

FILED

APR 05 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 307115

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ENERGYSOLUTIONS, LLC,

Respondent.

v.

ABW TECHNOLOGIES, INC.,

Appellant,

BRIEF OF RESPONDENT

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Molly A. Terwilliger (WSBA No. 28449)
Ralph H. Palumbo, (WSBA No. 4751)
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ATTORNEYS FOR ENERGYSOLUTIONS, LLC

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1 Phillip L. Bruner & Patrick J. O'Connor, *Bruner and O'Connor on Construction Law* (Database Updated December 2012)11

11 Richard A. Lord, *Williston on Contracts* (4th ed.)13

I. INTRODUCTION

ABW Technologies, Inc. (“ABW”) accuses the trial court of applying the incorrect standard and misapplying the relevant burden, but what ABW really takes issue with is the court’s ultimate conclusion that enforcing the forum selection clause would impose an unjust and unreasonable burden upon the parties. ABW contorts the trial court’s ruling in order to cast it as contrary to well-established legal authority, but at base, ABW’s argument is that the trial court must have applied the wrong standard because it came to the wrong conclusion. A close examination of the trial court’s ruling, however, reveals that the court did not abuse its discretion in denying ABW’s motion to dismiss. To the contrary, the trial court applied the correct standard and found that EnergySolutions, LLC (“EnergySolutions”) met its burden to show that enforcement of the forum selection clause was unjust and unreasonable. Because this conclusion was well within the bounds of its discretion, the trial court’s ruling should be upheld.

Even if the trial court did not apply the correct legal standard on the enforceability of the forum selection clause, its decision denying ABW’s motion to dismiss should nonetheless be affirmed on the grounds that the South Carolina forum selection clause is not applicable to this dispute. As discussed below, the trial court’s conclusion that the South

Carolina forum selection clause from the prime contract between Washington Savannah River Company, LLC (“WSRC”) and the Department of Energy (“DOE”) governs this dispute is in error. The relevant contract—the Purchase Order between ABW and EnergySolutions—contains no limitations on the plaintiff’s choice of forum. As such, this provides an additional basis to affirm the trial court’s ruling denying ABW’s Motion to Dismiss.

II. STATEMENT OF THE CASE

This dispute arises out of an agreement between ABW and EnergySolutions, under which ABW was to construct four WSB Cementation Mixing Glovebox Systems (the “Gloveboxes”) for use in an environmental cleanup project at the Savannah River Site located in South Carolina. CP 1-5. The terms of the relationship between ABW and EnergySolutions is governed by the Purchase Order for these Gloveboxes. CP 139-74. EnergySolutions entered into the agreement with ABW in its role as a subcontractor to WSRC,¹ who in turn contracted with DOE to clean up the Savannah River Site.² CP 135, 176-88, 190-99.

¹ A copy of the contract between EnergySolutions and WSRC (Contract AC57108A) is located at CP 176-88. Management and operation of the environmental cleanup at the Savannah River Site has been transferred from WSRC to Savannah River Nuclear Solutions, LLC (“SRNS”). CP 135.

² The General Terms and Conditions for Commercial Purposes relevant to the prime contract between DOE and WSRC/SNRS (Contract DE-AC09-96SR18500) are located at CP 190-99.

EnergySolutions filed suit against ABW in Benton County Superior Court in June 2011, seeking to recover damages resulting from ABW's delayed delivery of the Gloveboxes. CP 1-7. ABW filed its Motion to Dismiss for Improper Venue in November 2011, arguing that the forum selection clause in the contract between WSRC and DOE required any litigation to be initiated in South Carolina. CP 8-23. In its briefing in response to the Motion to Dismiss, as well as in oral arguments, EnergySolutions challenged ABW's claim that the South Carolina forum selection clause applied, and argued that the terms of the Purchase Order controlled in disputes between ABW and EnergySolutions. CP 74-88. The dispute resolution clause in the Purchase Order does not limit the jurisdictions in which a party may seek resolution. Specifically, it provides:

9. DISPUTES

All disputes under this Contract that are not disposed of by mutual agreement may be decided by recourse to an action at law or in equity. Until final resolution of any dispute hereunder, [ABW] shall diligently proceed with the performance of this Contract as directed by EnergySolutions.

CP 169 ¶ 9. The Purchase Order General Provisions define "Contract" to mean "the instrument of contracting, such as 'Purchase Order,' 'PO,' 'Subcontract,' or other such type designation, including these General

Provisions, all referenced documents, exhibits and attachments.” CP 168 ¶ 1(a).

Although ABW and EnergySolutions disagreed on the threshold issue of whether the South Carolina venue clause applied to the Benton County case, there was no dispute about what standard EnergySolutions would have to meet to overcome the South Carolina venue clause. Indeed, EnergySolutions cited to the same standard still advocated by ABW today. CP 86-87 (citing *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812-13 (Utah 1994)).

After oral arguments held on December 9, 2011, the trial court sided with ABW and held that the South Carolina forum selection clause governed the Benton County action. RP 32:21-22. However, the court nonetheless denied ABW’s motion to dismiss on the grounds that EnergySolutions had met the requisite showing that enforcement of the forum selection clause would be unjust. RP 32:23-35:6. The court articulated the relevant standard in its oral ruling:

So the question then becomes whether or not there has been a sufficient showing that ... I don’t know if “unfair” is the correct term, but that it would essentially be such that it would impair the ability for one of the parties to get a fair trial.

RP 32:23-33:5. Applying this standard, the trial court concluded that there were substantial justifications for having the matter remain here in

Washington. RP 33:21-24. The court entered a written order denying ABW's Motion that same day. CP 201.

ABW then moved for reconsideration, and the trial court asked EnergySolutions to respond. CP 213. Again, EnergySolutions agreed with ABW about the standard for excusing compliance with a forum selection clause. CP 215-217 (illustrating that ABW and EnergySolutions identified the same criteria for enforcing forum selection clauses). The trial court reaffirmed its prior decision in its written order on ABW's Motion for Reconsideration. The court rejected ABW's argument that it had applied the wrong legal standard or improperly shifted the burden of proof to ABW. CP 234. According to the court, "to enforce the forum selection clause would be unreasonable and unjust under the circumstances of this case." *Id.*

ABW sought discretionary review of the trial court's order denying its motion to dismiss, as well as the trial court's order denying its motion for reconsideration. CP 237-44. Commissioner McCown granted ABW's motion for discretionary review on October 18, 2012. CP 249.

III. STANDARD OF REVIEW

ABW concedes that it bears the heavy burden to show that the trial court's decision constituted an abuse of discretion. *See* Br. Of App. at 11; *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1017 (2007). The

abuse of discretion standard gives deference to the trial court's fact-specific determinations, and a trial court's decision must be upheld unless the decision "is manifestly unreasonable" or "based on untenable grounds." *Id.* Trial courts retain broad discretion in determining reasonableness. *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 765, 774, 287 P.3d 551 (2012).

IV. ARGUMENT

A. **The Trial Court Applied the Correct Legal Standard and Properly Imposed the Burden Upon EnergySolutions.**

As noted above, the parties briefed the issue of the appropriate legal standard for determining whether to excuse compliance with the forum selection clause not once, but twice. ABW's motion for reconsideration merely regurgitated the same arguments made in its original motion to dismiss. *See* CP 203-208 (ABW Motion for Reconsideration). As noted by the Court in its Order Denying Defendant's Motion for Reconsideration:

The court took the arguments presented by Defendant in its Motion for Reconsideration into account at the time of its initial decision and concluded that to enforce the forum selection clause would be unreasonable and unjust under the circumstances of this case.

CP 234. Significantly, the parties agreed on the relevant standard and agreed that it was EnergySolutions who had the burden to show that enforcement of the forum selection clause would be unfair or unjust

because it would essentially deprive EnergySolutions of its day in court.
CP 215-17, 219-20.

ABW's arguments on this point are based upon a tortured interpretation of the court's articulation of the relevant standard in its oral ruling. Contrary to ABW's arguments, the court did not conclude that enforcing the forum selection clause would be merely inconvenient. Instead, it held that requiring EnergySolutions to litigate in South Carolina "would essentially be such that it would impair the ability for one of the parties to get a fair trial." RP 33:3-5. This conclusion was based upon the trial court's finding that there were "substantial ... justifications for having the matter remain ... in Washington." RP 33:22-24.

There is simply no evidence to substantiate ABW's claim that the trial court applied the wrong standard here, and accepting ABW's arguments would invite other litigants to engage in hyper-technical parsing of trial court rulings. There is simply no basis to hold judicial opinions to such unrealistically high standards. Therefore, ABW's claims about the trial court's orders must be rejected.

B. The Trial Court's Conclusion That Enforcing the Forum Selection Clause Would Impair the Ability for the Parties to Get a Fair Trial Was Not an Abuse of Discretion.

Without prevailing on its claim that the trial court applied the wrong legal standard, ABW cannot meet its burden to show that the trial

court abused its discretion when it declined to enforce the South Carolina forum selection clause. Notwithstanding ABW's protests, the trial court's decision is not manifestly unreasonable. The trial court's decision is based upon factual determinations that are supported by the record, and its conclusions about the unfair burden and prejudice that would result if EnergySolutions was required to file suit in South Carolina are squarely within the court's discretion. For example, the trial court acknowledged the caselaw suggesting that the presence of witnesses outside the forum may not be sufficient to justify setting aside the forum selection clause, but articulated several other justifications for its decision. RP 33:17-24. These justifications include the locations of the parties, witnesses, and documentation relevant to the litigation. RP 33:6-34:16. Although ABW may disagree with the court's eventual conclusions, there is no dispute that the factors considered by the court were relevant and appropriate. As such, the trial court's decision was not an abuse of discretion, and it should therefore be affirmed.

C. Should the Court Conclude That the Trial Court Erred, This Matter Should Be Remanded to the Trial Court for an Application of the Correct Legal Standard.

Even if the Court concludes that the trial court applied the incorrect legal standard or misapplied the applicable burden, the proper remedy is not, as ABW suggests, remanding this matter with instructions

to enter an order dismissing the case. To the contrary, when a trial court rests its decision on an improper understanding of the law, the appellate court should remand the case for an application of the correct legal standard. *See Cedell v. Farmers Ins. Co. of Wash.*, -- Wn.2d --, 295 P.3d 239, 244 (Feb. 21, 2013); *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004). ABW has provided no justification for departing from this precedent. EnergySolutions therefore requests that if the Court finds that the trial court applied the incorrect legal standard or misapplied the applicable burden, the Court remand this matter back to the trial court with instructions to apply the correct legal standard.

D. The Trial Court's Ruling Should Be Affirmed on the Grounds That the South Carolina Forum Selection Clause Is Not Applicable.

Even if this Court concludes that the trial court did not apply the correct legal standard, EnergySolutions requests that the Court affirm the trial court's decision denying ABW's Motion to Dismiss on the grounds that the South Carolina forum selection clause between WSRC and DOE is not applicable to the current dispute between ABW and EnergySolutions. A trial court's judgment may be affirmed on any basis supported by the record. *See, e.g., Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, -- Wn. App. --, 293 P.3d 413 (Jan. 28, 2013); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491-92, 183 P.3d 283

(2008); *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

As explained in more detail below, the trial court's ruling that the South Carolina forum selection clause governs this dispute is in error. Because the forum selection clause is not applicable to the Benton County action, this provides an additional basis to affirm the trial court's denial of ABW's Motion to Dismiss.

As discussed above, ABW's argument that EnergySolutions was required to file suit in South Carolina relies upon general provisions found on DOE's website that are related to the prime contract between DOE and WSRC. *See* CP 190-99. It is undisputed, however, that the Purchase Order between ABW and EnergySolutions contains no limit on the appropriate forum for resolving disputes arising out of the parties' agreement. CP 169 ("All disputes under this Contract ... may be decided by recourse to an action at law or in equity."). ABW's reliance on the language of the prime contract, rather than the Purchase Order, is misplaced for the following reasons.

First, ABW's position is simply not supported by the plain language of the Purchase Order. Contrary to arguments made by ABW, the lone reference to provisions found on DOE's website is not sufficient to require EnergySolutions and ABW to step into the shoes of WSRC and DOE. Unlike the second tier contract between EnergySolutions and

WSRC, which is “made an integral part” of the Purchase Order, the general provisions upon which ABW relies are simply listed as “Flowdown Requirements for Savannah River Site.” CP 152. This is markedly different from flowdown provisions commonly found in construction contracts that are designed “to bind the subcontractor to the contractor in the same manner and to the same extent (subject of course to the scope of the subcontractor’s work) as the contractor is bound unto the owner.” 1 Phillip L. Bruner & Patrick J. O’Connor, *Bruner and O’Connor on Construction Law*, § 3:32 (Database Updated December 2012). See, e.g., *Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352, 354-55 (Utah 1993) (discussing subcontract that required subcontractor to be bound “by all obligations of the prime contract as they may apply to the work herein described as if the contractor were in the place of the owner, and subcontractor were in place of the contractor.”). In the absence of clear language binding ABW to the terms of the prime contract between DOE and WSRC, ABW remains a stranger to the general contract, and the only terms that flow down are those relating to work that is being subcontracted. *John W. Johnson, Inc. v. Basic Const. Co.*, 429 F.2d 764, 774-76 (D.C. Cir. 1970).

Nor do the other contracts support ABW’s argument. Section 5 of the general provisions upon which ABW relies makes clear the intent to

limit the flowdown provisions to the work to be done by the subcontractor: “If any part of the Work is subcontracted, the Seller is responsible for having *the subcontracted Work* comply with the terms of this Agreement/Subcontract.” CP 191, ¶ 5.B (emphasis added). The prime contract also provides that the general terms and conditions are not intended to trump the specific agreement or terms and conditions. *Id.* ¶ 3.A (providing that inconsistencies shall be resolved in order of preference, and identifying “[g]eneral terms and conditions” as the lowest priority). Indeed, even the terms of the second tier contract between EnergySolutions and WSRC do not require EnergySolutions to step into the shoes of WSRC with regard to the prime contract. *See* CP 176-88. It would be illogical to conclude that the third tier contract between EnergySolutions and ABW nonetheless obligated them to step into the shoes of the prime contract between DOE and WSRC.

Courts evaluating agreements similar to the Purchase Order between EnergySolutions and ABW have concluded that only the substantive provisions relating to the work being performed by the subcontractor are incorporated into the subcontract. “Prime contract provisions unrelated to the work of the subcontractor, such as a ‘dispute’ clause governing the resolution of monetary claims between the project owner and general contractor, are not incorporated by reference into a

subcontract.” *U.S. Steel Corp. v. Turner Const. Co.*, 560 F. Supp. 871, 873-74 (S.D.N.Y. 1983). *See also John W. Johnson*, 429 F.2d at 774-76 (dispute resolution provision not applicable to subcontract); *MPACT Const. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 907-10 (Ind. 2004) (arbitration provision in prime contract did not apply to dispute between contractor and subcontractor). “[A] general incorporation by reference of the terms of the principal contract refers only to the quality and manner of the subcontractor’s work, not the rights and remedies he may have against the prime contractor.” *A.F. Lusi Const., Inc. v. Peerless Ins. Co.*, 847 A.2d 254, 262 (R.I. 2004) (quoting *H.W. Caldwell & Son, Inc. v. U.S. for Use and Benefit of John H. Moon & Sons, Inc.*, 407 F.2d 21, 23 (5th Cir. 1969)).

Finally, ABW’s argument that the South Carolina forum selection clause applies to this dispute is contrary to the well-established principle that “[w]here general and specific clauses conflict, the specific clause governs the meaning of the contract.” 11 Richard A. Lord, *Williston on Contracts*, § 32:10 (4th ed.); *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 207 P.3d 1235, 1240 (Utah 2009). Even accepting ABW’s argument that all of the terms of the contract between DOE and WSRC governed the relationship between EnergySolutions and ABW, there is a clear conflict between the “Resolution of Disputes” in the DOE/WSRC prime contract

and the “Disputes” provision of the Purchase Order between ABW and EnergySolutions: the prime contract requires litigation to be initiated in South Carolina, while the Purchase Order places no limits on a party’s ability to seek judicial relief. *Compare* CP 190 to CP 169. In the event of a conflict, the more specific provision controls, and in this case, the more specific provision is the one in the Purchase Order between EnergySolutions and ABW *because it was specifically intended to apply to disputes between EnergySolutions and ABW*. CP 152 (incorporating General Provisions by reference and making them “an integral part” of the Purchase Order). Contrary to statements made by the trial court, the fact that the DOE/WSRC contract specifies a particular forum for dispute resolution does not thereby make it more specific than the dispute resolution provision in the Purchase Order between EnergySolutions and ABW. RP 32:14-22. Because the terms of the Purchase Order and the prime contract plainly conflict on the issue of forum selection, the more specific clause from the Purchase Order must govern.

The fact that provisions of the Purchase Order conflict with terms in the prime contract provides additional support for the argument that the parties did not intend for ABW and EnergySolutions to step into the shoes of the prime contract between WSRC and DOE. In addition to the forum selection clauses, the Purchase Order and prime contract have conflicting

choice of law provisions. *Compare* CP 168 (Purchase Order governed by Utah law) *with* CP 190-91 (prime contract governed by South Carolina law). Applying the Disputes provision of the Purchase Order would be consistent with the trial court's ruling that this dispute is governed by Utah law, as provided in the Purchase Order. RP 32: 4-8. For this reason as well, the trial court's ruling denying ABW's motion to dismiss should be affirmed.

V. CONCLUSION

ABW cannot meet its burden to show that the trial court abused its discretion in denying ABW's Motion to Dismiss. The parties were in agreement about the applicable legal standard, and the trial court properly applied this standard. Further, the trial court's conclusion that enforcing the South Carolina forum selection clause would be unfair and would deprive EnergySolutions of its day in court was well within the discretion afforded to the trial court. To the extent that this Court disagrees that the trial court applied the correct legal standard, the trial court's ruling on the applicability of the South Carolina forum selection clause provides an alternative basis upon which to affirm the trial court's ruling denying ABW's motion to dismiss. Specifically, the Utah choice of law and "Disputes" provisions in the Purchase Order between ABW and

EnergySolutions govern this dispute, not the South Carolina choice of law and forum selection provisions in the DOE/WSRC prime contract.

RESPECTFULLY SUBMITTED this 4th day of April, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on April 5, 2013 I caused to be served via hand delivery a copy of the foregoing document upon on the following individuals:

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DATED this 4th day of April, 2013 at Seattle, Washington.



Deanna Schow

VI. APPENDIX

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(Cite as: 847 A.2d 254)

H

Supreme Court of Rhode Island.
A.F. LUSI CONSTRUCTION, INC.
v.
PEERLESS INSURANCE COMPANY.

No. 2002-553-Appeal.
April 22, 2004.

Background: General contractor brought declaratory judgment action against insurer for subcontractor, alleging insurer breached its contractual duty to insure general contractor and to provide it with a defense in connection with personal-injury action brought by subcontractor's employee. The Providence Superior Court, Patricia A. Hurst, J., denied general contractor's motion for a partial summary judgment, and entered a final judgment in favor of insurer. General contractor appealed.

Holdings: The Supreme Court, Flanders, J., held that:

- (1) neither subcontract nor certificate of insurance evidenced clear intent by subcontractor and its insurer to designate general contractor as additional insured for claims alleging general contractor's own negligence;
- (2) general contractor failed to procure subcontractor's agreement to designate general contractor as an additional insured under terms of insurance policy; and
- (3) even if incorporation and flow-down provisions of subcontract or general contractor's primary contract with State resulted in parties to subcontract assuming correlative position of parties to primary contract, Court could not ascertain what obligations, if any, that subcontractor agreed to undertake with respect to procurement of insurance.

Affirmed.

West Headnotes

[1] Contracts 95 ↪143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) k. In General. Most Cited Cases

A reviewing court has no need to construe contractual provisions unless those terms are ambiguous.

[2] Contracts 95 ↪143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) k. In General. Most Cited Cases

Contracts 95 ↪143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a Whole.
Most Cited Cases

Contracts 95 ↪152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases
When the terms of a contract are clear and unambiguous, then the court should apply them as written; in making this determination, the court should view the agreements in their entirety and give the contractual language its plain, ordinary, and usual meaning.

[3] Contracts 95 ↪143(2)

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95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General

95k143(2) k. Existence of Ambiguity.

Most Cited Cases

On appeal, the Supreme Court will deem agreements to be ambiguous when they are reasonably and clearly susceptible to more than one rational interpretation.

[4] Contracts 95 ↪ 147(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract.

Most Cited Cases

If contractual language is unambiguous, the intention of the parties must govern if that intention can be clearly inferred from the writing and can be fairly carried out in a manner consistent with settled rules of law.

[5] Insurance 217 ↪ 2361

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2359 Manufacturers' or Contractors' Liabilities

217k2361 k. Scope of Coverage. Most Cited Cases

Neither relevant language of subcontract nor certificate of insurance evidenced clear intent by subcontractor and its insurer to designate general contractor as additional insured under terms of liability insurance policy; subcontractor and general contractor neglected to describe subcontractor's specific insurance obligations vis-à-vis claims alleging general contractor's negligence, by neglecting to insert any insurance requirements, and by leaving blank subcontractor's responsibility for ob-

taining, maintaining, and paying for necessary insurance.

[6] Insurance 217 ↪ 2361

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2359 Manufacturers' or Contractors' Liabilities

217k2361 k. Scope of Coverage. Most Cited Cases

General contractor failed to procure subcontractor's agreement to designate general contractor as an additional insured under terms of subcontractor's general liability insurance policy, so as to give rise to obligation by insurer to provide general contractor with a defense in connection with personal-injury action brought by subcontractor's employee, arising from so-called incorporation-by-reference, flow-down, or indemnification provisions contained in subcontract or general contractor's primary contract with State.

[7] Appeal and Error 30 ↪ 671(5)

30 Appeal and Error
30X Record
30X(M) Questions Presented for Review
30k671 Limitation by Scope of Record in General

30k671(5) k. Effect of Omission of Instrument Sued on or Involved. Most Cited Cases

Even if incorporation and flow-down provisions of subcontract or general contractor's primary contract with State resulted in parties to subcontract assuming correlative position of parties to primary contract, mere incorporation of primary contract into subcontract did not allow Supreme Court to ascertain what obligations, if any, subcontractor agreed to undertake with respect to procurement of insurance and, thus, correctness of general contractor's basic contention, that subcontractor's insurer was obligated to provide general contractor with defense in connection with personal-injury action

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brought by subcontractor's employee, could not be determined from record on appeal.

[8] Appeal and Error 30 ⚡671(5)

30 Appeal and Error
30X Record

30X(M) Questions Presented for Review
30k671 Limitation by Scope of Record in General

30k671(5) k. Effect of Omission of Instrument Sued on or Involved. Most Cited Cases

If the parties do not provide the reviewing court with the pertinent contract provisions, it cannot resolve questions of contract interpretation.

[9] Insurance 217 ⚡1702

217 Insurance

217XII Procurement of Insurance by Persons Other Than Agents

217k1702 k. Contracts. Most Cited Cases

Agreement by subcontractor to procure insurance to indemnify general contractor for general contractor's own negligence would exceed express limitations of general contractor's primary contract with State and additional-insureds provision of subcontractor's general liability insurance policy.

[10] Appeal and Error 30 ⚡671(5)

30 Appeal and Error
30X Record

30X(M) Questions Presented for Review
30k671 Limitation by Scope of Record in General

30k671(5) k. Effect of Omission of Instrument Sued on or Involved. Most Cited Cases

Supreme Court was not required to decide whether statute governing construction of indemnification agreements invalidated insurance-procurement agreement, where general contractor failed to prove that it obtained any "appropriate agreement" from subcontractor to assume same insurance-related duties and obligations toward general contractor that general contractor assumed to-

ward State, and parties failed to provide Court with adequate record of contract provisions in question from which Court could determine exactly what kind of insurance general contractor was required to procure for State, much less whether subcontractor agreed to procure insurance for general contractor's own negligence. Gen.Laws 1956, § 6-34-1.

[11] Indemnity 208 ⚡30(5)

208 Indemnity

208II Contractual Indemnity

208k26 Requisites and Validity of Contracts

208k30 Indemnitee's Own Negligence or Fault

208k30(5) k. Contractors, Subcontractors, and Owners. Most Cited Cases

Statute governing construction of indemnification agreements permits agreements in which the subcontractor indemnifies the general contractor for claims arising from the subcontractor's own negligence. Gen.Laws 1956, § 6-34-1.

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Present: WILLIAMS, C.J., FLANDERS, GOLDBERG, FLAHERTY, and SUTTELL, JJ.

OPINION

FLANDERS, Justice.

This case requires us to deconstruct various construction contracts, insurance agreements, and other related documents. In particular, we must decide whether an insurer for a subcontractor on a real-estate-construction project agreed to provide liability insurance and a defense for the general contractor with respect to a lawsuit alleging that the general contractor was negligent. After hacking our way through a dense thicket of so-called incorporation-by-reference, flow-down, and additional-insured provisions contained in the pertinent documents, we answer this question in the negative.

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Facts and Travel

While working on a real-estate-construction project for the State of Rhode Island (state), one David Genereux (Genereux), an employee of Pasquazzi Brothers, Inc. (Pasquazzi), a subcontractor on this project, suffered personal injuries from an accident and collected workers' compensation benefits from Pasquazzi's workers' compensation insurer during the period of his resulting incapacity for work. Genereux also sued the general contractor, plaintiff, A.F. Lusi Construction, Inc. (Lusi). His complaint alleged that Lusi negligently maintained certain conditions at the job site that caused him to suffer personal injuries. In response to Genereux's negligence claims, Lusi filed a Superior Court declaratory-judgment action against the defendant, Peerless Insurance Company (Peerless), the insurer for the subcontractor, Pasquazzi. Lusi alleged that Peerless breached its contractual duty to insure Lusi and to provide it with a *257 defense in connection with Genereux's underlying personal-injury action. Lusi asserted that, in the policy that Peerless issued to Lusi's subcontractor, Pasquazzi, Peerless agreed to defend and indemnify Lusi with respect to claims such as those asserted in Genereux's underlying personal-injury action.

After the Superior Court denied Lusi's motion for a partial summary judgment, the court entered a final judgment in favor of Peerless. On appeal, we conclude that Lusi failed to establish an agreement by Peerless to defend or to indemnify Lusi with respect to the negligence claims asserted against Lusi in the underlying personal-injury action. Consequently, we affirm the motion justice's entry of final judgment in favor of Peerless.

In its appeal from the Superior Court judgment denying its request for a declaratory relief, Lusi points to the incorporation provision in Pasquazzi's subcontract with Lusi as the source of Pasquazzi's obligation to insure Lusi against any liability that Lusi might incur for personal injuries arising from Lusi's alleged negligence in connection with the project. Lusi also asserts that the indemnification

provision in its subcontract with Pasquazzi required Pasquazzi to indemnify and hold Lusi harmless for all claims against Lusi arising out of work performed by Pasquazzi "to the extent caused in whole or in part by any negligent act or omission of the Subcontractor [Pasquazzi]." Lusi next contends that Peerless's duty to defend and indemnify Lusi arises from Pasquazzi's contractual obligation to obtain insurance for Lusi. This obligation, Lusi posits, arises from both the so-called incorporation-by-reference and flow-down provisions contained in its subcontract with Pasquazzi and in its primary contract with the state, respectively, as well as from Lusi's status as an additional insured under Pasquazzi's general liability insurance policy with Peerless. Lusi argues that Pasquazzi undertook the same indemnity and insurance obligations with Lusi that Lusi undertook with the state. To support this contention, Lusi invokes not only the terms of its primary contract with the state, but also the provision in its subcontract with Pasquazzi that incorporates by reference the terms of Lusi's primary contract with the state. Lusi submits that Peerless was obliged to provide such insurance because Pasquazzi had a written agreement with Lusi to obtain such insurance for Lusi's benefit and because Peerless agreed in its policy with Pasquazzi "to include as an additional insured any person or organization with whom you [Pasquazzi] agreed, because of a written contract or agreement or permit, to provide insurance such as is afforded under this policy."

