party was asking for too much. He testified that he did not conduct any independent research into the case, but felt that the settlements reached were reasonable.

Comunale and Mat Flex relied primarily upon the testimony of Pete Ruggirello. Ruggirello testified that the settlements were unreasonable and based his conclusions on his experience as a mediator/facilitator and as an attorney. Ruggirello testified that based upon the defenses available to the settling parties, they were more likely to prevail than plaintiff, rendering the settlements unreasonable. Specifically as to Wayne County, Ruggirello testified that it had a complete defense of governmental immunity and as to NWA, Ruggirello opined that NWA had no liability to plaintiff because workers' compensation was plaintiff's exclusive remedy against NWA.

As to Walbridge, Ruggirello testified that it would have had no liability based upon a ruling by the Michigan Supreme Court (in a case argued and decided after the facilitation) and that it would likely have prevailed on its motion for summary disposition against plaintiff or if not, perhaps on appeal, given the later decision of the Supreme Court. As pointed out by the trial court, however, this opinion would have required Walbridge to speculate as to the trial court's potential summary disposition ruling and then predict the future decisions of our appellate courts.

And, as further pointed out by the trial court, the lack of settlement and proceeding of the case through appellate courts on the issue would have resulted in more attorney fees incurred by the parties.

In its April 19, 2011, opinion finding the settlement reasonable, the trial court related the details of all of the evidentiary hearing testimony and weighed the testimony. The trial court noted that it had already ruled that NWA had to indemnify Wayne County and concluded that NWA was thus potentially liable to plaintiff based upon its indemnity contract with Wayne County and based upon Wayne County's potential liability. As indicated in *Williams v Unit Handling Systems Div of Litton Systems, Inc*, 433 Mich 755, 759; 449 NW2d 669 (1989), "Contractual indemnity, whether express or implied, subjects a defendant who is an employer of an injured worker to liability for damages resulting from injury in the workplace that otherwise has been abrogated by the exclusive remedy provision of the workers' compensation act." Based upon the evidence and applicable law, this finding was not in error.

The trial court further opined that Wayne County had potential liability because of the possible application of the public building defect exception to governmental immunity. Because this issue had yet to be resolved, there was no error in this finding. The court additionally opined that Walbridge had potential liability as the general contractor on the project and due to its indemnity contract with Wayne County. In finding the settlements reasonable, the trial court found that all three had some risk of exposure, that Wayne County and Walbridge each paid only slightly more than the $125,000 paid by Comunale in settlement to plaintiff, and that given plaintiff's alleged injuries and income loss, they could have been exposed to much more. The trial court also took into account the testimony of several witnesses that when considering settlement, one has to be cognizant of the potential costs of going forward to trial.

Evidence of potential liability was presented by the settling parties. The trial court considered the evidence, related how it determined the existence of potential liability and explained how it concluded that the settlements were reasonable based upon the evidence presented. The conduct of the hearing was in compliance with this Court's June 16, 2005, opinion and order and sufficient evidence was presented to support the conclusions. There was no error in the court's findings based upon the evidence presented.

V. Fees and Costs

Comunale next argues that the trial court failed to require Wayne County, Walbridge and NWA to establish that the fees and costs it submitted for reimbursement from Comunale were incurred in defense of the underlying action rather than in the pursuit of indemnity. Comunale argues that because the trial court specifically precluded these parties from recovering attorney fees incurred in establishing their rights to indemnity, they had the burden of proving that any attorney fee submitted for reimbursement were for the recoverable services and the trial court erred in simply awarding Wayne County, Walbridge and NWA all of their requested attorney fees rather than requiring them to prove the same.

We review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). An abuse of discretion occurs when

the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In connection with its summary disposition order regarding indemnification, the trial court ordered that Comunale must reimburse Wayne County, NWA and Walbridge for its attorney fees and costs expended in the underlying action. In a later order, the court clarified that none of these parties was entitled to its attorney fees incurred in pursuing indemnification. This ruling was consistent with the general rule that attorney fees requested in an indemnification action have to have been an expense incurred in the defense of the claim indemnified against and not an expense incurred in establishing the right of indemnity. See, *Hayes v General Motors Corp*, 106 Mich App 188, 201; 308 NW2d 452 (1981).

