## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

## JURISDICTIONAL STATEMENT

This cause involves claims for contractual indemnification among defendants arising out of settlements of personal injury actions brought by plaintiffs Wayne and Zilma Nusbaum. The trial court entered judgment holding Starlight Theater of Kansas City (Starlight) entitled to contractual indemnification from J.E. Dunn Construction Company (Dunn) for the amount of Starlight's settlement with plaintiffs and for its attorneys' fees and expenses in defending against plaintiffs' claims. Judgment was also entered on Dunn's indemnification claim against PC Contractors, Inc. (PC) for the amount awarded Starlight against Dunn, and for the amount of Dunn's settlement with plaintiffs and for Dunn's attorneys fees and expenses in defending against plaintiffs' claims.

Questions concerning the indemnification rights and duties of the respective parties involve the interpretation of a contract under Missouri law. The subject matter presented is not within the exclusive jurisdiction of the Missouri Supreme Court and, therefore, lies within the general appellate jurisdiction of the Missouri Court of Appeals for the Western District pursuant to Article V, Section 3, of the Missouri Constitution.

## STATEMENT OF FACTS

The petition of wife and husband Zilma and Wayne Nusbaum, was originally filed February 5, 1997. (L.F. Vol. I, pp. 1 – 5). The petition named only the City of Kansas City, Missouri as a defendant. *Id.* The petition alleged that plaintiff Zilma Nusbaum was injured on July 11, 1996 when she tripped on a manhole cover which protruded above a sidewalk. (L.F. Vol. I, p. 2). The petition alleged that plaintiffs were attending a production at Starlight Theatre as guests and visitors, and that the City owned the sidewalk. *Id.* Wayne Nusbaum asserted a claim for loss of consortium for his wife's injuries. (L.F. Vol. I, p. 4).

On June 10, 1997, plaintiffs filed their First Amended Petition naming Starlight Theatre Association of Kansas City, Inc. ("Starlight") and Asphalt Plant Sales, Inc. ("APSI") as additional defendants. (L.F. Vol. I, pp. 12 – 17). The First Amended Petition restated plaintiffs' claims against the City and alleged that Starlight was responsible for maintaining Starlight Theatre and the sidewalk. (L.F. Vol. I, p. 13). That petition alleged that APSI was the general contractor that installed the manhole and/or sidewalk upon which Zilma Nusbaum fell. *Id.*

Plaintiff's Second Amended Petition was filed February 13, 1998. (L.F. Vol. I, pp. 32 – 39). This petition added J.E. Dunn Construction Company ("Dunn") as an additional defendant. *Id.* It was alleged that Dunn was a general contractor performing work at Starlight Theatre in 1995 – 1996 and that Dunn's

employees knocked down a light pole nearest to the area where Zilma Nusbaum fell. (L.F. Vol. I, pp. 33 – 34). The petition also alleged that Dunn promised to replace the lightpole but failed to do so prior to Zilma Nusbaum's fall. (L.F. Vol. I, p. 34). The petition further alleged that Dunn damaged the manhole/sidewalk where Zilma Nusbaum was injured. *Id.*

Starlight, on May 6, 1998, filed its answer and asserted a cross-claim against Dunn. (L.F. Vol. I, pp. 52 – 59). Count I of the cross-claim asserted a contractual claim for indemnification pursuant to a contract between Starlight and Dunn for the construction of the Starlight Theatre Shirley Bush Helzberg Garden of the Stars ("Garden"). (L.F. Vol. I, p. 57). Count II of the cross-claim asserted a claim for non-contractual indemnification and contribution. (L.F. Vol. I, pp. 58 – 9). Dunn answered the petition on May 6, 1998 and answered the cross-claim on May 14, 1998. (L.F. Vol. I, pp. 61 – 65 and pp. 66 – 69).

