

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

THE SUMMIT COUNTRY DAY SCHOOL,	:	APPEAL NO. C-070044
	:	TRIAL NO. A-0506733
Plaintiff,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
	:	
REPUBLIC-FRANKLIN INSURANCE CO.,	:	
	:	
Defendant/Third-Party Plaintiff-Appellant,	:	
	:	
vs.	:	
	:	
TURNER CONSTRUCTION CO.,	:	
	:	
Third-Party Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Third-party plaintiff-appellant, Republic-Franklin Insurance Company, appeals the trial court’s judgment dismissing its third-party complaint asserting subrogation claims, as well as claims for unjust enrichment and tortious interference with a contract and a business relationship, against third-party defendant-appellee, Turner Construction Company. Because the waiver-of-subrogation provision in the construction contract between plaintiff, The Summit Country Day School, and

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Turner also applied to damaged property “adjoining or adjacent” to the construction work, we affirm.

Effective July 1, 2003, Republic issued to Summit a commercial property-insurance policy that contained a provision permitting Summit to waive its rights of recovery against another party in writing, if such waiver was given prior to a loss of Summit’s covered property or income. A few weeks later, Summit hired Turner to construct a new school building (“the Work”) immediately behind and adjacent to the existing school building on its property. The construction management agreement (“the CMA”) between the parties included a standard document used in the construction industry—a form agreement drafted in 1987 by the American Institute of Architects called the General Conditions of the Contract for Construction (“AIA 201”). As required by the AIA 201, Summit purchased “all-risk” property insurance (“the Builder’s Risk policy) to cover the Work. The AIA 201 also contained the following waiver-of-subrogation provisions at issue here:

“**11.3.5** If during the Project construction period the Owner insures properties * * * adjoining or adjacent to the site by property insurance under policies separate from those insuring the Project * * * the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance. * * *

“**11.3.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against (1) each other * * * for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work * * *.”

Due to allegedly negligent excavating by Turner, a portion of the existing school building collapsed, resulting in extensive property damage and lost income.

(Fortunately, the collapse occurred over a holiday weekend when school was not in session.) As a result, Republic advanced Summit \$250,000, recognizing that this amount was insufficient to cover the loss in the event that Summit's claim was covered under the Republic policy. No other funds were paid to Summit. Due to the exigent circumstances, Turner and Summit entered into an agreement ("the February Agreement") under which Turner advanced Summit the funds to cover the loss and Summit agreed to repay Turner those funds if Summit recovered any insurance proceeds from Republic. In the February Agreement, Turner indicated that it was not admitting liability for the collapse.

In August 2005, Summit sued Republic for breaching its obligation to make payment for covered losses under the policy. Republic then filed a third-party complaint against Turner asserting seven claims. Turner moved to dismiss the complaint arguing that Summit had waived its subrogation rights in the CMA and, thus, that Republic could not assert any claims against Turner. The trial court granted the motion.

In its single assignment of error, Republic now maintains that the trial court erred in dismissing its third-party complaint against Turner. When reviewing a ruling on a Civ.R. 12(B)(6) motion to dismiss, we must accept all factual allegations in the complaint as true and make all reasonable inferences in favor of the moving party.² To uphold the dismissal of Republic's complaint, it must appear beyond all doubt that Republic can prove no set of facts entitling it to relief.³

² *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 1995-Ohio-187, 649 N.E.2d 182, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

³ *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

In support of its assignment of error, Republic first argues that the waiver-of-subrogation provision in the CMA violated R.C. 2305.31, Ohio's anti-indemnity statute, because it required Republic, as Summit's insurer, to indemnify Turner for its own negligence. But we note that Turner was not seeking indemnification from Summit but was instead seeking to enforce the waiver-of-subrogation provision in the CMA. A waiver-of-subrogation provision allocates risk among the parties and is not an indemnity clause. "A distinction must be drawn between contractual provisions which seek to exempt a party from liability to persons who have been injured or whose property has been damaged [i.e., an indemnity clause] and contractual provisions * * * which in effect simply require one of the parties to the contract to provide insurance for all the parties."⁴

But even if a waiver of subrogation is construed as an indemnity agreement, R.C. 2305.31 is inapplicable to the circumstances here. R.C. 2305.31 is intended only to "prohibit[] indemnity agreements, in the construction-related contracts described therein, whereby the **promisor** agrees to indemnify the **promisee** for damages caused by or resulting from the negligence of the **promisee.**"⁵ (Emphasis added.) The purpose of R.C. 2305.31 is to protect contractors from being compelled to assume liability for the negligence of others.⁶ Accordingly, the statute is applied to prohibit a general contractor (the promisee) from hiring a subcontractor and imposing on the latter (as promisor) the condition that the subcontractor must indemnify the hiring contractor for its own negligence. But that was not the case here where Turner was the promisor, the one who was hired, and Summit was the

⁴ *Danis Bldg. Constr. Co. v. Employers Fire. Ins. Co.*, 2nd Dist. No. 19264, 2002-Ohio-6374, at ¶32, citing *Brzeck v. Standard Oil Co.* (1982), 4 Ohio App.3d 209, 212, 447 N.E.2d 760.

⁵ *Kendall v. U.S. Dismantling Co.* (1985), 20 Ohio St.3d 61, 485 N.E.2d 1047, paragraph one of the syllabus.

⁶ *Stickovich v. Cleveland*, 143 Ohio App.3d 13, 28, 2001-Ohio-4117, 757 N.E.2d 50.

promisee, the one who did the hiring.⁷ Since Summit was not attempting to force Turner to indemnify Summit for its own negligence, we hold that R.C. 2305.31 is not applicable in this case.

Next, Republic argues that waiver-of-subrogation provisions are exculpatory clauses, which are generally prohibited. But Ohio law is clear that waiver-of-subrogation provisions are valid and enforceable, as such provisions are part of a larger arrangement under which parties to a construction contract allocate the risks involved and spread the costs of different types of insurance.⁸

Republic also contends that any valid waiver of rights was limited to the Builder's Risk policy, which Summit had purchased to insure the Work, and did not apply to Republic's policy, which covered Summit's existing property. But this argument completely disregards the plain language of paragraph 11.3.5 of the CMA, which contained a waiver of damages for separately insured property adjoining or adjacent to the construction site "in accordance with the terms of paragraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance." Republic tries to bolster its argument by citing other jurisdictions that have held that the waiver contained in paragraph 11.3.7 only applies to insurance covering the construction work. But we do not find these cases persuasive because in each case there was not a separate policy of insurance covering "non-work" property,

⁷ See *Kovach v. Warren Roofing & Illumination Co.*, 8th Dist. No. 88430, 2007-Ohio-2514 (To determine whether an indemnification agreement violates R.C. 2305.31, the relevant inquiry is whether a promisor would be indemnifying a promisee for the promisee's own negligence under the contract).

⁸ *Nationwide Mutual Fire Ins. Co. v. Sonitrol, Inc. of Cleveland* (1996), 109 Ohio App.3d 474, 482, 672 N.E.2d 687; *Len Immke Buick, Inc. v. Architectural Alliance* (1992), 81 Ohio App.3d 459, 464, 611 N.E.2d 399; *Insurance Co. of North America v. Wells* (1973), 35 Ohio App.2d 173, 177, 300 N.E.2d 460.

and none of the courts addressed the specific language of paragraph 11.3.5 at issue here.⁹

Finally, Republic argues that if paragraph 11.3.5 was intended to waive Summit's rights of recovery for damages to property other than the Work, then the CMA would not have included provisions requiring Turner to buy liability insurance and to indemnify Summit against covered losses. But paragraph 11.3.7 reconciled any inconsistency among these provisions by expressly stating that "[a] waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise."

Under Ohio law, contract terms are to be given their plain and ordinary meaning.¹⁰ Here, paragraph 11.3.5 of the CMA clearly provided that if property adjoining or adjacent to the construction work site was covered under property insurance obtained by the owner, the owner then had to "waive all rights in accordance with the terms of [paragraph] 11.3.7 for damages caused by fire or other perils [to the extent] covered by this separate property insurance." Clearly, paragraph 11.3.5 effectively extended the waiver of subrogation to non-work areas covered by separate insurance.¹¹ Accordingly, we hold that because Summit had insured its property adjacent to the Work under a separate policy of insurance, Summit effectively waived its rights to recover damages from Turner under the CMA. Therefore, Republic, as a subrogee, may not recover from Turner any money it may pay to Summit to cover Summit's loss. We specifically note that this is not

⁹ See *Butler v. Mitchell-Hageback, Inc.* (Mo.1995), 895 S.W.2d 15; *Silverton v. Phoenix Heat Source System, Inc.* (Colo.App.1997), 948 P.2d 9; *Midwestern Indem. Co. v. Sys. Guilders, Inc.* (Ind.App.2004), 801 N.E.2d 661.

¹⁰ See *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 1995-Ohio-214, 652 N.E.2d 684.

¹¹ Accord *St. Paul Fire & Marine Ins. Co. v. Elkay Mfg. Co.* (2003), Del. Superior Ct. Nos. C.A. 98C-11-262 and C.A. 99C-11-144 2003; *Chadwick v. CIS, Ltd.* (1993), 137 N.H.515, 629 A.2d 820; c.f. *Knob Noster R-VIII School Dist. v. Dankenbring* (Mo.App.Ct.2007), 220 S.W. 3d 809.

intrinsically unfair to Republic, as its policy contained a provision allowing Summit to waive its rights of recovery in writing, prior to a loss. Presumably, Republic calculated its premium accordingly.

In conclusion, the trial court properly dismissed Republic's four subrogation claims against Turner for negligence, professional negligence, breach of contract, and breach of warranty, as well as the claims for unjust enrichment and tortious interference with a contract and business relationship. At the heart of the last three claims was the assertion that Summit had a duty to assign its rights to recovery to Republic. But we have already held that Summit had effectively waived its rights to recovery under the CMA. We also note that Summit did not gain any additional rights under the February Agreement, which was executed after the loss.

Therefore, the single assignment of error is overruled, and the judgment of the trial court is affirmed.

A certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 26, 2008
per order of the Court _____.
Presiding Judge