NWA did not request attorney fees from Comunale. Thus, this issue does not pertain to NWA. At the time Walbridge sought to have a judgment entered in its favor and against Comunale in June 2011, it sought reimbursement of the settlement it had paid to plaintiff in the amount of $141,600 plus its unpaid attorneys fees and costs for a total judgment of $253,385.17, plus interest. In support of its request for the claimed attorney fees, Walbridge attached an August 28, 2003, letter to Comunale's insurer seeking $89,648.38 in unpaid attorney fees (with no invoice for the same attached), and an itemized statement of fees incurred by Walbridge in connection with Comunale's motion for clarification (totaling $1760). At the hearing on the motion for entry of judgment, counsel for Walbridge stated, "With respect to the $89,648.38 in unreimbursed attorney fees, I know that some of that is non reimbursable, I know that, but I've never had a detailed bill of particulars from [Comunale's counsel] saying which of the line items that [prior counsel] arbitrarily scratched off are reimbursable or are not reimbursable according to their point of view. We submitted the bills and [prior counsel] even has an affidavit. He said, I looked at this stuff and I determined what was reimbursable and what was not. Well . . . I'm entitled to know why he says a certain item is not reimbursable. He never did that." The only fees that Walbridge specifically conceded were not recoverable were $21,000 in witness fees, which counsel says it mistakenly included in its request. Despite the lack of documentary evidence supplied by Walbridge, the trial court awarded all of Walbridge's requested attorney fees.

As stated in *Hayes*, 106 Mich App at 200, quoting 41 Am Jur 2d, Indemnity, s 36, pp. 725-727:

> As a necessary part of his damages an indemnitee may recover against his indemnitor interest and his expenses, or necessary defensive fees and expenses, including costs which have been awarded against him in the trial court on his unsuccessful defense of a claim after due notice to the indemnitor.
>
> As a general rule, and unless the indemnity contract provides otherwise, an indemnitee is entitled to recover, as part of the damages, reasonable attorneys' fees, although there is some authority to the contrary. The allowance of attorneys' fees is limited to the defense of the claim indemnified against and does not extend to services rendered in establishing the right of indemnity.

In that case, a panel of our Court remanded to the trial court "so an assessment of reasonable attorney fees" could be made. Thus, just as when awarding attorney fees as a case evaluation sanction or otherwise, the fee awarded must be reasonable. The burden of proving the reasonableness of a request for attorney fees rests with the party requesting it. *Augustine v Allstate Ins Co*, 292 Mich App 408, 423; 807 NW2d 77 (2011). In moving for an award of attorney fees, the fee applicant bears the burden of supporting its claimed hours with evidentiary support, including "detailed billing records, which the court must examine and opposing parties may contest for reasonableness." *Smith*, 481 Mich at 532.

Here, the issue is not precisely that the fees requested were unreasonable but whether Comunale owed the requested fees because they allegedly involved Walbridge's pursuit of indemnity. Walbridge indicates that it requested payment of its "contested" attorney fees from Comunale in 2003 but that Comunale failed to pay the same (having already paid those fees it agreed were recoverable). Walbridge admitted at the hearing, however, that some of the items in the billings were not recoverable. Whether that was in reference to the $21,000 in witness fees or some other items in the billings, however, is not clear. Walbridge's counsel further stated at the hearing, "Now, I know for a fact your honor that some of those deletions made by [Comunale's counsel] were items involving both, the defense of the case and pursuant to indemnity and yet he etched out all of it. I want to know why he did that and I am entitled to that because if it's both, I'm entitled to 50 percent of that." Thus, counsel admitted that the billings submitted to Comunale and which Comunale refused to pay included, at least in part, billings for the pursuit of indemnification, which it concedes it was not entitled to recover. Despite these admissions by counsel and the complete lack of evidence submitted by Walbridge concerning the billings (or even the billings themselves), the trial court ordered Comunale to pay all of the requested fees. This was an abuse of discretion.

If the trial court has sufficient evidence to determine the amount of attorney fees and costs, an evidentiary hearing is not required. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005). However, in this case, Walbridge did not provide a detailed billing concerning the requested fees to support its request in the first place. Because Walbridge provided no evidentiary support for its claimed attorney fees, this award constituted an abuse of discretion. We thus vacate the award of attorney fees to Walbridge.

Wayne County similarly moved for entry of a judgment in its favor and against Comunale seeking reimbursement of the $141,600 settlement it had paid to plaintiff as well as $14,769.00 in unpaid attorney fees and costs, plus interest. Attached to its motion were detailed billings it had submitted to Comunale over the course of the litigation. Comunale had paid the majority of the billings, but apparently did not pay those portions of the billings that it felt it was not responsible for paying.

