PARTIES/ATTORNEYS

Plaintiff	The Residences at Depot Street L.P.	Christopher E. Haskell Ryan D. Zick Price, Postel & Parma LLP
Defendant/Cross-Complainant	Wallace & Smith Contractors	Randall D. Gustafson, Esq. Katie C. Brach, Esq. Gabriella S. Burden, Esq. Lincoln, Gustafson & Cercos, LLP
Cross-Def	Cell-Crete Corporation Inc.	David L. Brault Law Offices of David L. Brault
Cross-Def	Famco Development Inc.	Tina L. Schoneman, Fischer | Schoneman LLP
Cross-Def	J&D Steel	Arthur J. Chapman, Esq. Benjamin Nachimson Chapman Glucksman
Cross-Def	TK Pacific Inc. dba GH Slack & Son	Mona J. Jeffery, Esq. Regina Jaramillo, Esq. Jeffery & Grosfeld, LLP
Cross-Def	Sweaney Inc.	Mona J. Jeffery, Esq. Regina Jaramillo, Esq. Jeffery & Grosfeld, LLP

TENTATIVE RULING

All evidentiary objections are overruled.

For all the reasons discussed below, the court finds that Wallace & Smith Contractors (Wallace) does not have the initial burden for purposes of this motion to

establish it was not negligent and did not engage in willful misconduct. The court grants Wallace's summary adjudication motion to the extent it requests a determination that a duty to defend is owed. That being said, the court exercises its discretion, under the authority of *Crawford v. Weathershield Manufacturing, Inc.*, (2008) 44 Cal. 4th 541, 565, fn. 12, to allow the matter to continue forward with counsel chosen and paid for by Wallace, with a later determination by the court of 1) how damages for the duty to defend should be apportioned among the subcontractors, if any, something that has not been addressed in the present briefing in any meaningful way; and 2) whether Wallace was negligent/engaged in willful misconduct, which would extinguish or offset expenses related to duty to defend.

The court's analysis and conclusions concerning the duty to defend are entirely preliminary; the parties will be allowed to revisit the issues again at the appropriate time after all evidence has been provided. The court expects to resolve at a later time:

- Total amount in defense costs incurred and paid for by Wallace;
- The appropriate apportionment of defense costs;
- The date the duty to defend arose as to J&D Steele;
- Whether Wallace was actively negligent or engaged in willful misconduct and if so, any offset to the defense costs owed.

This list isn't intended to be exclusive, but an attempt to corral the issues as raised while allowing the case to move forward.

ANALYSIS

On July 18, 2018, Wallace & Smith Contractors (Wallace) entered into a contract with The Residences at Depot Street, L.P. (The Residences or plaintiff) to construct an 80-unit apartment complex located at 201 and 205 North Depot Street in Santa Maria, California (Project). Wallace acted as the general contractor for the Project. Plaintiff now alleges that the finished floor at the Project—in the public and private areas of both buildings—developed gaps at the end joints and was visually out-of-flat with noticeable high and low spots. Plaintiff also alleges that in certain areas of both buildings the gypsum underlayment was fractured and defective, causing "soft spots" and other defects in the flooring. Additional defects are alleged, such as the drywall chases located behind the medicine cabinets in many, if not all, the units at the Project were not properly sealed; the fire doors were deficient; and the balcony railings were not property coated to prevent corrosion or attached.