On May 14, 1998, Dunn also filed its Third Party Petition against PC Contractors, Inc. ("PC"). (L.F. Vol. I, pp. 70 – 92). The third party petition sought contractual indemnification and/or contribution from PC pursuant to a December 4, 1995 subcontract between Dunn and PC. *Id.* PC filed its answer to the third party petition on July 8, 1998. (L.F. Vol. I, pp. 110 – 115). The answer admitted the existence of the contract but denied that Dunn was entitled to indemnification. *Id.* The answer further alleged that Dunn had assumed responsibility for repair of damages and negligently failed to properly or timely make such repairs and sought comparison of Dunn's fault. *Id.*

Plaintiff's Third Amended Petition for Damages was filed June 30, 1998. (L.F. Vol. I, pp. 93 – 100). That last petition added PC as a direct defendant asserting that PC was a subcontractor on the Garden project, and included PC with the allegations of negligence asserted against Dunn and others. *Id.* Starlight answered and re-asserted its cross-claim against Dunn. (L.F. Vol. I, pp. 101 – 109). Dunn answered the third amended petition but did not assert a cross-claim for indemnification against PC. (L.F. Vol. I, pp. 115 – 119). On July 17, 1998 Dunn answered the cross-claim of Starlight. (L.F. Vol. I, pp. 126 – 129). PC answered the third amended petition on October 9, 1998. (L.F. Vol. I, pp. 130 – 134).

A Standard Form of Agreement Between Owner and Contractor, dated November 22, 1995, was entered into by Starlight and Dunn for construction of the Garden. (L.F. Vol. IV, pp. 487 – 496). That agreement was prepared on The American Institute of Architects (AIA) form AIA Document A111. That agreement incorporates by reference the 1987 Edition of the AIA Document A201, General Conditions of the Contract for Construction. (L.F. Vol. IV. P. 487). AIA Document A201 included an indemnification clause that stated:

> 3.18 INDEMNIFICATION
>
> *3.18* To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or

> to injury or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abate, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18. *Id.*

Dunn and PC entered into a Standard Form of Agreement Between Contractor and Subcontractor, dated December 4, 1995, for the Garden project. (L.F. Vol. V, pp. 607 – 630). That agreement's indemnification clause stated:

> 4.6 INDEMNIFICATION
>
> 4.6.1. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Subsubcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6.

On May 24, 1996, an employee of PC, Johnny Vaca, was dumping a load of dirt at the Garden project and the truck he was operating overturned. (L.F. Vol. V, p. 653). When the truck overturned, it knocked down a streetlight and some

ornamental fencing. (L.F. Vol. V, p. 655). PC and Dunn agreed that Dunn would be responsible for arranging for repair of the damage and PC would be billed or backcharged for the repairs. *Id.* PC understood that Dunn would be responsible for doing what was necessary to make safe the area around the downed lightpole. (L.F. Vol. V, p. 658). Larry Mc Daniel, Operations Manager for PC, believed that the manhole being elevated above the level of the sidewalk was the result of the concrete being improperly poured originally, or due to settlement over time and not as a result of PC's work. (L.F. Vol. V, p. 657).

On February 1, 1999, APSI filed its motion for summary judgment on plaintiffs' third amended petition. (L.F. Vol. I, pp. 135 – 160). APSI's motion established that the manhole cover was installed by subcontractor Industrial Excavating & Equipment and the sidewalk was installed by subcontractor Glen-Dar, and that the work occurred between October 31, 1989 and December 30, 1990. (L.F. Vol. I, pp. 136, 151). That motion further established that the City of Kansas City, Missouri had accepted the work performed pursuant to the contract between the City and APSI. (L.F. Vol. I, pp. 137, 155 – 159). Plaintiffs filed suggestions in opposition to this motion on May 21, 1999. (L.F. Vol. II, pp. 161 – 218). The trial court granted APSI's motion on July 7, 1999. (L.F. Vol. III, pp. 434 – 435).

On March 30, 1999, Starlight filed its motion for summary judgment and supporting suggestions on plaintiff's third amended petition. (L.F. Vol. II, pp. 232 – 245). Starlight's motion was based upon the argument that Starlight did not own

or control the sidewalk and manhole outside the fence of Starlight Theatre, that the City was responsible for such inspection, repair and maintenance of the manhole and sidewalk, and that Starlight, as an abutting landowner, had no duty to repair or maintain the sidewalk. *Id.*

On May 21, 1999, plaintiffs filed their suggestions in opposition to Starlight's motion. (L.F. Vol. III, pp. 260 – 393). Plaintiffs challenged Starlight's motion by showing that Starlight had actual control and rights of possession and use of the sidewalk outside the fence of the theatre. *Id.* Plaintiffs attached the deposition testimony of City employee Stephen Lampone, stating that the term "Starlight Theatre," in addition to the theatre itself also included the parking areas, parking lots, grassy areas and the areas between the fence and the parking areas. (L.F. Vol. III, p. 320). Plaintiffs also showed that Starlight's Director of Operation, Dan Rieke, prepared an Incident Report in connection with Zilma Nusbaum's fall, even though it occurred on the sidewalk outside the theater's fence. (L.F. Vol. III, pp. 370 – 371).

Plaintiffs also opposed the motion showing that during the construction of the Garden inside the fence of Starlight Theatre, a truck operated by a PC employee overturned and knocked down a lightpole nearest the manhole where Zilma Nusbaum fell. (L.F. Vol. III, pp. 382 – 389). Plaintiffs argued that Starlight made "special use" of the sidewalk area by allowing equipment to be operated over the sidewalk in connection with the building of the Garden. (L.F. Vol. III, pp. 301 – 302). Plaintiff further argued that the absence of the lightpole

constituted a dangerous condition sufficient to render Starlight liable as an abutting owner. (L.F. Vol. III, pp. 302 – 303).

Starlight replied to plaintiff's suggestions on July 7, 1999. (L.F. Vol. III, pp. 394 – 404). Starlight cited deposition testimony from Zilma Nusbaum, Wayne Nusbaum and from the two people with whom they went to Starlight, which showed that lighting conditions were adequate and did not contribute to Mrs. Nusbaum's fall. (L.F. Vol. III, pp. 394 – 395). Starlight's motion was denied without explanation on July 7, 1999. (L.F. Vol. III, pp. 434 – 435).

On May 21, 1999, Dunn filed its motion for summary judgment and supporting suggestions on plaintiffs' third amended petition. (L.F. Vol. II, pp. 246 – 259). Dunn's summary judgment motion was based, in part, on the claim that it had no *respondeat superior* liability for negligent acts of PC because there was no master – servant relationship between Dunn and PC. (L.F. Vol. II, pp. 254 – 256). Dunn further sought summary judgment on the claim that it negligently failed to replace the light pole by citing the deposition summary of the Nusbaums and their friends to the effect that lighting was adequate. (L.F. Vol. II, pp. 256 – 257).

Plaintiffs' suggestions in opposition to Dunn's motion was filed May 21, 1999. (L.F. Vol. III, pp. 405 – 433). Plaintiffs stated that they were not proceeding against Dunn on a *respondeat superior* theory for the alleged negligence of PC. (L.F. Vol. III, p. 423). Plaintiffs clarified that their claim against Dunn was for Dunn's own negligence in failing to replace/repair the lighting: either as the general contractor, or pursuant to its express assumption of

the duty to replace the lightpole. (L.F. Vol. III, pp. 423 – 428). The suggestions were supported with statements of various people showing that Dunn agreed to be responsible for making the necessary repairs and back-charge PC for the repairs. *Id.* This also included showing that Dunn's project manager, Phil Wilson, inspected the area after the lightpole was knocked down but did not check the adequacy of lighting in the area of the manhole. (L.F. Vol. III, p. 427). The trial court, on July 7, 1999, sustained that portion of Dunn's motion based upon lack of vicarious or *respondeat superior* liability for the acts of PC. (L.F. Vol. III, p. 434 – 435). The court denied the remainder of the motion. *Id.*

On July 7, 1999, Dunn forwarded to PC a letter from plaintiffs demanding $35,000.00 to settle plaintiffs' claims against Dunn and seeking indemnification pursuant to the subcontract. (L.F. Vol. V, p. 635). In a letter sent via facsimile on July 9, 1999, PC pointed out that the subcontract only required PC to indemnify Dunn to the extent of Dunn's liability for PC's actions, and not for plaintiffs' claims based on Dunn's own direct negligence. (L.F. Vol. VI, pp. 740 – 742). On that same day PC had settled plaintiff's claims against it and any derivative claims of plaintiffs against Starlight or Dunn for PC's negligence. *Id.* Dunn was also advised of the settlement in the facsimile correspondence. *Id.*

The release between plaintiffs and PC provided, in part:

> . . . First Parties [plaintiffs] are releasing Starlight Theater Association of Kansas City, Inc., J.E. Dunn Construction Company, and all other companies, organizations or persons who may have contractual, *respondeat superior* or other derivative liability for the alleged negligent actions of PC Contractors, Inc. in performing its

> work at the Shirley Bush Helzberg Garden of the Stars located in Starlight Theatre.
>
> . . . [N]othing herein shall be construed to in any way limit First Parties' rights to pursue direct negligence actions or claims against Starlight Theater Association of Kansas City, Inc., J.E. Dunn Construction company, and any other company, organization or person. This reservation specifically includes First Parties' claims against J.E. Dunn Construction Company for liability deriving from J.E. Dunn Construction Company's commitment to fix, repair or replace the light and J.E. Dunn Construction Company's responsibilities for construction site safety. (L.F. Vol. VI, pp. 744 – 747).

On July 10, 1999, Dunn settled with the Nusbaums for $5,000.00. (L.F. Vol. V, p. 640). The "Settlement Contract and Complete Release" between plaintiffs and Dunn released plaintiffs' claims against Dunn but not claims against either Starlight or PC. (L.F. Vol. VI, pp. 761 – 764). Plaintiffs settled their claims with the City and filed a stipulation of dismissal of those claims on July 12, 1999. (L.F. Vol. III, pp. 436 – 438). The court ordered plaintiffs' claims against the City dismissed that same date. (L.F. Vol. III, p. 437). On July 13, 1999, the court ordered the indemnification claims of Starlight against Dunn and Dunn against PC severed from the trial of plaintiffs against Starlight. (L.F. Vol. III, pp. 438 – 439).

Starlight eventually settled plaintiffs' claims against it for $45,000.00 and sought indemnification and attorneys' fees from Dunn. (L.F. Vol. V, p. 641). In turn, Dunn sought indemnification and attorneys' fees from PC. (L.F. Vol. V, p. 642). Starlight filed its motion for summary judgment and suggestions against Dunn on July 28, 2000. (L.F. Vol. III, p. 446 – 448, Vol. IV. 449 – 532). Dunn filed its motion for summary judgment and suggestions against PC on September

1, 2000. (L.F. Vol. V, p. 536 – 676). PC filed its suggestions in opposition on September 20, 2000. (L.F. Vol. VI, pp. 677 – 748). The trial court granted both motions and a hearing on damages was held on November 30, 2000. (L.F. Vol. VI, pp. 753 – 758). PC denied owing indemnification for the attorneys' fees and the amounts of settlements between plaintiffs, Starlight and Dunn, but it did not challenge the reasonableness of those amounts. *Id.* PC also argued that Starlight and Dunn were not entitled to their attorneys' fees for pursuing indemnification. *Id.*

On December 21, 2000, Dunn filed its brief in support of its request for damages. (L.F. Vol. VI, 749 – 838). The brief sought $35,049.90, which represented the $5,000.00 settlement with plaintiffs and $30,049.90 for all attorneys' fees and expenses in defending plaintiffs' claims and in seeking indemnification. Starlight also submitted a brief in support of its request for damages, but this brief apparently was not filed with the court. (L.F. Vol. VII, p. 845 – 910). Starlight sought judgment in the amount of $70,505.27, representing its $45,000 settlement with plaintiffs and the remainder representing attorneys' fees and expenses for both defending against plaintiffs' claims and for pursuing indemnification. *Id.* PC filed a brief in response to Dunn's request, arguing that neither Starlight nor Dunn were entitled to attorneys' fees in pursuing indemnification under the agreements. (L.F. Vol. VI, p. 839 – 844). PC also argued that neither Starlight nor Dunn were entitled to prejudgment interest. *Id.*

By judgment dated June 14, 2001, the trial court entered judgment ordering, *inter alia*, that Starlight was contractually entitled to $68,994.77 from Dunn, and that Dunn was entitled to $95,194.77 from PC, and that both Dunn and Starlight entitled to post-judgment interest in the amount of 9%. (L.F. Vol. VII, pp. 919 – 922). PC filed its Notice of Appeal on July 20, 2001. (L.F. Vol. VII, pp. 911 – 914). Dunn filed its Notice of Cross-Appeal on July 27, 2001 (L.F. Vol. VII, pp. 915 – 922). Starlight filed its Notice of Cross-Appeal on July 30, 2001. (L.F. Vol. VII, pp. 923 – 931).

## POINTS RELIED ON

**The trial court erred in entering judgment in favor of Dunn and against PC on Dunn's claim for contractual indemnification because Dunn's settlement with plaintiffs was for Dunn's own direct negligence and the indemnification clause does not require PC to indemnify Dunn for Dunn's own negligent acts.**

*Dillard v. Shaughnessy, Fickle, et al.*, 884 S.W.2d 722 (Mo.App. W.D. 1994)

*Braegelmann v. Horizon Development Co.*, 371 N.W.2d 644 (Minn.App. 1985)

*Matzo v. J.P. Patti Co.*, 298 N.J. Super. 13, 688 A.2d 1088 (1977)

*Hagerman Const. Co. v. Long Electric Co.*, 741 N.E.2d 390 (Ind.Ct.App. 2000)

## ARGUMENT

**The trial court erred in entering judgment in favor of Dunn and against PC on Dunn's claim for contractual indemnification because Dunn's settlement with plaintiffs was for Dunn's own direct negligence and the indemnification clause does not require PC to indemnify Dunn for Dunn's own negligent acts.**

**Standard of Review.**

This court's review of the trial court's granting of summary judgment is essentially *de novo. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2nd 371, 376 (Mo. banc 1993). "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id.* Appellate courts review the record in the light most favorable to the non-moving party. *Slone v. Purina Mills, Inc.,* 927 S.W.2d 358, 367 (Mo.App. W.D. 1996). All reasonable inferences from the record must be read to benefit the party against whom judgment was sought. *Id.*

In a contract case, "summary judgment is proper when the meaning of that portion of the contract in issue is so clear that it may be determined from the four corners of the contract." *Burns v. Black & Veatch,* 854 S.W.2d 450, 452 (Mo.App. W.D. 1993). Construction of a contract is generally a question of law. *Id.*

This case hinges on whether or not the indemnification clauses at issue are sufficient to require the indemnitor to indemnify the indemnitee for the indemnitees' own negligent acts. Missouri law recognizes the ability of parties standing on equal footing to contract to indemnify a negligent actor for it own negligent acts. *Kansas City Power & Light Co. v. Federal Const. Corp.*, 351 S.W.2d 741, 745 (Mo. 1961). An intention of the parties to require the indemnitor to indemnify the indemnitee for the indemnitee's own negligence must be set forth in clear and unequivocal terms. *Parks v. Union Carbide Corp.*, 602 S.W.2d 188, 190 (Mo. *banc* 1980). "'(I)n the absence of such clear expression or where any doubt exists as to the intention of the parties,' courts in Missouri will not construe a contract of indemnity to indemnify against the indemnitee's own negligence." *Id.* citing *Southwestern Bell Telephone Co. v. J.A. Tobin Const. Co.,* 536 S.W.2d 881, 885 (Mo.App. K.C. 1976).

**Neither Starlight nor Dunn is entitled to indemnification for amounts paid by them to settle plaintiffs' claims of direct negligence against them.**

The indemnification clauses do not require PC to indemnify Dunn for Dunn's own negligence, nor do they require Dunn to indemnify Starlight for Starlight's own negligence. The indemnification clause from the AIA form subcontract between PC and Dunn provides:

4.6 INDEMNIFICATION

> 4.7. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, **but only to the extent caused** in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Subsubcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6. (Emphasis added).

The indemnification clause in the agreement between Starlight and Dunn is basically the same as that of the subcontract.

Dunn's motion for summary judgment argued that the indemnification clause requires PC to indemnify Dunn – even for Dunn's own negligence – so long as PC was "in part" a negligent actor in bringing about plaintiffs' injuries. Dunn cited no authority interpreting the AIA indemnification language to support its argument. Nor did Dunn even discuss the limiting language: "but only to the extent caused …by the negligent acts … of the Subcontractor"….

Every appellate court that has interpreted the AIA indemnification clause at issue here has rejected Dunn's interpretation. This court, in *Dillard v. Shaughnessy, Fickle, et al.,* 884 S.W.2d 722 (Mo.App. W.D. 1994) interpreted a similar AIA indemnification clause to require a determination of whether or not there were allegations of negligence directly against the indemnitee. *Dillard* involved a personal injury claim brought by the employee of a subcontractor

against the general contractor, the architects and engineers, and the owner of a construction project. The architects and engineers were granted summary judgment on plaintiff's claim and asserted cross-claims for indemnification against the general contractor. The trial court dismissed the cross-claims on grounds that plaintiffs' petition alleged separate allegations of negligence against the architects and engineers.

The contract in *Dillard* was interpreted in accordance with Kansas law, although there is nothing unusual about Kansas law that would require a different interpretation than if governed by Missouri law. At p. 725 the court held:

> If the General Contractor's or the subcontractor's negligence is determined to have been the "whole cause" of the accident, General Contractor will reimburse Architects and Engineers for all their reasonable legal expenses including attorney fees incurred defending the matter. If a percentage of fault is ascribed to General Contractor and/or the subcontractor, General Contractor will reimburse that same percentage of the expenses and legal fees to Architects and Engineers.

While there are no other Missouri cases which interpret this or similar indemnification language, other jurisdictions have uniformly followed the interpretation of *Dillard*, i.e., the indemnitor is only required to indemnify the indemnitee for the indemnitor's negligence.

In *Braegelmann v. Horizon Development Co.*, 371 N.W.2d 644 (Minn.App. 1985) an employee of a subcontractor sued the general contractor for injures suffered while working on a construction project. The general contractor filed a third-party action against the subcontractor/employer seeking contractual indemnification. Summary judgment was entered in favor of a the general

contractor and against the subcontractor holding that if the subcontractor was to any degree in fault for plaintiff's injuries, then subcontractor was obligated to indemnify the general contractor for all damages. The appellate court reversed.

The indemnification clause in *Braegelmann* was also an AIA document which had language very similar to the clause at issue here. That clause is set forth at p. 645:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the * * * Contractor and all of their agents and employees from and against all claims, damages, losses and expenses * * * arising out of or resulting from the performance of the Subcontractor's Work under the Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease, or death, * * * 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, regardless of whether it is caused in party by a party indemnified hereunder. Such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 11.11"

The court then interpreted this clause at p. 646 stating:

> The phrase "indemnify and hold harmless", in the technical sense, suggests an intent to reimburse the indemnitee for damages which may be asserted against the indemnitee for its own negligence. If that were the end of it, the trial court's interpretation would be correct.
>
> The additional phrase, "to the extent caused," however, suggests a "comparative negligence" construction under which each party is accountable "to the extent" their negligence contributes to the injury.

In reversing the trial court, it was held that this language did not require the subcontractor to indemnify the general contractor for the general contractor's own negligence.

A factual situation similar to *Braegelmann* existed in *Mautz v. J.P. Patti Co.*, 298 N.J.Super. 13, 688 A.2d 1088 (1997). The indemnification clause in *Mautz* appears identical to the clause in *Braegelmann.* The trial court in *Mautz* reached the opposite result from the trial court in *Braegelmann* and dismissed the general contractor's indemnification claim against the subcontractor. The court at 688 A.2d 1092 – 93 considered the meaning the indemnification clause as follows:

> The indemnity provision is somewhat stilted in expression. But stripped of unnecessary surplusage for purposes of our analysis, the clause says:
>
> > To the fullest extent permitted by law, the Subcontractor [Gagliano] shall indemnity … the Contractor [Remy] from all claims … arising out of or resulting from the performance of the Subcontractor's work under this Subcontract, provided that any such claim … is attributable to bodily injury … to the extent caused in whole or in part by any negligent act or omission of the Subcontractor, … regardless of whether it is caused in part by a party indemnified hereunder ….
>
> We find this clause clear and unambiguous. The clause states Gagliano's obligation to indemnify Remy but only *to the extent* that the claim is caused by Gagliano's own negligence. The clause does not provide for indemnity to Remy for Remy's own negligence, but only to the extent of Gagliano's negligence. And the indemnity is available "regardless of whether [the claim] is caused in part by a party indemnified hereunder [Remy]."

The *Mautz* court reinstated the general contractor's claim for indemnification from the subcontractor, but refused to allow indemnification for the general contractor's own acts of negligence.

In *Hagerman Const. Corp. v. Long Electric Co.*, 741 N.E.2d 390 (Ind.Ct.App. 2000) the court also interpreted the AIA indemnification clause in a claim for indemnification by a general contractor against a subcontractor for a

personal injury claim of the subcontractor's employee. The language at issue in *Hagerman* was the exact same AIA indemnification clause at issue here. The court held at p. 393 – 394:

> We conclude that the indemnification clause does not expressly state, in clear and unequivocal terms, that it applies to indemnify Hagerman for its own negligence. The clause explicitly indemnified Hagerman for the acts of the sub-contractor, Long, and its sub-subcontractors, employees and anyone for whom it may be liable, but it does not explicitly state that Long must indemnify Hagerman for its own negligent acts. **Further, the phrase "but only to the extent" clearly limits Long's obligation to indemnify Hagerman only to the extent that Long, its sub-subcontractors, employees, and anyone for whom it may be liable are negligent.** Otherwise, the clause contains no clear statement that would give the contractors notice of the harsh burden that complete indemnification would impose. (Emphasis added).

These cases all hold that the indemnification clause relied upon by Dunn only requires PC to indemnify Dunn for PC's negligence and not for Dunn's own acts of negligence. Similarly, Dunn has no obligation to indemnify Starlight for Starlight's own negligence.

**The settlements of Starlight and Dunn with Plaintiffs were for direct claims of negligence against Starlight and Dunn – not for claims of negligence of PC.**

Dunn sought and was awarded against PC $5,000.00 for Dunn's settlement of plaintiffs' claims against it, along with its attorneys' fees, expenses, and all amounts it was required to indemnify Starlight. On May 21, 1999, Dunn had filed for summary judgment on plaintiffs' third amended petition. Dunn argued that it could not be held vicariously liable for the actions of PC because PC was an

independent contractor. Plaintiffs responded to this motion stating at p. 24 of their suggestions in opposition:

> **Plaintiffs are not relying on the acts of PC Contractors with regard to their liability against J.E. Dunn. Plaintiff's [sic] claims against Dunn are based upon Dunn's direct negligence.** Dunn promised to repair. Inherent within that promise is an obligation to exercise reasonable care. In this case, Dunn did viewed [sic] the area and failed to discover the condition of the manhole, they also failed to barricade and warn against it. Also, no temporary lighting was provided for the Starlight Theatre guests while the light pole down [sic]. As a result of all of these failures, Mrs. Nusbaum suffered severe hip injuries. Therefore, punitive damages should be awarded for Dunn's indifference to the safety of others. (Emphasis added).

Similarly, Starlight on March 30, 1999 also sought summary judgment on plaintiffs' third amended petition.

On July 7, 1999, the trial court granted Dunn's motion for summary judgment in part, stating: "Plaintiffs agree not to pursue a cause of action based upon vicarious liability or respondeat superior against J.E. Dunn for the acts of defendant PC Contractors, Inc." The court denied the remainder of Dunn's motion and it also denied the motion of Starlight. Implicit in the court's denial of summary judgment to Starlight and Dunn was the recognition that plaintiffs were asserting direct claims of negligence against those entities. At the conclusion of pending separately against defendants Starlight, Dunn and PC.

Unlike the indemnitors in *Dillard, Braegelmann, Mautz and Hagerman,* PC was a party against whom fault could be assessed in the plaintiffs' personal injury actions. In the cited cases it appears that the subcontractors/employers were not parties to the plaintiffs' personal injury actions due to the exclusive remedy of the

various workers' compensation acts. Because the indemnitors were not parties for purposes of comparing fault in the plaintiffs' case in chief, a separate comparison of fault was required as between the indemnitors and the indemnitees. No such comparison is necessary in this case because Starlight, Dunn and PC were all parties against whom plaintiffs were asserting separate direct claims of negligence.

On July 9, 1999, PC negotiated a settlement with plaintiffs wherein plaintiffs agreed to a release of their claims against PC and "Starlight Theater Association of Kansas City, Inc., J.E. Dunn Construction Company, and all other companies, organizations or persons who may have contractual, *respondeat superior* or other derivative liability for the alleged negligent actions of PC Contractors, Inc. in performing its work at the Shirley Bush Helzberg Garden of the Starts located in Starlight Theater." PC notified Dunn of the settlement via facsimile on July 9, 1999 and advised that plaintiffs retained their direct claims of negligence against Dunn.

On July 10, 1999, Dunn settled plaintiffs' claims against it. The release obtained by Dunn released only J.E. Dunn Construction Company. This left for trial only plaintiffs' direct claims of negligence against Starlight Theater. Starlight Theater subsequently settled with plaintiffs for $45,000.00 but the terms of any release are unknown. However, by virtue of PC's July 9, 1999 settlement with plaintiffs, Starlight had been released from any possible liability for the negligent acts of PC.

The trial court erred in ruling that Starlight and Dunn were entitled to indemnification for the amount each paid to settle plaintiffs' claims. As shown above, the indemnification clauses only require indemnification to the indemnitee for the indemnitor's negligence. By the time Dunn settled with plaintiffs, PC had already settled plaintiffs' claims against PC, Dunn and Starlight for any negligence of PC in performing work on the Garden project. Similarly, by the time Starlight settled with plaintiffs, both PC and Dunn had already negotiated settlements and obtained releases from plaintiffs. The settlements of Starlight and Dunn were for plaintiffs' claims of direct negligence against each of them and therefore there is no indemnification owing under the indemnification clauses.