Wayne County met its evidentiary burden of providing detailed evidentiary support for its requested fees. It was thus incumbent upon Comunale to specify which billings it felt it was not responsible for and why. It did not do so, nor did Comunale request a hearing to delve further into the matter. The trial court found the billings sufficient to establish Wayne County's entitlement to their requested fees. Under the circumstances, we see no error in this conclusion.

VI. Summary Disposition in Favor of Comunale and Against Mat Flex

On cross-appeal, Mat Flex concedes that it is liable for some portion of Comunale's indemnity obligation, but contends that the doctrine of equitable subrogation does not require that the indemnification obligation be split 50/50 between them as the trial court ordered. Mat Flex asserts that a trial or evidentiary hearing should have been held to determine the amounts to be apportioned for indemnification to the indemnitee parties. We disagree.

Equitable subrogation is a flexible, elastic doctrine of equity. *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 521; 475 NW2d 294 (1991) (opinion of Brickley, J.). Equitable subrogation has been defined as a legal fiction wherein a person who pays a debt of which another is primarily responsible is substituted (subrogated) to all of the rights and remedies of the other. *Hartford Acc & Indem Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999). The subrogee may not be a volunteer and acquires no more rights than those of the subrogor. *Id*.

Equitable subrogation may be applicable in the indemnification arena where there are two or more indemnitors for the same party. For example, in *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 572; 683 NW2d 242 (2004), a co-indemnitor, Gunite, challenged the propriety of an action against it for indemnification when the plaintiff had already been fully indemnified by another party. A panel of this Court held that the other party who had already provided indemnification and Gunite were both potentially liable for indemnification to the plaintiff under their respective contracts with the plaintiff and which contained identical indemnification agreements. This Court held that the other indemnitor was equitably subrogated to the plaintiff's claim against Gunite such that the trial court was not precluded from fashioning a remedy of indemnification in favor of plaintiff and against Gunite. In so holding, the *Eller* Court stated, "Where two or more insurance companies are in the same tier of priority-for example, both are primarily liable or both contain irreconcilable escape clauses-an insured's loss is to be apportioned or prorated among the insurance companies on the basis of policy limits. By analogy, it follows that where PPP and Gunite signed identical indemnity provisions, both are equally liable to indemnify Metro as provided in the agreements, and the cost of doing so should be shared equally by both." *Id*. at 572 (internal citations omitted).

In the present case, Comunale was deemed the indemnitor of Walbridge, NWA, and Wayne County on March 27, 2002, pursuant to an indemnity clause in its contract with Walbridge. Mat Flex was also deemed the indemnitor of Walbridge and NWA and Wayne County on July 25, 2003, pursuant to an identical indemnification clause in its contract with Walbridge. Mat Flex acknowledges in its brief that it and Comunale have "equal equities as to the indemnitee parties Wayne County, Walbridge Aldinger and Northwest Airlines for purposes of the general proposition of indemnification" but contends that between them they do not have *equal* equities because facts would have shown that Mat Flex was not responsible for plaintiff's injuries and that a trial or evidentiary hearing should have been held to determine the proper apportionment amount of the judgments between Mat Flex and Comunale.

Mat Flex has provided no support for its position that a trial or evidentiary hearing on the apportionment issue is appropriate. It references *Eller, supra*, indicating that the requirement of a hearing or trial on the issue is implicit in the case, but there is no such requirement, implicit or otherwise to be read in *Eller*. Instead, the holding in *Eller* could not be clearer in that where two

parties "signed identical indemnity provisions, both are equally liable to indemnify [] as provided in the agreements, and the cost of doing so should be shared equally by both." *Id*. at 572. There is no ambiguity in the term "equally." And, judgments were entered in favor of Walbridge, NWA and Wayne County and against Comunale due to its indemnity agreement with Walbridge. Comunale did not volunteer to take on the liability of these parties. Consistent with applicable law, Mat Flex was equally responsible for indemnifying Walbridge and the trial court was not precluded from fashioning a remedy that allowed Comunale to recoup the one-half of the judgments from Mat Flex for which it was responsible under *Eller*.

We vacate the trial court's award of attorney fees to Walbridge and affirm in all other respects.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto