

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHARD L. HENDERSHOTT,

Plaintiff,

v

OVID ELSIE AREA SCHOOLS and  
PROGRESSIVE ARCHITECTS,

Defendants/Cross-Plaintiffs,

and

SHORT'S ROOFING COMPANY,

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

v

SOBIE COMPANY,

Third-Party Defendant/Appellee.

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

PER CURIAM.

Third-party plaintiff Short's Roofing Company (Short's) appeals as of right from the trial court's order granting summary disposition to third-party defendant Sobie Company (Sobie). Short's also challenges the court's orders denying Short's motion for rehearing, denying Short's cross-motion for summary disposition and granting Sobie's motion for summary disposition, denying Short's motion for reconsideration of the court's denial of Short's motion for directed verdict and order granting Sobie a new trial, and granting Sobie's motion for a new trial. We affirm the trial court's order granting Sobie's

motion for a new trial, reverse the court's grant of summary disposition to Sobie, and remand for further proceedings.

## I

Short's was the general contractor for a reroofing project designed by Progressive Architects for the Ovid-Elsie Area Schools. Sobie was a subcontractor on the project. The principal action was filed by Richard Hendershott, an employee of Sobie's who was injured when he fell through the roof and landed on a cement floor. Hendershott alleged that his injuries were the result of negligence on the part of the school district, Progressive Architects and Short's. Short's brought a third-party suit against Sobie, alleging that Sobie breached its contract to provide insurance naming Short's as the insured. The third-party complaint also alleged that Short's was entitled to both contractual and implied contractual indemnification from Sobie.

The principal case was settled, leaving only Short's claim against Sobie for trial. After Short's contractual and implied indemnification claims were dismissed on summary disposition motions that are not the subject of appeal, the case went to trial on the breach of contract to insure claim only. The jury found that the contract between the parties required Sobie to purchase insurance coverage for Short's. Sobie then moved for a new trial or judgment notwithstanding the verdict, arguing that it was prejudiced by the court's failure to inform the parties of the content of the jury instructions prior to closing argument. The court, agreeing that the hypothetical example given in the instructions unduly influenced the jury, granted Sobie's motion for a new trial. Short's motions for reconsideration were denied.

Before the start of the new trial, the parties renewed their motions for summary disposition. The court granted Sobie's motion for summary disposition pursuant to MCR 2.116(C)(10). This appeal followed.

## II

Short's first claims that the trial court abused its discretion in granting Sobie's motion for new trial. We disagree. Although counsel for both parties submitted requested jury instructions regarding whether the parties had a meeting of the minds with regard to insurance, the court did not instruct the jury on that issue prior to closing arguments. After closing arguments were presented and without first reviewing the additional instructions with counsel, the court gave the jury its own supplemental instruction using a hypothetical involving the purchase of an automobile to explain the requirement of meeting of the minds. Although the instruction accurately described the applicable law, the court's conclusion that a new trial was necessary was nonetheless correct.

The court did not abuse its discretion in ordering a new trial because Sobie was irreparably prejudiced by its inability to address the hypothetical in closing argument because the court failed to inform the parties of the instruction before closing arguments. MCR 2.516(A)(4) provides that "[t]he court shall inform the attorneys of its proposed action on the [jury instruction] requests before their arguments to the jury." In *Moody v Pulte Homes, Inc.*, 423 Mich 150, 157; 378 NW2d 319 (1985), our Supreme Court stated that the purpose of this rule "is, of course, to enable counsel to tailor the closing argument to the facts of the case in the context of the law that the court will advise the jury is applicable." The trial court erred when it failed to comply with the mandate of MCR 2.516(A)(4).

We further find that this error was not harmless. That the jury relied on the court's hypothetical was demonstrated by the statement of the jury foreman referring to the hypothetical when handing the verdict form to the bailiff. Because Sobie was unable to respond to the hypothetical, it was irreparably prejudiced by the trial court's error. Accordingly, we affirm the court's order granting Sobie's motion for a new trial.

### III

Short's next argues that the trial court abused its discretion when it denied Short's motion for a directed verdict. We find no error here because Sobie presented sufficient evidence to raise a question of fact for the jury with regard to whether the conduct of the parties evidenced an intent to be bound by the general contract specifications. *Phillips v Diehm*, 213 Mich App 389, 394-395; 541 NW2d 566 (1995). A jury could reasonably conclude that Short's own failure to insist on compliance with the terms of the general contract led Sobie to believe that the specifications relating to insurance were inapplicable.

### IV

However, we agree with Short's that the trial court erred in granting Sobie's motion for summary disposition. The trial court improperly decided factual issues that were within the province of a jury. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).<sup>1</sup>

Although indemnity contracts are strictly construed against the indemnitee, "[i]ndemnity contracts should be construed to ascertain and give effect to the intentions of the parties. In ascertaining their intentions, one must consider the language used in the contract as well as the situation of the parties and circumstances surrounding the contract." *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995), citing *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987).

In the instant case, the trial court granted summary disposition in part because it concluded that Sobie "agreed to perform in accordance with those specifications applicable to that portion of the job only," and that "there is nothing . . . that would lead a reasonable person to conclude that Sobie was going to provide insurance coverage for Short's." These statements ignore Raymond Short's testimony that he was verbally assured that Sobie had all the specifications, agreed to perform in accordance with the specifications and agreed to provide insurance as called for in the specifications. A record could be developed on this testimony that would leave open an issue upon which reasonable minds could differ, thus making summary disposition inappropriate. *Farm Bureau Mutual Ins Co of Mich v Stark*, 437 Mich 175, 184-85; 468 NW2d 498 (1991).

We also disagree with the trial court's statement that Short's failure to insist that the bid proposal form include the "step-over" clause is necessarily "fatal to its claim." The court apparently agreed that the parties could have intended that only some of the specifications applied to the contract, because it concluded that only those specifications stated on the bid proposal form were contract terms.

In making this determination, the court usurped the jury's function as factfinder because the question of which of the specifications the parties intended to apply to their contract is one of fact that must be determined in light of the facts and circumstances surrounding the making of the contract. *MSI Construction Managers, supra* at 343.

Affirmed with regard to the order granting Sobie's motion for a new trial, but reversed with regard to the grant of summary disposition in favor of Sobie and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Henry William Saad

/s/ Janet T. Neff

/s/ Kathleen Jansen

<sup>1</sup> Because the court's fact finding constituted a palpable error requiring a different disposition of the motion for summary disposition, the court's denial of Short's motion for rehearing was an abuse of discretion. See MCR 2.119(F)(3).