Plaintiff's complaint was filed on June 22, 2022. An amended complaint was filed on April 12, 2023. The following cross-complaints have been filed:

- On October 24, 2022, Wallace filed a cross-complaint against Cell-Crete Corporation, Inc. and Famco Development, Inc. alleging that cross-defendants were subcontractors on the Project and are responsible for the alleged defects. The cross-complaint alleges causes of action for: (1) equitable/partial/total indemnity; (2) express indemnity; (3) breach of contract re: workmanlike manner; (4) breach of contract re: insurance requirements; (5) breach of express and implied warranties; (6) declaratory relief: duty to defend; (7) declaratory relief: duty to indemnify; and (8) declaratory relief.
    - On February 3, 2023, the cross-complaint was amended to substitute TK Pacific Inc., Sweaney Inc., and J&D Steel Fabrication & Repair, LP as Roes 1-3.
    - On November 27, 2023, the cross-complaint was amended to add LW Construction Inc. as Roe 4.
    - On April 16, 2024, the cross-complaint was amended to add Templeton Flooring as Roe 5.
- On March 7, 2023, TK Pacific Inc. filed a cross-complaint against "Moes 1-20" alleging (1) declaratory relief; (2) implied indemnity; (3) comparative equitable indemnity; and (4) contribution.
    - On May 5, 2023, Joseph Schroeder was substituted for Moe 1.
- On October 5, 2023, Famco Development Inc. filed a cross-complaint against Templeton Floor Company, Inc. alleging causes of action for (1) comparative equitable indemnity; (2) contribution; and (3) declaratory relief.
- On February 26, 2024, LW Construction Inc. filed a cross-complaint against Roes 1-25 for (1) equitable indemnity; (2) contribution; (3) comparative fault; and (4) declaratory relief.
- On March 13, 2024, Templeton Floor Company, Inc. filed a cross-complaint against Wallace & Smith Contractors; Cell-Crete Corporation, Inc.; Famco Development, Inc.; Thomas Edward Castillo Dba Castle Floor Covering; JLS Flooring Incorporated; Robert Joseph Termeer DBA Termeer's Floor Covering; Jesse Robert Termeer DBA Central Coast Floors; Kelly Ray Miller DBA Kelly Ray Miller Floor Coverings By Certified; John Jeffrey Wikel DBA J W Flooring; Miguel Angel Mariscal DBA Miguel's Custom Carpet; Max Oppenau DBA Deluxe Floor Coverings alleging causes of action for (1) indemnity; (2) contribution; (3) apportionment; and (4) declaratory relief.

Wallace's sixth cause of action alleges that Cell-Crete Corporation, Inc., Famco Development, Inc., TK Pacific Inc., Sweaney Inc., J&D Steel Fabrication & Repair, LP (collectively, Subcontractors) are required to defend it against plaintiff's claims in this action.

On February 2, 2024, Wallace filed one motion for summary adjudication asserting it was entitled to summary adjudication in its favor on this issue pursuant

to the indemnity agreement in the contract between it and the subcontractors and the holding in *Crawford v. Weathershield Manufacturing, Inc.*, (2008) 44 Cal. 4th 541. Each named Subcontractor filed separate opposition as well as individual opposing separate statements and their own evidence in support of their individual oppositions. Some filed evidentiary objections. Wallace then filed separate replies. Wallace's separate statement included facts as to each individual subcontractor, which were not relevant to the remaining subcontractors, drawing objection. This has made for an unwieldy record. Even so, the resolution turns largely on legal issues rather than factual issues and this analysis therefore concerns itself mostly with the law.

1. Subcontract Agreement

According to Wallace's Separate Statement of Undisputed Facts, section 23.1 of each Subcontract provides:

> "Subcontractor agrees to defend, indemnify, and hold harmless Wallace & Smith Contractors and Owner, and each of their respective agents and employees, from and against all claims, lawsuits, damages, losses, judgments, administrative rulings or decisions, arbitration awards, attorney's fees and costs, other fees, costs, expenses, liabilities, penalties, and fines, of every kind and nature, in law or in equity ("Claims"), to the greatest extent permissible under California law (including but not limited to, Civil Code section 2782, et seq.). In so doing, but without limitation on the breadth of the preceding sentence: (1) Subcontractor accepts and assumes entire responsibility and liability for any and all bodily injury, sickness, disease, or death of any person ("Person Damage"), including Subcontractor's employees, as well as any and all damage, injury, or destruction of any kind or nature to any tangible property ("Property Damage"), to the extent the Person Damage or Property Damage was caused by, resulted from, arose out of, or occurred in connection with the performance of the Work; and (2) Subcontractor will reimburse, defend, indemnify, and hold harmless Wallace & Smith Contractors and Owner, and each of their respective agents and employees, from and against all Claims incurred by Wallace & Smith Contractors or Owner in enforcing any reimbursement, defense, or indemnity obligation under this paragraph or in defending against any claims (a) for Person Damage or Property Damage, including loss of use of any property resulting from the Property Damage, and (b) caused by or arisen out of, in whole or in part, (1) any act or omission by Subcontractor, or anyone employed, directly or indirectly, by Subcontractor, or anyone for whose act Subcontractor may be liable, arising out of or in connection with the performance of the Work or any portion thereof, or (2) the use of any products, material, or equipment furnished to the Project by Subcontractor or any of the Subcontractor's

agents, employees, materialmen, equipment suppliers, or anyone for whose act Subcontractor may be liable."

(UMF No. 28.) This will be referred to as the "duty to defend" provision.

According to the Subcontract, it goes on to state:

The reimbursement, defense, and indemnity obligations under this paragraph are not limited in any way by any limitations on the amount or type of damages (e.g., workers compensation benefits), and survive the termination of this Agreement. *Subcontractor will not be required to reimburse, defend, or indemnify Wallace & Smith Contractors or Owner for the willful misconduct or sole or active negligence of Wallace & Smith Contractors or Owner.*[1] Subcontractor waives all Claims against Wallace & Smith Contractors or Owner, for Person Damage or Property Damage from any cause arising at any time, except for the willful misconduct or sole or active negligence of Wallace & Smith Contractors or Owner. If any Claims subject to the reimbursement. defense, or indemnity obligations under this paragraph are made, asserted, entered, or threatened against Wallace & Smith Contractors or Owner, or any of their respective agents or employees, Wallace & Smith Contractors may, in its sole and complete discretion, either (a) withhold from any payments due or to become due to the Subcontractor an amount sufficient to protect and indemnify Wallace & Smith Contractors and Owner, and each of their respective agents and employees, from and against all such Claims, including legal fees and disbursements; or (b) require the Subcontractor to furnish a surety bond satisfactory to Wallace & Smith Contractors guaranteeing equivalent protection, which bond shall be furnished by the Subcontractor within five (5) days after written demand by Wallace & Smith Contractors. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL ANY PARTY TO THIS AGREEMENT BE LIABLE TO ANY OTHER PARTY TO THIS AGREEMENT FOR SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTAL DAMAGES INCWDING COMMERCIAL LOSS, LOSS OF USE, OR LOST PROFITS

(Emphasis added.) This will subsequently be referred to as "Limitation."

2. Subcontractors' Responsibilities

[1] For construction contracts entered into after January 2, 2013, California Civil Code § 2782.05 subdivision (a) voids certain indemnification agreements, including the cost to defend, that cover "active negligence or willful misconduct" of the indemnitee.

Cell-Crete agreed to furnish and install all work, labor, services, materials and all other things necessary for gyp-crete level rock at the Project, including installation of USG Levelrock Sound Reduction Board, felt vapor barrier building paper and gyp-crete underlayment on the interior floors of the second and third floors of the Project. (UMF No. 8.)

Famco agreed to furnish all materials, labor and equipment for the fine grade, form and pour site concrete and SOG [slab on grade] concrete (first floor) at the Project. (UMF No. 12.)

Sweaney Inc. ("Sweaney") entered into a Subcontract Agreement wherein Sweaney agreed to furnish and install all work, labor, services, equipment, materials and all other things necessary for installing and applying the drywall, Denglass, and painting at the Project. (UMF No. 16.)

T.K. Pacific, Inc. DBA G.H. Slack & Sons ("GH Slack") entered into a Subcontract Agreement wherein GH Slack agreed to furnish and install doors, frames, and hardware at the Project, including installation of the fire doors. (UMF No. 20.)

J&D Steel Fabrication & Repair, LP ("J&D") entered into a Subcontract Agreement wherein J&D agreed to furnish, provide labor, and services relating to the structural steel and steel stairs at the Project, including furnishing and installing the steel railings at the Project balconies. (UMF No. 25.)

3. Indemnitor's Duty to Defend, Generally

Both case law and statutes govern the duty to defend. Civil Code section 2778(4) provides: "In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: [ ] The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so." The California Supreme Court interpreted this provision in *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541. It is the seminal case on the issue of whether and when a subcontractor owes a general contractor a duty to defend in light of an indemnification provision in the parties' contract.

In *Crawford*, the Cal. Supreme Court considered whether an indemnity provision in the subcontractor agreement included a separate duty to defend. (*Id.* at p. 551.) The Court considered Civil Code section 2778, subdivision 4 and held that it mandated a separate and immediate duty to defend upon the satisfaction of certain conditions:

> "[T]he duty arises immediately upon a proper tender of defense by the indemnitee [here, Wallace], and thus before the litigation to be defended has determined whether indemnity is actually owed. This duty, as described in the statute, therefore cannot depend on the outcome of that litigation. It follows that, under subdivision 4 of section 2778, claims 'embraced by the indemnity,' as to which the duty to defend is owed, include those which, at the time of tender, *allege* facts that would give rise to a duty of indemnity. Unless the indemnity agreement states otherwise, the statutorily described duty 'to defend' the indemnitee upon tender of the defense thus extends to all such claims."
>
> (*Crawford, supra*, 44 Cal.4th at p. 558, internal footnote omitted, emphasis in original.)

Notably, the *Crawford* court found the duty to defend "was not dependent on whether the very litigation to be defended later established [Subcontractor's] obligation to pay indemnity." (*Id.*) In other words, "the duty "to defend" [General Contractor] against claims " founded upon" damage or loss caused by [Subcontractor's] negligent performance of its work, as set forth in [the] subcontract, imposed such duties on [Subcontractor] as soon as a suit was filed against [General Contractor] that asserted such claims, and regardless of whether it was ultimately determined that [Subcontractor] was actually negligent." (*Crawford, supra,* 44 Cal.4th at p. 568.)

The duty to defend is an issue appropriately resolved on summary adjudication. (*Transamerica Ins. Co. v. Superior Court* (1994) 29 Cal.App.4th 1705, 1713, citing Code Civ. Proc, § 437c, subd. (f)—party may move for summary adjudication of issue of duty.) However, the *Crawford* court noted:

> "If any party moves for summary judgment or adjudication (Code Civ. Proc., § 437c) with respect to the duty to defend against litigation still in progress, the court may proceed as it deems expedient. For example, the court may resolve legal issues then ripe for adjudication, such as whether any of the contracts at issue include a duty to defend, and, if so, whether the underlying suit or proceeding as to which a defense is sought falls within the scope of any of the parties' contractual duty to defend. If the court finds that an ongoing duty to defend is owed by one or more parties, but the affected parties, acting in good faith, then cannot agree on how such a defense should be provided or financed, the court may, in its discretion, permit the underlying litigation to proceed with counsel chosen and paid by the party to whom the duty is owed, subject to a later determination of how damages for breach of the duty to defend should be apportioned among the breaching parties."

(*Crawford, supra,* 44 Cal.4th at 565, fn. 12.)[2]

This procedure was an accommodation of observations made by *Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425. In that case, the trial court granted summary adjudication for the general contractor, holding that the subcontractor had a duty to defend regardless of any duty to indemnify under the contract. The appellate court reversed, and in doing so observed :

> "[A]s a practical matter, [summary adjudication] does not finally resolve the duty to defend issue. Since there are approximately 24 subcontractors, each of whom performed work on a different phase or area of construction, their duty to defend is apparently limited by the clause to the issues concerning the type of work they did; Pacific Scene thus seeks to have a series of related defenses provided. While such a fragmented duty to defend poses no particular problems with regard to any ultimate division of the costs of defense, as part of the indemnification duty, it does pose practical problems for an immediate or current duty to defend (or to pay pro rata for another's defense) up to and including trial. There has been as yet no determination of any breach of this duty, which would allow the consequences of a failure to defend to be made clear."

(*Regan Roofing Co. v. Superior Court*, *supra*, 24 Cal.App.4th at 437.)

The *Crawford* court specifically disapproved the *Regan Roofing* decision insofar as that decision suggests that a contractual duty to defend specified classes of claims necessarily depends on the promisor's ultimate liability for indemnity on those claims. Nevertheless, it approved the use of the summary adjudication procedure to establish a duty to defend, while postponing the ultimate decision regarding apportionment to accommodate the practical problems raised by multiple subcontractors as identified by *Regan Roofing*.[3]

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[2] While the *Crawford* court expressly acknowledged the issue of prematurity and the practical difficulties of sorting out multiple, and potentially conflicting, duties to assume the active defense of litigation then in progress, it noted: "But the case before us does not present such problems." (*Crawford, supra*, 44 Cal.4th at 565, fn. 12.) That's because there was no summary adjudication to establish duty in *Crawford.* The issue was instead resolved after trial, so the court was able to assess *after the fact* the appellant subcontractor's proportionate liability for breach of its duty to defend.

[3] The issue of apportionment among several subcontractors can also be seen in California Civil Code § 2782.05 subdivision (e), which states in part: "A subcontractor shall owe no defense or indemnity obligation to a general contractor . . . for a claim unless and until the general contractor . . . provides a written tender of the claim, or portion thereof, to the subcontractor that includes the information provided by the claimant or claimants relating to claims caused by that subcontractor's scope of work. In addition, the general contractor or construction manager shall provide a written statement regarding how the reasonable allocated share of fees and costs was determined." (Emphasis added.)

When a complaint filed by homeowners alleges defects arising out of a subcontractor's scope of work, and a developer's cross-complaint alleges the subcontractor is responsible for the homeowners' claims, then the duty to defend is triggered. (*UDC-Universal Dev., L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 20.) "An indemnitee should not have to rely on the plaintiff to name a particular subcontractor or consultant in order to obtain a promised defense by the one the indemnitee believes is responsible for the plaintiff's damages." (*Ibid*.) "The duty to defend . . . arose when the cross-complaint attributed responsibility for the [plaintiff's] damages to [the subcontractor's] deficient performance of its role in the project. Although the [plaintiff's] complaint did not specifically identify each subcontractor or the details of each role in the project, its general description of the defects in the project implicated [the subcontractor's] work. This is sufficient to trigger [the subcontractor's] duty to defend." (*Ibid*.) When a contract calls for a defense between developer and contractor "when any claim against [the developer] implicated [the subcontractor's] performance of its role in the project. That defense obligation arose when the [plaintiff' complaint] alleged harm resulting from deficient work that was within the scope of the services for which [the developer] retained the [subcontractor]." (*Id.* at p. 24.)

4. Analysis

Here, the complaint alleges that "the finished floor at the Project—in the public and private areas of both buildings—developed gaps at the end joints and was visually out-of-flat with noticeable high and low spots." Plaintiff also alleges that "in certain areas of both buildings the gypsum underlayment was fractured and defective, causing "soft spots" and other defects in the flooring." (First Amended Complaint (FAC) filed 4/12/23, ¶ 12.) Additional defects are alleged, such as the drywall chases located behind the medicine cabinets in many, if not all, the units at the Project were not properly sealed; the fire doors were deficient; and the balcony railings were not property coated to prevent corrosion or attached. (FAC, ¶ 15.) Wallace has identified each subcontractor and their respective scope of work. (See UMF Nos. 8, 12, 16, 20, and 25.)

Famco argues that Wallace has failed to show that the claims arise from its work. Famco agreed to furnish all materials, labor and equipment for the fine grade, form and pour site concrete and SOG [slab on grade] concrete (first floor) at the Project. (UMF No. 12.) According to the FAC, "the finished floor at the Project—in the public and private areas of both buildings—was developing gaps at the end joints and was visually out-of-flat with noticeable high and low spots. Upon further inspection, Depot Street discovered that in certain areas of both buildings the gypsum underlayment installed by W&S was fractured and defective, causing "soft spots" and other defects in the flooring." (FAC, ¶ 12.) It is undisputed that Famco did not install any gypsum substrates on the Project. (Famco's Statement of Additional Facts, No. 5.) However, it is also undisputed that plaintiff has asserted

in response to discovery that: "On the first floors, a luxury vinyl plank floor was installed over an on-grade concrete subfloor. The concrete, however, is not flat — the concrete surface has a high and low contour finish. Consequently, much like the upper floors, the first floors have a wavy appearance." (Separate Statement, No. 15.) Inasmuch as Famco prepared and poured the concrete for the first floors, the allegations implicate their work. Famco argues that they were not negligent, which, as discussed above, is not a consideration for determining whether it has a duty to defend. It appears that the duty to defend is sufficiently triggered by these pleadings.

J&D Steele further contends that its duty to defend was not triggered because Wallace's tender of defense was defective and therefore invalid under California Civil Code § 2782.05 subdivision (e), which states in part:

> "A subcontractor shall owe no defense or indemnity obligation to a general contractor or construction manager for a claim unless and until the general contractor or construction manager provides a written tender of the claim, or portion thereof, to the subcontractor that includes the information provided by the claimant or claimants relating to claims caused by that subcontractor's scope of work. In addition, the general contractor or construction manager shall provide a written statement regarding how the reasonable allocated share of fees and costs was determined."

On November 21, 2022, after the original complaint was filed, Wallace submitted an "additional insured tender of defense and indemnity" to AXIS Insurance Company, J&D Steele's insurer. In the tender, Wallace asserted: "Specifically, Plaintiff is alleging that the steel balcony railings at the Project are defective in that they are prematurely deteriorating and rusting causing damage to the surrounding Project components. Plaintiff's allegations clearly include claims arising out of the work of J&D." However, the original complaint only identified flooring defects as the extent of damages. On May 3, 2023, AXIS rejected the November 21, 2022 tender.

Meanwhile, on April 12, 2023, plaintiff filed the FAC alleging that the balcony railings were not properly installed or protected from corrosion. On December 13, 2023, Wallace submitted a renewed tender, referencing the original tender. It did not add any new information or enclose a copy of the FAC. J&D Steele submits that tender was entirely defective. However, even if there is a dispute over the *timing* of the tender (which may impact the date from which the duty to defend commences), there is absolutely no dispute that J&D, on receipt of Wallace's Cross-Complaint, had notice of the allegations made against them. J&D has an obligation to immediately defend Wallace. The *date* the duty arose will be revisited.

None of the subcontractors deny their subcontract contains a "duty to defend." However, they each point out that each Subcontract contains the following language which provides:

> "Subcontractor will not be required to reimburse, defend, or indemnify Wallace & Smith Contractors or Owner for the willful misconduct or sole or active negligence of Wallace & Smith Contractors or Owner." ("Limitation.")

Four of the five subcontractors argue that this Limitation imposes on Wallace the obligation to produce evidence to establish it was not negligent and did not engage in willful misconduct. The court has power on noticed motion to summarily adjudicate:

- that one or more causes of action has no merit; or
- that one or more claims for damages has no merit; or
- that there is no merit to a claim for punitive damages; or
- that there is no affirmative defense to one or more causes of action or claims for damages; or
- that there is no merit to one or more affirmative defenses; or
- that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs.