Peerless counters that the terms of Pasquazzi's subcontract with Lusi do not clearly and unambiguously require Pasquazzi to purchase liability insurance or to indemnify Lusi for Lusi's own negligence, which is all that Genereux alleged in his underlying personal-injury action. Thus, it contends, the trial justice did not err in refusing to rule in Lusi's favor on this issue as a matter of law. In addition, Peerless asserts that the provisions of G.L.1956 § 6-34-1 ^{FN1} apply to bar the enforcement*258 of any agreements in which a subcontractor, such as Pasquazzi, agrees to indemnify a

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general contractor, such as Lusi, against third-party claims arising from the general contractor's own alleged negligence. Here, Genereux, the personal-injury plaintiff, asserted in his complaint that Lusi's negligence proximately caused his injuries. Therefore, according to Peerless, any agreements by Pasquazzi—including any agreements to purchase insurance for Lusi's benefit that purport to require Pasquazzi or its insurer to indemnify Lusi for its own negligent acts—would be unenforceable because they would violate § 6-34-1 and the public policy embodied in that law against enforcing such agreements to indemnify another party for its own negligence.

FN1. General Laws 1956 § 6-34-1(a) provides in pertinent part:

“A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building [or] structure * * * pursuant to which contract or agreement the promisee or the promisee's independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, the promisee's independent contractors, agents, employees, or indemnitees, is against public policy and is void; provided that this section shall not affect the validity of any insurance contract, worker's compensation agreement, or an agreement issued by an insurer.”

I

The Relevant Contract Language Does Not Evidence a Clear Intent by Peerless and Pasquazzi to

Designate Lusi as an Additional Insured Under the Terms of the Peerless Insurance Policy

[1][2][3][4] A reviewing court has no need to construe contractual provisions unless those terms are ambiguous. *W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I.1994). When the terms are clear and unambiguous, then the court should apply them as written. *Id.* In making this determination, the court should view the agreements in their entirety and give the contractual language its “plain, ordinary and usual meaning.” *Id.* On appeal, this Court will deem agreements to be ambiguous when they are reasonably and clearly susceptible to more than one rational interpretation. *Id.* But if the contractual language is unambiguous, the intention of the parties must govern “if that intention can be clearly inferred from the writing and * * * can be fairly carried out in a manner consistent with settled rules of law.” *Id.*

[5] In this case, we hold that the relevant contract language does not evidence a clear intent by Peerless and Pasquazzi to designate Lusi as an additional insured under the terms of the Peerless insurance policy—at least not with respect to claims alleging that Lusi's negligence caused an employee of Pasquazzi to suffer personal injuries while working at the job site. The terms of the subcontract between Lusi and Pasquazzi provide no support for Lusi's contention that Pasquazzi was required to obtain insurance that would indemnify and provide a defense for Lusi against the negligence claims asserted in the underlying Genereux lawsuit. In fact, the provision of the Lusi-Pasquazzi subcontract that purports to address Pasquazzi's insurance obligations lacks the very information that presumably would have answered this question.

Article 9, § 9.1 of the Lusi-Pasquazzi subcontract addresses the subject of insurance and provides: “[T]he Subcontractor shall obtain the required insurance from a responsible insurer, and shall furnish satisfactory evidence to the Contractor that the Subcontractor has complied with the requirements of this Article 9.” The parties failed,

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however, to insert any description of “the required insurance” in the space provided for doing so under Article 9 of the subcontract. Just below this section, *259 § 9.2 of the form contract reads: “Here insert any insurance requirements and Subcontractor’s responsibility for obtaining, maintaining and paying for necessary insurance with limits equaling or exceeding those specified in the Contract Documents and inserted below, or required by law.” Thus, it appears to us that if the parties had intended to describe Pasquazzi’s specific insurance obligations vis-a-vis claims alleging general contractor they would have done so in this part of the contract. But they neglected to do so by failing to describe “the required insurance,” by neglecting to “insert any insurance requirements,” and by leaving blank the “Subcontractor’s responsibility for obtaining, maintaining, and paying for necessary insurance.”

Nevertheless, Lusi maintains that the certificate of insurance that Pasquazzi provided to it constitutes evidence of the parties’ intent to add Lusi as an additional insured under the Peerless policy. But the terms of this certificate provide no evidence of any obligation on Pasquazzi’s part to procure insurance that would cover Genereux’s negligence claims against Lusi. Rather, the insurance certificate merely says: “This certificate is issued as a matter of information only and confers no rights upon the certificate holder [Lusi]. This certificate does not amend, extend or alter the coverage afforded by the policies below.” The certificate then lists the various types of insurance Pasquazzi obtained. Nowhere on the certificate is Lusi or any other party named as an additional insured; rather, the certificate states only that Pasquazzi had obtained a general liability policy, which included a “BLKT ADD’L INS” provision. Therefore, the certificate itself provides no evidence that the parties intended for Lusi to be an additional insured under Pasquazzi’s policy with Peerless, let alone that Peerless would provide insurance and a defense to Lusi for claims alleging Lusi’s own negligence.

II

Lusi Failed to Procure Pasquazzi’s Agreement to Designate Lusi as an Additional Insured Under the Terms of the Peerless Insurance Policy

[6] Pasquazzi’s general-liability-coverage policy, issued by Peerless, provides for “additional insureds” as follows:

“Who is an insured is amended to include as an additional insured any person or organization with whom you [Pasquazzi] agreed, because of a written contract or agreement or permit, to provide insurance such as is afforded under this policy, *but only with respect to your [Pasquazzi’s] operations, ‘your work’ or facilities owned or used by you.*” (Emphasis added.)

In addition, the insurance certificate that Pasquazzi provided to Lusi said: “Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies.” Thus, the insurance that Peerless agreed to provide to Pasquazzi, including insurance to cover any “additional insureds,” was limited by that policy’s terms to include as an additional insured only “any person or organization with whom [Pasquazzi] agreed, because of a written contract or agreement or permit, to provide insurance such as is afforded under this policy.”

Lusi posits that one such contractual indication that Pasquazzi agreed to provide insurance for Lusi is contained in a so-called flow-down provision in § 5.3.1 of the *260 primary contract between Lusi and the state. Significantly, however, Pasquazzi was not a party to that contract and Lusi furnished us with no evidence that Pasquazzi ever agreed to assume toward Lusi all the insurance obligations and responsibilities that Lusi assumed toward the state and the project’s architect. Moreover, § 5.3.1 contains a significant limitation on Lusi’s obligation to require each subcontractor to assume toward Lusi all the obligations and responsibilities that Lusi assumed toward the owner and the architect.

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Thus, § 5.3.1 provides:

“By appropriate agreement, written where legally required for validity, the Contractor [Lusi] shall require each Subcontractor [Pasquazzi], *to the extent of the Work to be performed by the Subcontractor* [Pasquazzi], to be bound to the Contractor [Lusi] by terms of the Contract Documents, and to assume toward the Contractor [Lusi] all the obligations and responsibilities which the Contractor [Lusi], by these Documents, assumes toward the Owner [the State] and Architect.” (Emphasis added.)

Thus, pursuant to this contract language, Lusi had to satisfy three prerequisites before it could qualify as an additional insured under the policy Peerless issued to Pasquazzi: (1) it had to prove the existence of an agreement on Lusi's part to provide insurance for the state and the architect that would indemnify them for Lusi's alleged negligence; (2) it had to prove the existence of an agreement on Pasquazzi's part to assume toward Lusi the same insurance obligations and responsibilities that Lusi had assumed toward the state and the project's architect; and (3) it had to show that such an agreement by Pasquazzi would cover the alleged negligence in the underlying lawsuit because such a claim related to “the extent of the work to be performed” by Pasquazzi. As discussed in this opinion, Lusi failed on all three counts to qualify as an additional insured under the Peerless policy.

Because the parties failed to provide specifically for Pasquazzi's insurance obligations in the subcontract—leaving blank that portion of the subcontract that called for a specific description of such insurance obligations—Lusi asks this Court to deduce as much by following a vanishing trail of contractual breadcrumbs that winds through the various provisions of the subcontract, the primary contract, the Peerless insurance policy, and the insurance certificate that Pasquazzi provided to Lusi. In doing so, however, we inevitably find ourselves lost in the woods of inapposite contract language.

Lusi first suggests that the indemnification provision in its subcontract with Pasquazzi, § 11.11.1, shows that Pasquazzi agreed to obtain insurance for the benefit of Lusi. The terms of the indemnification provision, however, are conspicuously silent with respect to any obligation on Pasquazzi's part to provide insurance for Lusi.^{FN2} A contractual duty to “indemnify *261 and hold harmless” is not the legal equivalent of a duty to procure insurance coverage for that indemnity obligation. Thus, § 11.11.1 of the subcontract neither required Pasquazzi to obtain insurance for Lusi, nor did it provide support for Lusi's contention that it was an additional insured under the Peerless policy.

FN2. Section 11.11.1 of the subcontract provides, in pertinent part:

“To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, 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.”

Lusi next insists that Pasquazzi agreed to insure Lusi via the so-called incorporation provision in its subcontract with Lusi and in the flow-down provision in Lusi's primary contract with the state. Article 1, § 1.1 of the Lusi-Pasquazzi subcontract contains an incorporation provision that reads:

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“The Contract Documents for this Subcontract consist of this Agreement and any Exhibits attached hereto, the Agreement between the Owner and Contractor dated as of Jan. 21, 1999, [and] the Conditions of the Contract between the Owner and Contractor (General, Supplementary and other Conditions) * * *. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein.”

Additionally, the primary contract between Lusi and the state contained a so-called flow-down provision in § 5.3.1 that provides:

“By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, *to the extent of the Work to be performed by the Subcontractor*, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect.” (Emphasis added.)

But Lusi provided no evidence that it ever obtained such an “appropriate agreement” from Pasquazzi. Section 5.3.1 of Lusi’s primary contract with the state does not say that Pasquazzi agreed to be bound by the terms of the primary contract; rather, it says that Lusi will *require* Pasquazzi to agree to be bound, but only “to the extent of the [w]ork to be performed by the [s]ubcontractor.” Thus, for Pasquazzi to be so bound, Lusi must have obtained Pasquazzi’s agreement to that effect. Absent a promise by Pasquazzi to assume toward Lusi “all the obligations and responsibilities” that Lusi assumed toward the state, the mere incorporation-by-reference provision in Article 1, § 1.1 did not accomplish such a result because the mere inclusion of Lusi’s promises to the state in the subcontract between Lusi and Pasquazzi did not convert Lusi’s promises into Pasquazzi’s promises.

The United States Supreme Court has held that a reference in a subcontract to the main or primary contract or to any other extraneous writing, made for a particular purpose, makes it part of the sub-

contract only for the purpose specified. *Guerini Stone Co. v. P.J. Carlin Construction Co.*, 240 U.S. 264, 277, 36 S.Ct. 300, 60 L.Ed. 636 (1916). In *United States Steel Corp. v. Turner Construction Co.*, 560 F.Supp. 871, 873 (S.D.N.Y.1983), the contract in question contained incorporation and flow-down provisions that were both similar to and different from the ones at issue here.^{FN3} In that case, the court determined*262 that a forum-selection clause in the general contract did not bind the subcontractor in an action against the general contractor. The court held “[t]here is no forum selection clause in the subcontract and * * * the incorporation by reference of the conditions of the prime contract does not * * * extend beyond the scope, quality, character and manner of performance of the subcontracted work.” *Id.* at 874. Likewise, in *H.W. Caldwell & Son, Inc. v. United States ex rel. John H. Moon & Sons, Inc.*, 407 F.2d 21, 23 (5th Cir.1969), involving a suit brought under the Miller Act, 40 U.S.C. § 270(a), the court determined that a subcontractor was not bound by the arbitration clause of a general contract. The court held that “a general incorporation by reference of the terms of the principal contract * * * refers only to the quality and manner of the subcontractor’s work, not the rights and remedies he may have against the prime contractor.” *H.W. Caldwell & Son, Inc.*, 407 F.2d at 23. See also *Washington Metropolitan Area Transit Authority v. Norair Engineering Corp.*, 553 F.2d 233, 235 (D.C.Cir.1977) (incorporation-by-reference and flow-down provisions in the subcontract incorporated only matters regarding work specifications and performance and not the arbitration clause of the primary contract); *S. Leo Harmonay, Inc. v. Binks Manufacturing Co.*, 597 F.Supp. 1014, 1026 (S.D.N.Y.1984) (incorporation by reference into the subcontract of the terms of the primary contract does not bind a subcontractor to a “no damages for delay” mechanism for resolving disputes because the subcontractor is not a party to the primary contract and has no rights thereunder). *But see Turner Construction Co. v. Midwest Curtainwalls, Inc.*, 187 Ill.App.3d 417, 135 Ill.Dec. 14, 543 N.E.2d 249, 252 (1989) (when

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viewing contract as a whole, which included incorporation and flow-down provisions, the court held that the parties intended the subcontract to incorporate the general contract's arbitration clause); *Sime Construction Co. v. Washington Public Power Supply System*, 28 Wash.App. 10, 621 P.2d 1299, 1303 (1980) (incorporation clause was general and unlimited, thus both the contract specifications and procedural provisions of the prime contract, including notice requirements for damage claims due to delay, were incorporated by reference into the subcontract).

FN3. The language of the incorporation provision at issue in *United States Steel Corp.* was self-executing because the primary contract included language whereby the subcontractor *directly agreed* to be bound to the owner and to the general contractor. In contrast, the language of § 5.3.1 in the primary contract between Lusi and the state only required Lusi to obtain Pasquazzi's agreement to be bound. Thus, the primary-contract provision in *United States Steel Corp.* said: “[T]he Subcontractor agrees to be bound to the Owner and to [the General Contractor] by each and all of the terms and provisions of the General Contract and the other Contract Documents, and to assume toward the Owner and [the General Contractor] all of the duties, obligations and responsibilities that [the General Contractor] by those Contract Documents assumes toward the Owner * * *.” *United States Steel Corp. v. Turner Construction Co.*, 560 F.Supp. 871, 873 (S.D.N.Y.1983). When the subcontractor agreed to incorporate that provision into the subcontract, it thereby bound itself to assume those provisions of the primary contract that related to the scope, quality, character, and manner of the work that the subcontractor agreed to perform. *Id.* at 873–74. But the provision in the Lusi-state primary contract, however, says only: “ By

*appropriate agreement * * * the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound * * *.”* (Emphases added.) Significantly, there is no similar language in the Lusi–Pasquazzi subcontract under which Pasquazzi agreed to be bound to the state and to Lusi by each and all terms of the primary contract.

III

The Record Does Not Reveal to What Extent the Primary Contract Required Lusi to Procure Insurance from Its Subcontractors

[7] In this case, as previously noted, the mere incorporation of the primary contract between Lusi and the state—including the general and supplementary conditions*263 —into the subcontract between Lusi and Pasquazzi, does not allow us to ascertain what obligations, if any, that Pasquazzi may have agreed to undertake with respect to the procurement of insurance. This is especially so because Lusi has not provided us with all the general and supplementary conditions in its primary contract with the state that may be relevant to this issue. Attached to Lusi's brief to this Court are only certain portions of its primary contract with the state. But Lusi never included the entire primary contract as part of the record. And those contractual excerpts that Lusi has appended to its brief do not include a complete description of Lusi's insurance obligations to the state pursuant to the primary contract. For example, § 11.1.1 of Lusi's primary contract with the state provides as follows:

“The Contractor [Lusi] shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from *claims set forth below* which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indir-

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ectly employed by any of them, or by anyone for whose acts any of them may be liable.” (Emphasis added.)

Included in this section is the language of § 11.1.1.7 that requires Lusi to procure insurance to cover “claims involving contractual liability insurance applicable to the Contractor’s obligations under Paragraph 3.18.” But Lusi did not provide us or the Superior Court with copies of paragraph 3.18 or with any other evidence concerning the contract language contained in paragraph 3.18, the nature of “claims set forth below,” or the text of any other provision that explicitly required Lusi to obtain insurance to indemnify the state for claims arising out of the state’s negligence, Lusi’s negligence, or that of any subcontractor.

[8] If the parties do not provide the reviewing court with the pertinent contract provisions, it cannot resolve questions of contract interpretation. *McGee v. Local 682 of the Brotherhood of Painters, Decorators and Paperhangers of America, A.F. of L.*, 69 R.I. 1, 3, 30 A.2d 461, 462 (1943). Even if the incorporation and flow-down provisions of the contracts here resulted in the parties to the subcontract assuming the “correlative position of the parties to the prim[ary] contract,” *Industrial Indemnity Co. v. Wick Construction Co.*, 680 P.2d 1100, 1104 (Alaska 1984), the record lacks sufficient information from which this Court may discern to what extent the primary contract required Lusi to procure insurance from its subcontractors that would be for the benefit of either Lusi or the state, much less to what extent Pasquazzi agreed to do so. As such, the “correctness of * * * [Lusi’s] basic contention[] cannot now be determined from such a record.” *McGee*, 69 R.I. at 3, 30 A.2d at 462.

IV

An Agreement by Pasquazzi to Procure Insurance to Indemnify Lusi for Lusi’s Own Negligence Would Exceed the Express Limitations in § 5.3.1 of the Primary Contract and the Additional-Insureds Provision of the Peerless Insurance Policy

[9] Section 5.3.1 of the primary contract between Lusi and the state suggests that Lusi agreed only to have each subcontractor assume toward Lusi those obligations that Lusi assumed toward the owner and the architect, but only “to the extent of the [w]ork to be performed by *264 the [s]ubcontractor.” This indicates that Lusi was not required to have Pasquazzi indemnify Lusi for Lusi’s own negligence because that would exceed “the extent of the [w]ork to be performed by the [s]ubcontractor.”

Likewise, even if Lusi was an “additional insured” pursuant to the Peerless policy, we are unable to say that the language of the additional-insureds clause of the policy provides coverage for the claim that Genereux brought against Lusi. The additional-insureds provision limited coverage to Pasquazzi’s “operations,” “work[,] or facilities owned or used by” Pasquazzi. Therefore, given this limitation on the coverage, even if the Peerless insurance policy covered Lusi as an additional insured, it does not appear to us that Peerless agreed to indemnify or defend Lusi in connection with claims asserting Lusi’s own negligence.

Lusi cites a number of cases for the proposition that “additional insureds” provisions, such as the one contained in Pasquazzi’s general liability policy that Peerless issued, have been interpreted to protect the additional insured against liability arising from the additional insured’s own negligence.^{FN4} These cases, however, are distinguishable from this one because, for the most part, they interpreted different policy language than the language used in the Peerless policy.^{FN5} Many of the policies interpreted in the cases cited by Lusi used the term “arising out of” or “arising from” work or operations of the insured. *McIntosh v. Scottsdale Insurance Co.*, 992 F.2d 251, 254 (10th Cir.1993); *Fireman’s Fund Insurance Companies v. Atlantic Richfield Co.*, 94 Cal.App.4th 842, 115 Cal.Rptr.2d 26, 30 (2001); *Acceptance Insurance Co. v. Syufy Enterprises*, 69 Cal.App.4th 321, 81 Cal.Rptr.2d 557, 559 (1999); *Township of Springfield v. Ersek*, 660

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A.2d 672, 676 (1995). The language of the policy at issue here, however, does not include claims that “arise out of” Pasquazzi’s operations. Rather, the policy uses the more limited language that the Peerless insurance will extend to additional insureds “only with respect to” Pasquazzi’s operations, work, or facilities that Pasquazzi owned or used.

FN4. See *McIntosh v. Scottsdale Insurance Co.*, 992 F.2d 251 (10th Cir.1993); *Philadelphia Electric Co. v. Nationwide Mutual Insurance Co.*, 721 F.Supp. 740 (E.D.Pa.1989); *Fireman’s Fund Insurance Companies v. Atlantic Richfield Co.*, 94 Cal.App.4th 842, 115 Cal.Rptr.2d 26 (2001); *Acceptance Insurance Co. v. Syufy Enterprises*, 69 Cal.App.4th 321, 81 Cal.Rptr.2d 557 (1999); *Florida Power & Light Co. v. Penn America Insurance Co.*, 654 So.2d 276 (Fla.Dist.Ct.App.1995); *Lim v. Atlas-Gem Erectors Co.*, 225 A.D.2d 304, 638 N.Y.S.2d 946 (N.Y.App.Div.1996); *Township of Springfield v. Ersek*, 660 A.2d 672 (Pa.Comm. Ct.1995).

FN5. In all but three of these cases, the language employed in the insurance contracts is the “arising out of” language discussed above. In *Lim* and *Florida Power & Light Co.*, however, the language employed in the insurance contracts is the same as the provision of the Peerless policy at issue here; namely, “with respect to operations.” *Florida Power & Light Co.*, 654 So.2d at 277; *Lim*, 638 N.Y.S.2d at 947. The courts in these two cases relied upon the reasoning used in the cases involving the language “arising out of” and failed to acknowledge any distinction between the scope of these two different phrases. In *Philadelphia Electric Co.*, 721 F.Supp. at 742, the contract language provided that the plaintiff was an additional insured “for any work performed by [the

defendant].” In that case, the court determined that the language used was broad and, had the parties intended to limit the liability to vicarious liability, they should have used more specific, limiting language. *Id.*

More importantly, in all the cases cited above, the parties clearly designated the entity claiming coverage as an “additional insured” by either naming that entity specifically*265 as an additional insured, or by indicating in an otherwise clear and unequivocal manner that the entity asserting the entitlement to coverage qualified as an “additional insured” under the policies at issue. Here, as discussed previously, no such clear designation of Lusi as an additional insured exists.

V

We Need Not Decide Whether an Agreement by One Party to a Construction Contract to Procure Insurance for Another Party’s Alleged Negligence Violates § 6-34-1

[10] Assuming *arguendo* that Pasquazzi and Peerless were under a contractual duty to insure Lusi against claims based upon Lusi’s own alleged negligence, the question arises whether the anti-indemnification provisions of § 6-34-1 would render unenforceable a subcontractor’s agreement to procure insurance that would indemnify the general contractor for that general contractor’s own negligence, as opposed to agreements in which the subcontractor itself promises to indemnify the general contractor for the subcontractor’s negligence. Notably, § 6-34-1(a) says that “this section shall not affect the validity of any insurance contract * * * or an agreement issued by an insurer,” and § 6-34-1 (b) adds that “[n]othing in this section shall prohibit any person from purchasing insurance for his or her own protection * * *.”

[11] This Court has interpreted the provisions of § 6-34-1 to invalidate agreements between contractors in which a subcontractor has agreed to indemnify a general contractor for the latter’s own negligence. *Cosentino v. A.F. Lusi Construction Co.*, 485 A.2d 105, 107 (R.I.1984). This same stat-

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ute, however, permits agreements in which the subcontractor indemnifies the general contractor for claims arising from the subcontractor's own negligence. *Id.* In *Cosimini v. Atkinson-Kiewit Joint Venture*, 877 F.Supp. 68, 72 (D.R.I.1995), for example, the court interpreted the insurance-procurement clause of a construction contract to require the subcontractor to indemnify the general contractor only to the extent of the subcontractor's own negligence. The court acknowledged that "[i]t is true * * * § 6-34-1 does not, by its terms, require [the court] to nullify a clause clearly requiring a subcontractor to procure insurance to cover a general contractor's negligence." *Cosimini*, 877 F.Supp. at 72. The court went on to reason, however, that, "[t]he scope of the insurance that [the subcontractor] was obligated to procure is determined by the scope of the indemnity obligation, as it is legally required to be performed. Because [the court has] * * * narrowed [the subcontractor's] performance obligation under the indemnity clause, the insurance obligation, by its own language, is equally limited." *Id.* at 72-73.

Other courts, however, when interpreting statutory provisions similar to those found in § 6-34-1, have upheld agreements by a subcontractor to purchase insurance for a general contractor—even though the insurance would indemnify the general contractor against claims for damages resulting from the general contractor's own negligence. *See, e.g., Lulich v. Sherwin-Williams Co.*, 799 F.Supp. 64, 69 (N.D.Ill.1992); *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 475 (Minn.1992); *Meadow Valley Contractors, Inc. v. Transcontinental Insurance Co.*, 27 P.3d 594, 598 (Utah Ct.App.2001). In *Meadow Valley*, for example, the court distinguished agreements to indemnify from agreements to purchase insurance by deciding that the statute invalidates only agreements requiring one party in a construction contract "to personally insure against liability stemming*266 from the other party's negligence." *Meadow Valley Contractors, Inc.*, 27 P.3d at 598. The court reasoned that a promise by one party to purchase insurance for another did not

make that promisor an indemnitor, but merely allocated the cost of procuring insurance to that party; thus, it was not void under the statute. *Id.*

In this case, however, we need not decide whether § 6-34-1 invalidates insurance-procurement agreements because Lusi has failed to prove that it obtained any "appropriate agreement" from Pasquazzi to assume the same insurance-related duties and obligations toward Lusi that Lusi assumed toward the state. Moreover, the parties have not provided this Court with an adequate record of the contract provisions in question from which we could determine exactly what kind of insurance Lusi was required to procure for the state, much less whether Pasquazzi agreed to procure insurance for Lusi's own negligence. Additionally, given that Lusi's obligations to the state to obtain similar promises from its subcontractors appear to be limited by "the extent of the [w]ork to be performed by the [s]ubcontractor," we hold that Lusi provided insufficient evidence to support its claim that it was entitled to a defense and to indemnification from Peerless under its policy with Pasquazzi for claims alleging Lusi's own negligence.

Conclusion

Thus, we affirm the motion justice's entry of final judgment in favor of Peerless.

R.I.,2004.
A.F. Lusi Const., Inc. v. Peerless Ins. Co.
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(Cite as: 856 P.2d 352)

C

Supreme Court of Utah.
 Daniel C. BROWN, Plaintiff and Appellee,
 v.
 BOYER-WASHINGTON BOULEVARD ASSO-
 CIATES, a Utah limited partnership, Boman &
 Kemp Steel and Supply Company, Inc., a Utah cor-
 poration, and Jacobsen-Robbins Construction Com-
 pany, a Utah corporation, Defendants.
 JACOBSEN-ROBBINS CONSTRUCTION COM-
 PANY, a Utah corporation, Third-Party Plaintiff
 and Appellant,
 v.
 CCC & T, a Utah corporation, and Boman & Kemp
 Steel and Supply, Inc., a Utah corporation, Third-
 Party Defendants and Appellees.

No. 910082.
June 30, 1993.

Welding subcontractor's employee sued general contractor, property owner, and subcontractor who agreed to supply and erect all steel necessary in construction of building for personal injuries he incurred when he stepped off building while welding metal flooring sheets at place where there was gap in safety cable which had been strung by general contractor. General contractor filed third-party complaint against plaintiff's employer for purpose of determining respective proportions of fault and cross claim against subcontractor who had contracted to erect steel. The Third District Court, Salt Lake County, Richard H. Moffat, J., dismissed third-party complaint and granted summary judgment for subcontractor on cross claim. General contractor appealed. The Supreme Court, Howe, Associate C.J., held that: (1) general contractor could not be held liable for any amount in excess of proportion of fault attributable to it, and thus, fact finder was required to determine proportion of fault, if any, attributable to plaintiff's employer, and (2) since general contractor's liability was limited to its proportion of fault as found by fact finder, indem-

nity provision requiring subcontractor to indemnify general contractor for subcontractor's negligence would not become operative precluding general contractor's recovery on its cross claim against subcontractor.

Affirmed in part; reversed in part and re-manded.

Durham, J., concurred and filed opinion.

Stewart, J., dissented and filed opinion.

West Headnotes

[1] Negligence 272 ↪ 1304

272 Negligence
 272XVII Premises Liability
 272XVII(L) Defenses and Mitigating Cir-
 cumstances
 272k1301 Effect of Others' Fault
 272k1304 k. As grounds for apportion-
 ment; comparative negligence. Most Cited Cases
 (Formerly 272k97)

General contractor was not liable to welding subcontractor's employee for personal injuries sustained by employee when he stepped off building where there was gap in safety cable which had been strung by general contractor for any amount in excess of proportion of fault attributable to general contractor, and thus, fact finder was required to account for relative proportion of fault of injured employee's employer that might have caused or contributed to accident, even though employer was immune from suit under workers' compensation law. U.C.A.1953, 35-1-1 to 35-1-108, 78-27-38, 78-27-41; Rules Civ.Proc., Rule 54(b).

[2] Workers' Compensation 413 ↪ 2142.25

413 Workers' Compensation
 413XX Effect of Act on Other Statutory or
 Common-Law Rights of Action and Defenses
 413XX(B) Action by Third Person Against

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Employer

413XX(B)1 In General
413k2142.10 Indemnity or Contribution

413k2142.25 k. Indemnity, contractual. Most Cited Cases

Because general contractor's liability to employee of welding subcontractor for personal injuries resulting when employee stepped off building at place where there was gap in safety cable strung by general contractor was limited to general contractor's proportion of fault as found by fact finder, indemnity provision binding subcontractor to indemnify general contractor from and against all damages arising out of or resulting from the negligent performance of subcontractor's work would not become operative so that general contractor was not entitled to recover on its cross claim for indemnity against subcontractor. U.C.A.1953, 78-27-38.

*353 L. Rich Humpherys, Mark L. Anderson, Karra J. Porter, Salt Lake City, for Jacobsen-Robbins.

James R. Black, Salt Lake City, for CCC & T.

Robert G. Gilchrist, Salt Lake City, for Bowman & Kemp.

Roger D. Sandack, Edward B. Havas, W. Brent Wilcox, Salt Lake City, for Brown.

HOWE, Associate Chief Justice:

Defendant Jacobsen-Robbins Construction Company ("Jacobsen") appeals from an order dismissing its third-party complaint against CCC & T, Inc., and from an order granting defendant Boman & Kemp Steel and Supply Company, Inc. ("Boman"), summary judgment on Jacobsen's cross-claim against it. The trial court certified the two interlocutory orders as final and appealable pursuant to rule 54b, Utah Rules of Civil Procedure.

Jacobsen contracted as a general contractor to construct a six-story office building in Ogden for Boyer-Washington Boulevard Associates

("Boyer"). One term of the contract required Jacobsen to install a safety cable around all elevated exterior portions of the building. Jacobsen subsequently subcontracted with Boman to supply and erect all steel necessary in the construction of the building but not to install the safety cable. Jacobsen kept that duty. Boman, in turn, contracted with CCC & T to erect the steel.

Plaintiff Daniel Brown was a welder employed by CCC & T. His duties required him to weld metal flooring sheets. He secured the flooring sheets to the steel framework of the building at various points using welding equipment while wearing a sight-restricting welder's mask. As Brown began to weld along a floor beam, he would place a weld and then step sideways to his left. While attaching the flooring on the fourth floor, Brown lost track of where he was in relation to the side of the building. He stepped off the building at a place where there was a gap in the safety cable which had been strung by Jacobsen. Brown was seriously injured and received workers' compensation benefits from CCC & T pursuant to the Utah Workers' Compensation Act, Utah Code Ann. §§ 35-1-1 to -108 (1988 & Supp.1992).

Brown brought this action against Jacobsen and Boyer for damages, alleging that his injuries were caused by Jacobsen's failure to install adequate safety cables to protect construction workers. Jacobsen then filed a third-party complaint against CCC & T after a representative of the Utah Industrial Commission's Division of Occupational Safety and Health investigated the accident and concluded that CCC & T had failed to train Brown in safe welding procedures. The third-party complaint did not seek money damages because CCC & T was immune from tort liability under the exclusive remedy provision of the Workers' Compensation Act, section 35-1-60, but sought only the apportionment of CCC & T's fault. Jacobsen's complaint was in pursuance of Utah Code Ann. § 78-27-41, which provides that any defendant who is a party to litigation may join as parties any defendants who have

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caused or contributed to the injury or damage for which recovery is sought for the purpose of determining their respective proportions of fault. Section 78-27-38 provides that "no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant."

Jacobsen also filed a cross-claim against Boman, seeking indemnity for any liability it might incur. The cross-claim was based on indemnity provisions contained in both the prime contract and the subcontract.

*354 CCC & T moved the trial court to dismiss the third-party complaint on the ground that it was immune from liability to Jacobsen under section 35-1-60 and that it could not be joined as a defendant for the purpose of apportioning fault. The court granted CCC & T's motion, ruling that "no evidence of CCC & T's conduct will be submitted to the finders of fact in this case.... [N]o comparison of CCC & T's conduct with defendants' and plaintiff's fault [will] be allowed at trial."

Subsequently, Boman moved for summary judgment on Jacobsen's cross-claim for indemnity. The trial court granted the motion without explaining the basis for its ruling other than that the cross-claim was "found to be barred by Utah law." Jacobsen appeals.

THIRD-PARTY COMPLAINT

[1] The trial court erred in dismissing Jacobsen's third-party complaint against CCC & T. Since this case was argued, we have decided *Sullivan v. Scoular Grain Co.*, 853 P.2d 877 (Utah 1993), where we held that the fact finder must account for the relative proportion of fault of a plaintiff's employer that may have caused or contributed to an accident even though the employer is immune from suit. We reached that result because under section 78-27-38 Jacobsen cannot be held liable for any amount in excess of the proportion of fault attributable to it, as fully explained in *Sullivan*. This limitation on liability necessitates that the fact finder de-

termine the proportion of fault (if any) attributable to Brown's employer.

CROSS-CLAIM

[2] In its cross-claim against Boman, Jacobsen sought "full and complete indemnity for all claims and liabilities, court costs, attorneys' fees and other litigation expenses" incurred by Jacobsen in this action brought by Brown. Jacobsen relied upon a provision for indemnity contained in the prime contract between Jacobsen and the owner, Boyer, which provision Jacobsen contended was incorporated by reference into its subcontract with Boman and therefore was binding on Boman. Additionally, in seeking indemnity, Jacobsen relied upon a separate and distinct provision in the subcontract. We will examine those provisions.

In the subcontract, Boman agreed to be bound to Jacobsen "by all obligations of the prime contract as they may apply to the work herein described as if the contractor were in the place of the owner, and subcontractor were in place of the contractor." In other words, Boman obligated itself to perform under the terms of the prime contract between the owner and Jacobsen as though Jacobsen were the owner and Boman were the general contractor. After substituting Jacobsen in place of the owner and Boman in place of the general contractor, paragraph 3.18.1 of the prime contract can be summarized to provide:

To the fullest extent permitted by law, Boman shall indemnify and hold harmless Jacobsen from and against claims, damages, losses and expenses arising out of or resulting from performance of the work, provided that such claim, damage, loss or expense is attributable to bodily injury, but only to the extent caused in whole or in part by negligent acts or omissions of Boman, a subcontractor, anyone directly or indirectly employed by Boman or a subcontractor, 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.

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The separate indemnity provision contained in the subcontract can be summarized as follows:

Subcontractor shall indemnify contractor against and save harmless from any and all loss, damage, injury, liability, and claims thereof for injuries to persons resulting directly or indirectly from subcontractors' performance of this agreement, regardless of the negligence of the contractor, provided that where such loss, damage, injury, liability or claims are the result of active negligence on the part of the contractor and are not caused or contributed to by omission to perform some duty also imposed on the subcontractor, *355 his agents or employees, such indemnity will not apply to such party guilty of such active negligence *unless the prime contract documents otherwise provide.*

Clearly, the scope of the duty assumed by the indemnitor in the two provisions is not the same. Jacobsen contends that in case of a conflict between the two provisions, the provision in the prime contract which it asserts was incorporated by reference into the subcontract should prevail. Jacobsen bases this contention on the italicized words contained in the above summary of the provision in the subcontract, i.e., "unless the prime contract documents otherwise provide."

In accordance with that contention, Boman is bound to indemnify Jacobsen from and against all damages arising out of or resulting from the performance of Boman's work but only to the extent they are caused in whole or in part by negligent acts or omissions of Boman or its subcontractor, CCC & T. It is very likely that this provision was drafted with joint and several liability in mind and was designed to shield the contractor from liability for the negligent acts of others. The provision was written to require Boman to indemnify Jacobsen from Brown's damages but only to the extent they are found to have been caused in whole or in part by negligent acts or omissions of Boman or CCC & T. In view of the fact that section 78-27-38 limits Jacobsen's liability to its proportion of fault as may be

found by the fact finder, the indemnity provision will not become operative in this case. Thus, summary judgment on the cross-claim was proper.

We reverse the order dismissing Jacobsen's third-party complaint against CCC & T, affirm the summary judgment on the cross-claim, and remand the case to the trial court for further proceedings.

HALL, C.J., and ZIMMERMAN, J., concur.
DURHAM, Justice, concurring:

I write separately to note that Justice Stewart's dissent misreads the majority opinion in *Sullivan v. Scoular Grain Company*, 853 P.2d 877 (Utah 1993), when he claims that the court ignored legislative intent and "decided the issue on the basis of what it deemed to be good policy." As the author of that opinion, I am not of the view that its result was necessarily "good policy"; I believed it to be dictated by the statutory scheme viewed in its entirety. Like Justice Stewart, I hope that the legislature will address the issue.

STEWART, Justice, dissenting:

I dissent for the reasons stated in my dissent in *Sullivan v. Scoular Grain Co.*, 853 P.2d 877 (Utah 1993). The language of the Liability Reform Act is crystal clear that CCC & T is not a "defendant" under the Act because it is immune from liability and that negligence may be allocated only among parties to the lawsuit, not nonparties such as CCC & T. The legislative history unequivocally demonstrates that the Legislature specifically addressed and rejected the result the majority reached in *Sullivan*. The Court ignored this, however, and decided the issue on the basis of what it deemed to be good policy.

The Court's rejection of clear statutory language and unequivocal legislative history will produce serious consequences for the statutory scheme embodied in the Workers' Compensation Act and/or the plaintiffs' constitutional rights. It appears that the Legislature ought to readdress the issue.

Utah, 1993.

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H

Supreme Court of Utah.

CAFÉ RIO, INC., a Utah corporation, and Michael
D. Hughes, as Trustee of the Vera R. Hughes
Grandchildren's Trust, Plaintiffs and Appellees,

v.

LARKIN-GIFFORD-OVERTON, LLC, a Utah
limited liability company, Defendant and Appel-
lant.

No. 20070618.

May 1, 2009.

Background: Adjoining landowner and its tenant brought action against property owner, claiming that property owner's construction of building violated terms of development's cross-easement agreement. The Fifth District Court, St. George, James L. Shumate, J., granted summary judgment in favor of adjoining landowner and tenant. Property owner appealed.

Holdings: The Supreme Court, Durrant, Associate Chief Justice, held that:

- (1) cross-easement agreement allowed property owner to construct building without limitation on where building could be placed;
- (2) for purposes of provision of cross-easement agreement that prohibited owners from constructing any fence, wall, barricade, or obstruction which materially limits or impairs flow of traffic, building was not "obstruction";
- (3) for purposes of section of cross-easement agreement providing that none of common areas shall be changed in any material respect without prior written consent of all owners, "common areas" did not include proposed building; and
- (4) property owner was not judicially estopped from challenging tenant's parking rights.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ↪842(8)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k838 Questions Considered

30k842 Review Dependent on Whether
Questions Are of Law or of Fact

30k842(8) k. Review Where Evid-
ence Consists of Documents. Most Cited Cases

Supreme Court reviews a district court's inter-
pretation of a written contract for correctness,
granting no deference to the district court.

[2] Contracts 95 ↪143.5

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143.5 k. Construction as a Whole.
Most Cited Cases

When interpreting a contract, court considers
each contract provision in relation to all of the oth-
ers, with a view toward giving effect to all and ig-
noring none.

[3] Contracts 95 ↪147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of Contract.
Most Cited Cases

Contracts 95 ↪176(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k176 Questions for Jury

95k176(2) k. Ambiguity in General.
Most Cited Cases

Where the language within the four corners of

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a contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.

[4] Evidence 157 ⚡448

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(D) Construction or Application of Language of Written Instrument

157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases

Only if the language of the contract is ambiguous will the court consider extrinsic evidence of the parties' intent.

[5] Contracts 95 ⚡156

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k156 k. General and Specific Words and Clauses. Most Cited Cases

Under rule of construction ejusdem generis, court determines the meaning of a general contractual term based on the specific enumerations that surround that term.

[6] Covenants 108 ⚡69(2)

108 Covenants

108II Construction and Operation

108II(D) Covenants Running with the Land

108k69 Covenants as to Use of Property

108k69(2) k. Buildings or Other Structures or Improvements. Most Cited Cases

Development's cross-easement agreement allowed owner of parcel to construct building without limitation on where building could be placed on parcel; by excluding buildings from definition of common areas, owners of development's parcels implicitly agreed that buildings on owner's parcel and another parcel would not be subject to restric-

tions placed on defined common areas.

[7] Covenants 108 ⚡69(2)

108 Covenants

108II Construction and Operation

108II(D) Covenants Running with the Land

108k69 Covenants as to Use of Property

108k69(2) k. Buildings or Other Structures or Improvements. Most Cited Cases

For purposes of provision of development's cross-easement agreement that prohibited owners of parcels from constructing or erecting within any of the parcels any fence, wall, barricade, or obstruction which materially limits or impairs free and unimpeded flow of vehicular or pedestrian traffic, building was not "obstruction"; "obstruction" referred to those barriers that were similar to fences, walls, and barricades, and building was not similar in character or purpose to those barriers.

[8] Contracts 95 ⚡156

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k156 k. General and Specific Words and Clauses. Most Cited Cases

Court will not interpret a general contractual term such that it renders an explicit right meaningless.

[9] Covenants 108 ⚡69(2)

108 Covenants

108II Construction and Operation

108II(D) Covenants Running with the Land

108k69 Covenants as to Use of Property

108k69(2) k. Buildings or Other Structures or Improvements. Most Cited Cases

For purposes of cross-easement agreement's prohibition on any obstruction that materially limits or impairs ability to have unobstructed view of any of development's parcels, building that parcel owner proposed to construct on parcel was not

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“obstruction”; “obstruction” referred to those barriers that were similar to fences, walls, and barricades, and building was not similar in character or purpose to those barriers.

[10] Covenants 108 69(2)

108 Covenants

108II Construction and Operation

108II(D) Covenants Running with the Land

108k69 Covenants as to Use of Property

108k69(2) k. Buildings or Other Structures or Improvements. Most Cited Cases

For purposes of section of development's cross-easement agreement providing that none of common areas shall be changed in any material respect without prior written consent of all owners of the parcels, “common areas” did not include proposed building that owner sought to construct on parcel, and thus parcel owner was not required to obtain consent of all parcel owners before beginning construction of building; common areas were defined in agreement to exclude buildings on owner's parcel and on another parcel.

[11] Estoppel 156 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Property owner was not judicially estopped from challenging rights of adjoining landowner's tenant to park on property owner's parcel in development, though property owner in prior action signed settlement agreement, which provided that each parcel shall be benefited by nonexclusive easement for parking of vehicles for customers and employees of all businesses and occupants of buildings on any of the parcels; parties to settlement agreement explicitly reserved right to litigate terms of cross-easement agreement, and promises in set-

tlement agreement applied only to time between execution of settlement agreement and commencement of any future litigation.

[12] Estoppel 156 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Under “judicial estoppel,” a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.

*1237 Paul D. Veasy, T. Mickell Jimenez Rowe, Aaron D. Lebenta, Salt Lake City, Aaron D. Randall, St. George, for plaintiffs.

James A. Boevers, M. David Eckersley, Michael N. Zundel, Salt Lake City, Steven W. Beckstrom, St. George, for defendant.

AMENDED OPINION

DURRANT, Associate Chief Justice:

INTRODUCTION

¶ 1 In this case, we must determine the construction and parking rights of two adjacent landowners Larkin-Gifford-Overton, LLC (“LGO”), and Michael D. Hughes, Trustee of the Vera R. Hughes Grandchildren's Trust (“the Trust”), as established in the Declaration of New Easements and Covenants (the “Cross-Easement Agreement” or “Agreement”) executed between the parties.^{FN1} LGO owns Parcel 5 in a development in St. George; the Trust owns the adjacent Parcel 4.

FN1. There are six contiguous parcels in the development at issue. Each parcel owner is a party to the Cross-Easement Agree-

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ment. We limit our discussion to LGO and the Trust because they are the only parcel owners who are parties to this dispute.

¶ 2 In 2003, LGO filed suit against Café Rio and other defendants to determine the defendants' rights to park on LGO's Parcel 5. Café Rio is not a party to the Agreement, but is a tenant of the Hughes Building, which is owned by the Trust and located on the Trust's Parcel 4. To resolve the litigation, the parties entered into a settlement agreement (the "Settlement Agreement"), and the lawsuit was dismissed without prejudice.

¶ 3 A few months later, LGO began constructing a building on its Parcel 5. In response, the Trust and Café Rio brought suit, claiming that LGO's construction violated the terms of the Cross-Easement Agreement. The district court entered both a preliminary injunction stopping LGO's construction and a restoration order requiring LGO to restore the property to its pre-construction condition.

¶ 4 The Trust and Café Rio, and LGO, filed cross motions for summary judgment with respect to the parties' parking rights under the Cross-Easement Agreement. The court granted the Trust and Café Rio's motion, ruling that LGO "cannot construct a building on Parcel 5 without regard to the terms of the [Cross-Easement Agreement]." The court also enjoined LGO "from future violations of the parking agreements" and ruled that "LGO is judicially estopped from challenging*1238 Café Rio's [parking] rights under the Settlement Agreement." Thus, the court did not reach the question of whether the allowance of Café Rio restaurant customer parking on Parcel 5 merely because Café Rio maintained a district office on Parcel 4 constituted an overburdening of the easement. It is unclear whether the court reached LGO's claim that parking by Café Rio restaurant customers and employees on Parcel 5 was prohibited under the terms of the Cross-Easement Agreement. The court then granted attorney fees, costs, and interest on its costs to the Trust and attorney fees and costs to Café Rio.

¶ 5 LGO appeals, claiming that the district court erred in

- (1) interpreting the Cross-Easement Agreement as limiting the location on which LGO could construct a building on Parcel 5 and granting summary judgment based on that conclusion;
- (2) ruling that LGO is judicially estopped from challenging Café Rio's rights to park on Parcel 5; and
- (3) granting attorney fees, costs, and interest to the Trust and attorney fees and costs to Café Rio.
FN2

FN2. LGO claims several additional errors by the district court, but because we hold that the district court erred in interpreting the Cross-Easement Agreement, it is unnecessary to reach these additional claimed errors.

¶ 6 We reverse the district court's decisions and, for the reasons detailed below, hold that

- (1) the Cross-Easement Agreement unambiguously allows LGO to construct a building without limitation on where that building may be placed on Parcel 5;
- (2) LGO is not judicially estopped from challenging Café Rio's rights to park on Parcel 5; and
- (3) the district court erred in granting attorney fees, costs, and interest to the Trust and attorney fees and costs to Café Rio. Thus, we reverse those awards.

¶ 7 Based on these holdings, we remand for the district court to determine whether LGO suffered compensable damages in connection with the preliminary injunction and the restoration order, whether parking by Café Rio restaurant customers and employees on Parcel 5 is prohibited under the terms of the Cross-Easement Agreement, and

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whether such parking on Parcel 5 overburdens the easement if it is allowed merely because Café Rio maintains a district office on Parcel 4. We also note that LGO is entitled to pursue attorney fees and costs related to the issue of its right to construct a building on Parcel 5.

BACKGROUND

¶ 8 LGO owns Parcel 5, one of six contiguous parcels of real property in a development north of St. George Boulevard in St. George. The Trust owns the adjacent Parcel 4 and the Hughes Building on that parcel. Prior to February 2000, LGO had only one access point for vehicular traffic off of St. George Boulevard for Parcel 5; that access point was located about one-half block away. LGO contacted the Trust to inquire about obtaining an access easement across Parcel 4. As a result of their negotiations, the owners of all six parcels entered into the Cross-Easement Agreement.

¶ 9 The Agreement establishes common areas of open space in the center of the six parcels. These common areas are defined as, in part, “all of the areas of the Parcels ... designed for use as approaches, exits, entrances, and all parking lots, ... however expressly excluding all buildings (and any building(s) constructed on Parcels 5 and 6 in the future).”

¶ 10 The Agreement also grants each parcel owner the right to an “unobstructed view of any of the Parcels,” and it provides a “nonexclusive easement for the parking of motor vehicles ... for the customers, invitees and employees of all business and occupants of the buildings constructed on ... any of the Parcels.”^{FN3}

FN3. After drafting the Cross-Easement Agreement in February 2000, the Trust and LGO entered into a separate agreement on April 3, 2000. Under the terms of the April agreement, the Trust agreed to provide LGO and the public an easement for ingress and egress across Parcel 4 into the common areas. The Trust and Café Rio ar-

gue that the April agreement is relevant to our analysis. However, that agreement contains no provision prohibiting the construction of buildings on Parcel 5 or relating to parking rights. Hence, resolving this dispute hinges on the interpretation of the Cross-Easement Agreement alone.

*1239 ¶ 11 Café Rio leases space for its district office in the Hughes Building, which is owned by the Trust and located on Parcel 4. Café Rio also owns and operates a Café Rio Mexican Grill restaurant that is near, but not located on, any of the six parcels that are subject to the Cross-Easement Agreement. Nevertheless, Café Rio's restaurant customers and employees began parking on LGO's Parcel 5. In response, in April 2003, LGO brought suit against Café Rio and other defendants (the “2003 litigation”), claiming that Café Rio's restaurant customers and employees had no rights to park on Parcel 5 because the Café Rio restaurant was not a party to the Cross-Easement Agreement, is not located on any parcel of the property that is subject to the Cross-Easement Agreement, and therefore is “not ... entitled to benefit from the [parking easement]” that is established in the Cross-Easement Agreement. LGO further argued that allowing Café Rio restaurant customers and employees to park on Parcel 5 merely because Café Rio maintained a district office on Parcel 4 “unreasonabl[y] increase[d] the burden” on the easement. LGO then asserted claims for trespass, waste, and private nuisance, and sought a preliminary and permanent injunction.

¶ 12 The parties resolved the litigation by executing the Settlement Agreement. The court then entered an order of dismissal without prejudice, approving the Settlement Agreement.

¶ 13 Under the terms of the Settlement Agreement, the parties agreed that “[t]he parking of motor vehicles within the ‘designated paved parking spaces’ [on Parcel 5] shall be non-exclusive between the Parties, or their customers, employees, and/or invitees (on a first come, first serve basis), as provided in the [Cross-Easement Agreement].”

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LGO agreed not to tow any of Café Rio's customers' and employees' cars that were parked according to these terms. LGO and Café Rio also, however, expressly reserved their rights to litigate the terms of the Cross-Easement Agreement.

¶ 14 In April 2004, LGO began constructing a two-story, 10,000 square foot building on the parking lot of Parcel 5. The Trust, Café Rio, and another parcel owner, Flood Street, initiated suit, claiming that LGO's building constituted an "obstruction" that was explicitly prohibited by the Cross-Easement Agreement and seeking injunctive relief and damages.

¶ 15 Plaintiffs sought and were granted a preliminary injunction to stop LGO's construction of the new building. LGO answered and brought four counterclaims, seeking declaratory relief that it could construct a building in any location of its choice on Parcel 5. LGO also asserted claims that it had raised in the 2003 litigation, again challenging Café Rio's restaurant customers' and employees' rights to park on Parcel 5.

¶ 16 In August 2004, the Trust, Café Rio, and Flood Street moved the district court to order LGO to restore the common area. Following a hearing, the court ordered LGO to do so. The court did not, however, resolve the issue of the parties' parking rights.

¶ 17 The parties then conducted discovery on their respective parking rights and filed cross-motions for partial summary judgment. The district court granted summary judgment for the Trust and Café Rio and denied summary judgment for LGO, ruling that (1) the Cross-Easement Agreement was "clear and unambiguous" with regard to the parking and construction rights of the parties; ^{FN4} (2) LGO breached the Agreement by interfering with the Trust's and Café Rio's parking rights; (3) LGO was judicially estopped from challenging Café Rio's parking rights; (4) LGO was enjoined from future violations of the [Cross-Easement] Agreement; and (5) LGO could "not construct a building on Parcel

*1240 5 without regard to the terms of the [Cross-Easement] Agreement."

FN4. The court's order was entitled "Order Granting Café Rio's and the Trust's Motion for Summary Judgment Re: Parking." While the title of the order suggests that it addresses only the issue of parking, the court determined that the construction of LGO's building interfered with the parties' parking rights, and, therefore, the court ruled on both the parking and construction issues in the summary judgment order.

¶ 18 The Trust and Café Rio sought attorney fees and costs under the Cross-Easement Agreement. ^{FN5} The district court awarded the Trust and Café Rio attorney fees and costs; it also awarded the Trust 18% interest on its costs and expenses. The court entered final judgment in June 2007.

FN5. The Trust and Café Rio also sought fees and costs under the April 3 agreement. As noted, the April 3 agreement is inapplicable to this dispute.

¶ 19 LGO timely appealed, claiming that the district court erred in

- (1) interpreting the Cross-Easement Agreement as limiting the location on which LGO could construct a building on Parcel 5 and granting summary judgment based on that conclusion;
- (2) ruling that LGO is judicially estopped from challenging Café Rio's rights to park on Parcel 5; and
- (3) granting attorney fees, costs, and interest to the Trust and attorney fees and costs to Café Rio.

¶ 20 We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(j) (2008).

STANDARD OF REVIEW

[1] ¶ 21 We review a district court's interpretation of a written contract for correctness, granting

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no deference to the court below.^{FN6}

FN6. *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341, 347 (Utah Ct.App.1991).

ANALYSIS

I. THE DISTRICT COURT ERRED IN INTERPRETING THE CROSS-EASEMENT AGREEMENT

¶ 22 LGO first argues that the district court erred in interpreting the Cross-Easement Agreement as “prohibiting LGO from constructing buildings on Parcel 5” and in granting summary judgment based on that conclusion.

¶ 23 There are three provisions of the Cross-Easement Agreement that are relevant to determining whether LGO has the right to construct a building on its Parcel 5 without limitation on where that building may be placed: (1) the definition of “Common Areas,” (2) paragraph 12, “Prohibition of Barriers,” and (3) paragraph 2, “Composition and Use of Common Areas.”

¶ 24 The district court interpreted the provisions of the Cross-Easement Agreement as being “clear and unambiguous” in limiting the location on which LGO could construct a building on Parcel 5. The district court was incorrect.

[2][3][4][5] ¶ 25 Under well-accepted rules of contract interpretation, we look to the language of the contract to determine its meaning and the intent of the contracting parties.^{FN7} We also “consider each contract provision ... in relation to all of the others, with a view toward giving effect to all and ignoring none.”^{FN8} Where “the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.”^{FN9} Only if the language of the contract is ambiguous will we consider extrinsic evidence of the parties’ intent.^{FN10} We have explained that “ambiguity exists in a contract term or provision if it is capable of

more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.”^{FN11} Additionally, “[u]nder the well-established rule of construction *ejusdem generis*, ” we determine the meaning of a general contractual term based on the specific enumerations that surround that term.^{FN12}

FN7. *See Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 17, 84 P.3d 1134.

FN8. *Id.* (ellipses in original) (internal quotation marks omitted).

FN9. *Id.* (internal quotation marks omitted).

FN10. *Deep Creek Ranch, LLC v. Utah State Armory Bd.*, 2008 UT 3, ¶ 16, 178 P.3d 886.

FN11. *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 20, 54 P.3d 1139 (internal quotation marks omitted).

FN12. *Swenson v. Erickson*, 2000 UT 16, ¶ 16, 998 P.2d 807.

*1241 [6] ¶ 26 The question presented here is whether the Cross-Easement Agreement unambiguously allows LGO to construct a building without limitation on where that building may be placed on Parcel 5. We hold that it does and address each of the provisions at issue: (1) the definition of “Common Areas,” (2) paragraph 12, “Prohibition of Barriers,” and (3) paragraph 2, “Composition and Use of Common Areas.”