The trial court similarly erred in ruling that Starlight and Dunn were entitled to their attorney's fees in defending against plaintiffs' claims. It is clear that Starlight and Dunn were both defending plaintiffs' direct claims of negligence against them and not defending against allegations of PC's negligence. Starlight was added to the suit in plaintiffs' First Amended Petition filed June 10, 1997. The First Amended Petition did not mention either the knocking down of the lightpole or inadequacy of lighting. The Second Amended Petition, filed February 13, 1998, added Dunn as a defendant and added allegations attendant to the knocking-down of the lightpole. Dunn filed its Answer on May 6, 1998 and its Third-Party Petition against PC on May 14, 1998. PC answered on July 8, 1998.

If either Starlight or Dunn defended against allegations based upon PC's negligence, they only did so during the period February 13, 1998 (filing of the

Second Amended Petition) and July 8, 1998 (Answer of PC to the Third-Party Petition). This case should be remanded solely for a determination of whether or not Starlight or Dunn incurred any attorneys' fees or expenses in defending against plaintiffs' claims based upon the negligence of PC. Pursuant to the indemnification clause, Starlight and Dunn are not entitled to their attorneys' fees and expenses incurred in defending against plaintiffs' direct claims of negligence against them. Nor are they entitled to recovery of their attorneys' fees in pursuing indemnification. *Missouri Pacific Railroad Co. v. Rental Storage & Transit Co.*, 524 S.W.2d 898, 912 (Mo.App. Spfld. 1975). For these reasons the trial court's award of summary judgment should be reversed and the matter remanded solely for determining whether any attorneys' fees and expenses are owed.

## CONCLUSION

The indemnification clauses at issue only require indemnification for the indemnitor's negligence – not for the negligence of the indemnitees. On July 9, 1999, PC settled all of plaintiffs' claims of negligence against PC, Dunn and Starlight for any negligence of PC for work performed for the Garden project. Dunn and Starlight each subsequently settled with plaintiffs for their direct claims of negligence against each of them. Therefore the indemnification clauses here require no indemnification for the amounts of those settlements.

Because a question of fact remains as to whether or not Starlight and Dunn defended against claims based upon PC's alleged negligence, as well as against allegations of their own negligent acts, the matter should be remanded for the trial court's determination about whether or not such attorneys' fees were incurred, and if so, the amount of the same. PC requests this court reverse the trial court's award of indemnification for settlements of Starlight and Dunn with plaintiffs. PC further requests the court remand this case for determination of whether or not Starlight and Dunn incurred attorneys' fees and expenses in defending against allegations of PC's negligence and, if so, the amounts thereof.

Respectfully submitted,

Steven G. Piland, #36891
PILAND & MAGRUDER
2405 Grand Blvd., Suite 490
Kansas City, Missouri 64108-2519
Telephone: (816) 474-7055
Facsimile: (816) 474-4105
Attorney for Appellant/Respondent
PC Contractors, Inc.

## CERTIFICATE OF COMPLIANCE AND SERVICE

COMES NOW, the undersigned attorney for Appellant/Respondent PC Contractors, Inc., on this 20th day of December, 2001, and hereby certifies pursuant to Rule 84.06(c), the following:

1. To the best of the undersigned's belief, this brief complies with Rule 55.03;

2. This brief complies with the limitations contained in Rule 84.06(b);

3. This brief, according to statistics compiled by the Microsoft Word program, contains 6595 words and 734 lines of text.

4. A Microsoft Word file containing this brief is being submitted on a disk which has been scanned with Norton AntiVirus Version 5.02.00.

5. Two (2) copies each of this brief have been hand-delivered to the following:

David Buchanan
Brown & James, PC
1100 Main Street, Suite 1900
Kansas City, Missouri 64105-2153
Attorney for Respondent/Appellant
J.E. Dunn Construction Company

Brian Fowler
Evans & Dixon
1100 Main Street, Suite 2000
Kansas City, Missouri 64105-2119
Attorney for Respondent/Appellant
Starlight Theater of Kansas City, Inc.

Steven G. Piland, #36891
PILAND & MAGRUDER
2405 Grand Blvd., Suite 490
Kansas City, Missouri 64108-2519
Telephone: (816) 474-7055
Facsimile: (816) 474-4105
Attorney for Appellant/Respondent
PC Contractors, Inc.