(Code Civ. Proc. § 437c, subd. (f)(1).)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party must show that the undisputed facts, when applied to the issues framed by the pleadings, entitle the moving party to judgment. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 66; see also *Hedayati v. Interinsurance Exch. of Auto. Club* (2021) 67 Cal.App.5th 833, 846.)

This is a fairly straightforward inquiry when the motion for summary adjudication is directed at an entire cause of action or affirmative defense, which is defined by elements identified by case law or statute. Here, however, the issue is raised by the sixth cause of action for declaratory relief, the elements of which are unhelpful: To qualify for declaratory relief under section 1060, plaintiffs must show their action presented two essential elements: "(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party." (*Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410.) And of course, the issue of duty can be raised independently of a declaratory relief cause of action, meaning it may be divorced of any cause of action at all.

The court finds that Wallace as the moving party is not required to establish it was not negligent and did not engage in willful misconduct. The court considered the following to reach this conclusion. No such provision appeared in the contract at issue in *Crawford*, which limits its applicability. Nevertheless, the court observes that (1) any such interpretation would conflict with *Crawford's* holding that the duty to defend is immediate upon the filing of an action and is not dependent upon the outcome of litigation; and (2) interpreting the subcontractor's duty to defend the general contractor to be contingent on a finder of fact ruling the subcontractor was not negligent would make the language related to the duty to defend nugatory, inoperative or meaningless because it would convert the express language requiring a duty to defend into a duty to embrace the costs of defense after the conclusion of litigation. The court is persuaded that the Limitation cannot alter *Crawford*'s holding.

But it's important not to strip the Limitation of meaning entirely, contrary to ordinary contract rules. (See Civ.Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."]; Civ.Code, § 1652 ["Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."].) In the briefing, the parties have not harmonized these provisions. But the court must do so in order to understand how this Limitation will ultimately impact the final determination of defense costs. One way to do that is to hold that the parties have effectively, by contractual fiat, converted the duty to defend into a bifurcated process. Consistent with *Crawford*, a duty to defend immediately arises and is thus immediately imposed on the Subcontractors. However, if there is a later finding of active negligence or willful misconduct by the General Contractor, any expenses paid under the duty to defend should result in a judgment against the General Contractor. In other words, Wallace is entitled to an immediate defense from the Subcontractors subject to a later duty to reimburse should it be found to have been actively negligent or committed willful misconduct. Under this construction, Wallace need only address the Duty to Defend Provision to be successful on its motion; it does not have the burden to produce evidence that it was not negligent, and it did not commit willful misconduct in the first instance.

The court thus returns to the prematurity concerns. Section 2778, subdivision 4, specifies that, absent evidence of a contrary intention, a contract of indemnity requires the indemnitor "to defend actions or proceedings brought against [the indemnitee] *in respect to the matters embraced by the indemnity*." This means that each Subcontractor's obligation to defend is limited to its scope of work. (*Carter v. Pulte Home Corporation* (2020) 52 Cal.App.5th 571, 586-587.) Following this to its natural conclusion, each Subcontractor's defense obligation is thus limited to a

proportionate share based on its scope of work. In other words, the Subcontractors cannot be jointly and severally liable for the cost of Wallace's defense.

This is precisely the type of difficulty the *Crawford* court anticipated when crafting footnote 12 of its ruling. Here, Wallace fails to provide a mechanism for apportionment of the defense costs as to all subcontractors. Accordingly, the court should exercise its discretion, as afforded by *Crawford*, and allow the matter to go forward with Wallace paying for its chosen counsel, subject to a later determination of how damages for breach of the duty to defense should be apportioned among the breaching parties.

Subcontractors argue there is an issue of disputed fact whether Wallace has actually suffered any out-of-pocket loss. This issue, too, will be relevant *when the court is in a position to allocate the monies owed.* It is premature at this point.