¶ 27 The Agreement defines “Common Areas” as “all of the areas of the parcels ... [which are] designed for use as approaches, exits, entrances, and all parking lots, ... however *expressly excluding all buildings (and any building(s) constructed on Parcels 5 and 6 in the future)*.” (Emphasis added.) Citing this definition, LGO argues that it “has the right to construct buildings on its Parcel 5, and there are no [contractual] limitations on where those build-

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ings may be placed.”^{FN13} LGO is correct.

FN13. The only apparent limitations on where buildings may be constructed on Parcels 5 and 6 are the applicable zoning ordinances.

¶ 28 The definition of common areas is clear and unambiguous: it defines precisely what is a common area and precisely what is not. Future buildings on Parcels 5 and 6 are not. Under this definition, then, the parties explicitly agreed that buildings would be constructed on Parcels 5 and 6, and the parties placed no limitation on the location of those buildings. By excluding buildings from the definition of common areas, the parties also implicitly agreed that buildings on Parcels 5 and 6 would not be subject to the restrictions placed on the defined common areas.

[7] ¶ 29 The Trust and Café Rio contend, however, that the explicit exclusion of buildings on Parcels 5 and 6 from the definition of common areas “merely ensures that buildings, unlike the Common Area parking lot and other defined areas, will not be available for unrestricted common use. It does not grant LGO carte blanche to put a building anywhere it wants, without regard for the other provisions of the Cross-Easement Agreement.” The Trust and Café Rio cite paragraphs 12 and 2 as support for this conclusion.

¶ 30 Paragraph 12, entitled “Prohibition of Barriers,” prohibits any parcel owner from

construct[ing] or erect[ing] within any of the Parcels or on the perimeter of any of the Parcels, any fence, wall, barricade, or *obstruction*, whether temporary or permanent in nature, *which materially limits or impairs* the free and unimpeded flow of vehicular or pedestrian traffic between and among the Parcels or *the ability to have an unobstructed view of any of the Parcels.* (Emphases added.)

¶ 31 Citing the emphasized language in para-

graph 12, the Trust and Café Rio claim that “[c]onstruction of a building ... in a known and declared easement area is an ‘obstruction.’ ” They also argue that the unobstructed view requirement is “perpetual and unchangeable,” and that LGO’s building would violate paragraph 12’s prohibition of barriers by obstructing the view of other parcels.

¶ 32 When the provisions of the Cross-Easement Agreement are construed together, it is clear that the parties contemplated the construction of buildings and specifically indicated, as to each parcel, where buildings would be allowed and where they would be prohibited. As to Parcels 5 and 6, the definition of common areas provides for buildings on those parcels. Paragraph 2, “Composition and Use of Common Areas,” on the other hand, explicitly prohibits any “building or other structure [from being] erected or placed upon any of the Common Areas of Parcels 1 through 4.” Given this level of specificity regarding buildings, it is plain that the parties did not intend the general term “obstruction” to include buildings.

[8] ¶ 33 Additionally, interpreting “obstruction” to include buildings would eviscerate LGO’s ability to construct a building on Parcel 5—a right explicitly bargained and provided for. We will not interpret a general contractual term such that it renders an explicit right meaningless.^{FN14}

FN14. See, e.g., *Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 2004 UT 54, ¶ 11, 94 P.3d 292.

¶ 34 Furthermore, under the principle *ejusdem generis*, the general term “obstruction,” *1242 as used in paragraph 12, should be construed according to the specific enumerations of “fence, wall, [and] barricade,” that precede it. Under this interpretive framework, the term obstruction refers to those barriers that are similar to fences, walls, and barricades. A building is not similar in character or purpose to those barriers.

[9] ¶ 35 The Trust and Café Rio also claim that

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LGO's building would violate paragraph 12's prohibition on any "obstruction ... [that] materially limits or impairs ... the ability to have an unobstructed view of any of the Parcels." The unobstructed view requirement is, however, limited to defined "obstructions." As we have just explained, a building is not an "obstruction" within the meaning of paragraph 12. Therefore, the unobstructed view requirement does not apply to LGO's building, and this argument fails.

[10] ¶ 36 The Trust and Café Rio next claim that LGO breached paragraph 2, entitled "Composition and Use of Common Areas." Referring to the definition of "Common Areas" that immediately precedes it, paragraph 2 provides that "none of such Common Areas shall be changed in any material respect ... without the prior written consent of all Owners of the Parcels." The Trust and Café Rio contend that because "LGO did not seek permission from other parcel owners prior to beginning construction" of its building, LGO breached paragraph 2. This argument has no merit.

¶ 37 The limitation in paragraph 2 on altering common areas is necessarily confined to those areas defined as "common." That is, owners must obtain the consent of all parcel owners before materially altering *defined* common areas. The common areas are defined to exclude buildings on Parcels 5 and 6. Therefore, LGO was not required to obtain the consent of all parcel owners before beginning construction of its building on Parcel 5.

¶ 38 Because the Cross-Easement Agreement unambiguously provides that LGO may construct a building on Parcel 5 without limitation as to the building's location, we reverse the district court's grant of summary judgment to the Trust and Café Rio on this issue and order that summary judgment be entered on behalf of LGO.^{FN15}

FN15. Given our holding, it is unnecessary to reach LGO's claim that the district court erred in visiting the parcels. The district court visited the site twice and entered the

preliminary injunction based upon the language of the "agreement [between] the parties," as well as its "own observations of the property." We strongly caution district court judges to avoid undertaking their own "off-the-record fact gathering," which may limit the opportunity of parties to "cross-examine, to object to the introduction of the evidence, or to rebut the evidence." *Lillie v. United States*, 953 F.2d 1188, 1191 (10th Cir.1992).

¶ 39 It necessarily follows from our holding that the district court erred in issuing the preliminary injunction and the restoration order based on its interpretation of the Cross-Easement Agreement. LGO seeks damages, and we remand for the district court to determine whether LGO suffered compensable damages related to the preliminary injunction and the restoration order, and, if so, the amount of such damages.

II. THE DISTRICT COURT ERRED IN RULING THAT LGO IS JUDICIALLY ESTOPPED FROM CHALLENGING CAFÉ RIO'S PARKING RIGHTS ON PARCEL 5

[11] ¶ 40 LGO next argues that the district court erred in ruling that "LGO is judicially estopped from challenging Café Rio's [parking] rights under the Settlement Agreement." Based on its holding, the court did not reach LGO's claim that, because the Café Rio restaurant is not a party to the Cross-Easement Agreement and "is not located on any Parcel of the Property" that is subject to the Cross-Easement Agreement, it has no rights to park on Parcel 5.^{FN16} LGO also argues that the easement associated with "Parcel 5 is overburdened if it is allowed to be used for the benefit of [the Café Rio restaurant] that is not a beneficiary of the easement under *1243 the Cross-Easement Agreement." We hold that LGO is not judicially estopped from challenging Café Rio's parking rights, and we remand for the district court to determine whether parking by Café Rio restaurant customers and employees on Parcel 5 is prohibited under the terms of

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the Cross-Easement Agreement and whether such parking overburdens the easement if it is allowed merely because Café Rio maintains a district office on Parcel 4.

FN16. LGO cites paragraph 15 of the Cross-Easement Agreement, which provides that “[e]ach and all of the easements ... contained in this agreement are made for the direct, mutual or reciprocal benefit of the Owners and occupants of the respective Parcels ” and prohibits the transfer or assignment of the easement rights to any non-owner or non-parcel occupant. (Emphasis added.)

¶ 41 The Trust and Café Rio claim that because LGO signed the Settlement Agreement, it is judicially estopped from now challenging Café Rio's restaurant customers' and employees' parking rights on Parcel 5. Specifically, the Trust and Café Rio point to the paragraph in the Settlement Agreement providing that each parcel “shall have appurtenant thereto and be benefitted by a nonexclusive easement for the parking of motor vehicles ... for the customers, invitees and employees of all business and occupants of the buildings ... on any of the Parcels.” The Trust and Café Rio interpret this provision to conclusively establish the rights of Café Rio's restaurant customers and employees to park on Parcel 5. They claim that LGO is judicially estopped from denying these rights.

[12] ¶ 42 “Under judicial estoppel, a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.”^{FN17}

FN17. *Nebeker v. State Tax Comm'n*, 2001 UT 74, ¶ 26, 34 P.3d 180 (internal quotation marks omitted).

¶ 43 Judicial estoppel is inapplicable in this case, however, because pursuant to the language of

the Settlement Agreement, the parties explicitly reserved the right to litigate the terms of the Cross-Easement Agreement. In the paragraph of the Settlement Agreement entitled “Reservation of Rights,” Café Rio and LGO agreed that “no party is waiving any right, claim, or defense it has, nor making any admission with respect to the interpretation or meaning of the [Cross-Easement Agreement.]” Thus, the Settlement Agreement merely stayed the litigation, with both parties retaining all future rights to litigate. This conclusion is further reinforced by the fact that the parties agreed that the case would be dismissed without prejudice, and it was.

¶ 44 Regarding the promises made by each party in the Settlement Agreement, those promises applied only to the time between the execution of the Settlement Agreement and the commencement of any future litigation.^{FN18} Thus, the promises cannot be construed as permanently binding, and judicial estoppel simply does not apply.

FN18. For example, LGO agreed not to tow any of Café Rio's customers' cars, and Café Rio agreed not to park on the drive strip or dirt pad on Parcel 5.

¶ 45 The district court erred in ruling that LGO was judicially estopped from challenging Café Rio's rights to park on Parcel 5. We remand for a determination of whether parking by Café Rio's restaurant customers and employees on Parcel 5 is prohibited under the terms of the Cross-Easement Agreement and whether such parking overburdens the easement if it is allowed merely because Café Rio maintains a district office on Parcel 4.

III. THE DISTRICT COURT ERRED IN GRANTING ATTORNEY FEES, COSTS, AND INTEREST TO THE TRUST AND ATTORNEY FEES AND COSTS TO CAFÉ RIO

¶ 46 Based on our conclusion that the district court erred in granting summary judgment to the Trust and Café Rio on the issue of LGO's right to construct a building on Parcel 5, and our conclusion

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that LGO is not judicially estopped from challenging Café Rio's rights to park on Parcel 5, we reverse the grant of attorney fees, costs, and interest to the Trust, and the grant of attorney fees and costs to Café Rio. We note that LGO is entitled to pursue attorney fees and costs related to the issue of its right to construct a building on Parcel 5.^{FN19}

FN19. Paragraph 19 of the Cross-Easement Agreement provides that “[i]f any action is brought ... to enforce or interpret any of the ... provisions [of the Cross-Easement Agreement], ... the party prevailing in such action shall be entitled to recover from the unsuccessful party reasonable attorney fees (including those incurred in connection with any appeal).”

***1244 CONCLUSION**

¶ 47 We reverse the district court's grant of summary judgment to the Trust and Café Rio. First, we hold that the Cross-Easement Agreement unambiguously allows LGO to construct a building without limitation on where that building may be placed on Parcel 5 and order that summary judgment be entered on behalf of LGO. Second, we hold that LGO is not judicially estopped from challenging Café Rio's rights to park on Parcel 5.

¶ 48 Based on these holdings, we reverse the award of attorney fees, costs, and interest to the Trust and the award of attorney fees and costs to Café Rio, and we recognize that LGO is entitled to pursue attorney fees and costs related to the issue of its right to construct a building on Parcel 5. Additionally, we remand for the district court to determine whether LGO suffered compensable damages related to the preliminary injunction and the restoration order, whether parking by Café Rio's restaurant customers and employees on Parcel 5 is prohibited under the terms of the Cross-Easement Agreement, and whether such parking overburdens the easement, if it is allowed merely because Café Rio maintains a district office on Parcel 4.

¶ 49 Chief Justice DURHAM, Justice WILKINS,

Justice PARRISH, and Judge HIMONAS concur in Associate Chief Justice DURRANT'S opinion.

¶ 50 Having disqualified himself, Justice NEHRING does not participate herein; District Judge DENO HIMONAS sat.

Utah, 2009.

Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC
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429 F.2d 764, 139 U.S.App.D.C. 85
(Cite as: 429 F.2d 764, 139 U.S.App.D.C. 85)

▷

United States Court of Appeals, District of
Columbia Circuit.

JOHN W. JOHNSON, INC., a Corporation
v.

BASIC CONSTRUCTION CO., Inc., Appellant,
Defendant and Third Party Plaintiff, Edward Durell
Stone, JOHN W. JOHNSON, INC., a Corporation
v. BASIC CONSTRUCTION CO., Inc., Appellant,
Defendant and Third Party Plaintiff, Edward Durell
Stone, The Travelers Indemnity Co., Third Party
Defendant.

JOHN W. JOHNSON, INC., a Corporation, Appel-
lant,
v.

BASIC CONSTRUCTION CO., Inc., Defendant
and Third Party Plaintiff, Edward Durell Stone.
JOHN W. JOHNSON, INC., a Corporation, Appel-
lant,
v.

BASIC CONSTRUCTION CO., Inc., Defendant
and Third Party Plaintiff, Edward Durell Stone, The
Travelers Indemnity Co., Third Party Defendant.

Nos. 22813, 22814, 22836, 22837.
Argued March 2, 1970.
Decided June 22, 1970.

Breach of contract action by subcontractor against prime contractor and architect. The United States District Court for the District of Columbia, Holtzoff, J., 292 F.Supp. 300, rendered Judgment for subcontractor against prime contractor, but in favor of architect, and prime contractor and subcontractor both appealed. The Court of Appeals, MacKinnon, Circuit Judge, held that prime contractor was obliged to give subcontractor commitment for payment for extra work even though it had received no commitment from owner, that in absence of such commitment subcontractor's abandonment of the work was justified and it was entitled to be compensated for the work it had performed, and that finding that subcontractor aban-

doned contract because it had not received such commitment from prime contractor, rather than because of architect's directive to prime contractor to discharge subcontractor, was not clearly erroneous.

Affirmed.

West Headnotes

[1] Contracts 95 ⚡ 199(2)

95 Contracts

95H Construction and Operation

95H(C) Subject-Matter

95k197 Buildings and Other Works

95k199 Plans or Drawings and Specifications

95k199(2) k. Extra work. Most Cited Cases

Provision of article of specifications, incorporated in subcontract by reference, that nothing in such article, which called for written supplement and additional compensation if extra work were required, should excuse subcontractor from proceeding with the extra work as directed did not oblige subcontractor to perform extra work on direction refusing to recognize the work as extra or failing to meet contract requirements that prime contractor in some manner undertake commitment to pay therefor.

[2] Colleges and Universities 81 ⚡ 5

81 Colleges and Universities

81k5 k. Powers, franchises, and liabilities in general. Most Cited Cases

Public Contracts 316H ⚡ 276

316H Public Contracts

316HV Construction and Operation

316Hk276 k. Extra costs or expenses in general. Most Cited Cases

Within provision of construction contract indicating method whereby adjustments and allow-

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ances would be made for changes in the work if the owner were the government, "Government" referred to United States or state, as bodies exercising sovereignty, and not to subordinate divisions thereof, including State University Construction Fund.

[3] Contracts 95 199(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k199 Plans or Drawings and Specifications
95k199(2) k. Extra work. Most Cited Cases

Letter from prime contractor directing painting subcontractor to apply third coat of paint not specified in subcontract was not sufficient compliance either with provision of specifications that supplement to contract was required with respect to extra work or with provision of subcontract requiring written change order signed by contractor, where letter did not recognize that work was additional and did not provide that any allowance would be made for increase in cost.

[4] Contracts 95 199(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k199 Plans or Drawings and Specifications
95k199(2) k. Extra work. Most Cited Cases

Provision in subcontract requiring written change order was applicable even if extra work were controlled by terms of specifications, incorporated in subcontract by reference, requiring supplement to contract, as subcontract was not in conflict with specifications, both requiring same type of financial commitment by contractor; but written supplement as contemplated by specifications would satisfy requirement for written change order.

[5] Contracts 95 155

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k155 k. Construction against party using words. Most Cited Cases
Ambiguities in subcontract would be construed most strongly against contractor, which created them.

[6] Contracts 95 303(5)

95 Contracts
95V Performance or Breach
95k303 Excuses for Nonperformance or Defects
95k303(5) k. Contracts for buildings and other works. Most Cited Cases

Painting subcontractor was justified in abandoning work when prime contractor directed application of extra coat of paint not contemplated by original subcontract, while refusing to supply written agreement covering payment therefore, and subcontractor was entitled to be compensated for the work it had performed.

[7] Contracts 95 199(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k199 Plans or Drawings and Specifications
95k199(2) k. Extra work. Most Cited Cases

Prime contractor was not relieved of its obligation to furnish painting subcontractor with supplement to contract or with written change order, allowing in either case for increased consideration for extra coat of paint not contemplated by original subcontract, though prime contractor had not received commitment from owner in connection with such extra coat, and prime contractor breached con-

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tract by refusal to furnish either of such documents.

[8] Contracts 95 ⚡199(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k199 Plans or Drawings and Specifications
95k199(2) k. Extra work. Most Cited Cases

Even if prime contract were fully incorporated into subcontract, its general provisions would not overcome specific provision of the subcontract which required prime contractor to give a written order for extra work and made allowance for increased cost.

[9] Contracts 95 ⚡199(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k199 Plans or Drawings and Specifications
95k199(2) k. Extra work. Most Cited Cases

Where fault necessitating application of extra coat of paint not contemplated in original painting subcontract lay in specifications, prime contractor could not contend that painting subcontractor was not entitled to supplement or change order agreeing to payment for the extra work.

[10] Contracts 95 ⚡156

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k156 k. General and specific words and clauses. Most Cited Cases
General language in written document is limited by more particular words.

[11] Contracts 95 ⚡164

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k164 k. Construing instruments together. Most Cited Cases

Contracts 95 ⚡199(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k199 Plans or Drawings and Specifications
95k199(2) k. Extra work. Most Cited Cases
(Formerly 95k99(2))

Provision in subcontract incorporating prime contract by reference incorporated the prime contract only for limited purpose of requiring compliance with terms and provisions thereof insofar as the same were applicable to work to be performed, and did not extend to require adherence by subcontractor to administrative remedies within the prime contract as to extra work and disputes.

[12] Contracts 95 ⚡199(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k199 Plans or Drawings and Specifications
95k199(2) k. Extra work. Most Cited Cases

Subcontractor sufficiently complied with requirement that it provide statement of amount claimed for extra work, though it did not make specific quotation, where it timely submitted estimates.

[13] Evidence 157 ⚡71

157 Evidence
157II Presumptions

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157k71 k. Mailing, and delivery of mail matter. Most Cited Cases

Letter dated in Washington, D. C. on January 14 would be presumed to have been received in New York State on Monday, January 17, the first business day following the date of the letter.

[14] Contracts 95 303(5)

95 Contracts

95V Performance or Breach

95k303 Excuses for Nonperformance or Defects

95k303(5) k. Contracts for buildings and other works. Most Cited Cases

Subcontractor did not breach contract when it abandoned job eight weeks following original breach by contract or, after having accepted in the meantime certain advances and payments, where parties had agreed that the same would not constitute waiver of their contract positions or relinquishment of any rights or claims.

[15] Contracts 95 322(4)

95 Contracts

95V Performance or Breach

95k322 Evidence

95k322(4) k. Sufficiency of evidence as to building contracts. Most Cited Cases

In action by subcontractor against architect for breach of contract, finding that subcontractor did not abandon its contract because of architect's directive to prime contractor to discharge it, but because subcontractor had not received assurance of payment for extra work from contractor, was not clearly erroneous.

*766 **87 Mr. Alexander M. Heron, Washington, D.C., with whom Mr. John A. Whitney, Washington, D.C., was on the brief, for appellant in Nos. 22813 and 22814 and appellee Basic Construction Co., Inc. in Nos. 22836 and 22837.

Mr. John P. Arness, Washington, D.C., with whom Messrs. James E. Murray and David J. Hensler,

Washington, D.C., were on the brief, for appellant in Nos. 22836 and 22837 and appellee John W. Johnson, Inc. in Nos. 22813 and 22814.

Mr. John F. Myers, Washington, D.C., with whom Mr. Kahl K. Spriggs, Washington, D.C., was on the brief, for appellee Stone in Nos. 22836 and 22837.

Before WRIGHT, McGOWAN and MacKINNON, Circuit Judges.

MacKINNON, Circuit Judge:

This is an appeal in a breach of contract case brought by John W. Johnson, Inc., a painting subcontractor, against Basic Construction Co., the prime contractor, and Edward Durell Stone, the architect. The project involved the construction of several buildings for the State University of New York at Albany. Basic Construction Company (hereinafter Basic) contracted to construct these buildings for a compensation of approximately \$25 million, and subcontracted out the painting and wall-covering work to John W. Johnson, Inc. (hereinafter Johnson), a Washington, D.C. corporation, for \$375,000. The architect, Edward Durell Stone (Stone) was the agent of the owner, the State University Construction Fund (hereinafter the Fund), and was in charge of supervising the construction. Jurisdiction is vested in this court by D.C.Code 11-101 and 11-521. The amount in controversy exceeds \$10,000 exclusive of interest and costs.

Johnson commenced work under its subcontract in April of 1965. By September, some peeling of the paint on the ceilings in the Biology Building had been observed, and by October the condition had worsened to the point where Johnson was directed to stop painting all the ceilings.^{FN1} At this time no one knew the cause of the peeling. The architect called in a research firm which eventually determined that the peeling was caused by the presence of stearic acid on the ceiling. Stearic acid had been employed by Basic as a release agent in removing the temporary molds used in forming the

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concrete arches which constituted the ceilings. The research firm recommended that either the stearic acid be removed or that a primer coat of paint be applied which would permit a secure bond for the two final coats. Because the stearic acid was difficult to remove, the architect after some time spent in experimenting adopted the solution of removing the peeling paint and then applying the additional coat of primer paint. However, on December 20, 1965 he ordered that Basic bear this cost on the ground that it was its responsibility under its contract to remove foreign substances from the ceilings before painting. Basic disputed this liability and appealed to the Fund under a Disputes Clause in the prime contract; meanwhile on December 22nd it ordered Johnson to proceed with the application of the additional paint in accordance with the architect's directive.^{FN2} The architect's*767 **88 directive stated the work was 'in lieu of, not in addition to, original contract requirements' and that 'No extra to contract will be approved by this office, for this work.' Johnson denied any responsibility for the failure, on request submitted an estimate as to the cost of the extra painting, requested a change order or other definite assurance of payment it claimed it was entitled to under its contract, and started the painting under protest without relinquishing its right to compensation. Basic did agree to advance Johnson \$1,500 a month to assist the latter to meet some of the cost of the additional painting. However, Basic expressly conditioned its advances with the reservation that same did not constitute an acknowledgment of liability to Johnson for the disputed painting work.

FN1. Basic's field project manager directed Johnson to stop painting all the ceilings some time in October to find out the cause of the peeling. (App. 21-22.)

FN2. A letter was sent by Basic to Johnson directing work but all this fell short of being the commitment required by the Changes paragraph of the subcontract. See page 769 et seq., infra. This was admitted

by Basic's Executive Vice President, H.P. Read, who testified Basic did issue an initial letter to Johnson but this contemplated a following document which was the change order and this final change order was never sent. (App. 69-70).

The Fund then on January 10, 1966 rendered its decision upon the appeal by Basic. It determined that the stearic acid had been used with the architect's knowledge and approval, that the removal of the stearic acid by means of 'exotic' cleaning compounds was not anticipated under its contract with Basic,^{FN3} and that the Fund would therefore bear the cost of the additional coat of primer. However, apparently as a compromise with Basic, the Fund held that Basic was responsible for removing the defective coat of paint on the ground that it should have tested the adhesiveness of the paint before commencing the painting operations. Although Basic denied this liability, it nevertheless agreed to continue work and to resolve the matter at a later date.^{FN4}

FN3. The contractual provisions on Preparation of Surfaces provided:

'Properly prepare surfaces required to receive paint, finishes. * * * Thoroughly clean concrete, plaster surfaces, other surfaces to be painted or otherwise finished, of grit, efflorescence, grease, dirt, loose material, and the like.' (Dfts. Ex. 6.)

FN4. This was the procedure envisioned by the Disputes Clause of the prime contract. See p. 774 infra. The record does not show how the Fund finally ruled in this matter.

In summary, there was at this point an unresolved three-way dispute as to who should bear the cost of removing the original coat of paint. The Fund had ruled that Basic should bear the cost; this was disputed by Basic who contended the responsibility should lie on the Fund. Johnson was caught in this cross fire— it had denied liability entirely

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and was interested primarily in receiving some assurance of payment for the extra work it was being directed to perform and of being absolved from liability for the expense of removing the paint in the peeling areas.

Another element was then injected into this unstable situation. Painting had been stopped, first for strikes in July and August, and secondly since early October while the cause of the peeling was being determined, and the Fund thereafter became increasingly upset over the slow progress being made in the painting due to the fact that Johnson was not employing what the Fund considered to be an adequate number of painters to meet completion deadlines. The Fund put pressure on Basic to speed up the work and Basic in turn warned Johnson that more painters would be needed to meet the approaching completion deadlines. During this time Johnson was complaining that he had not received the change orders required by his subcontract before he could be assured of payment for the extra work, that he had not been absolved of responsibility for the cost of removing the ceiling paint in the Biology Building and that to accelerate the work by adding the additional workmen being required by the Fund would decrease their efficiency and substantially increase his cost, for which he should also receive some assurance that he would be compensated. A temporary working arrangement was reached between Johnson *768 **89 and Basic to gradually build up the painting crews, but apparently this was not enough to satisfy the architect, Edward Stone, who recommended to the Fund that Johnson's contract be cancelled. The Fund agreed, and on February 9, 1966, the architect Stone wrote Basic directing it to cancel its subcontract with Johnson and advising that no extension of time would be granted for this cancellation.^{FN5}

FN5. The architect, as the Fund's agent, could not deal directly with Johnson but rather had to deal with him through Basic. See note 21 infra.

Basic, however, was reluctant to discharge

Johnson. Basic did notify Johnson by telephone of the February 9th directive it had received to cancel his contract but recommended that Johnson come in to discuss the matter. This Johnson refused to do, and the next day informed Basic that unless it received an assurance of payment for the extra work, it would quit the job.

Again on February 12th, Johnson, according to Basic's memorandum of a telephone conversation, demanded that Basic send him a telegram or letter 'cancelling his contract if that was what he intended to do.' Later in the day, Johnson's attorney orally informed Basic that Johnson was not financially able, even if he so desired, to carry the burden of increasing the number of painters to 60 or 80 without some help and agreed that Johnson would submit information as to the extra cost for the third coat of paint and for escalating of the work. On February 14th Basic wrote the Fund and requested them to conform to the contract and to state they had determined that Johnson was 'incompetent, careless or uncooperate (uncooperative)', if they had so determined. Basic also stated that Johnson had 35-38 painters working and informed the Fund that Johnson was claiming the extra work which was being directed was not caused by any fault of Basic or Johnson and that it entailed an acceleration of work not contemplated by the original contract and for which additional compensation should be paid. Johnson also submitted the requested additional information to Basic in detailed form on February 14th^{FN6} which estimated (without prejudice) the cost for the extra work at \$98,000 and \$42,000 additional for the escalation.^{FN7} On February 16th Basic informed Johnson by telephone that such demands 'were completely unacceptable to us and that we could not go along with them.' Basic also at that time refused to state its position to Johnson as to whether they were going to wire him cancelling his contract and Johnson then hung up. The architect's direction to Basic to cancel the contract had been dated February 9th and under *769 **90 the contract the architect's decision was 'final, binding and conclusive' unless the contractor appealed

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within five days. Basic did not within such period appeal the decision.

FN6. The February 14, 1966 letter Johnson wrote Basic stated (1) that 23,853 man hours were necessary to complete the eight buildings, (2) that the change in painting specifications was not concluded until January 14, 1966, (3) that Johnson had expanded its crew to 35 men, (4) that if Basic desired further acceleration they would have to absolve Johnson from responsibility for the cost of removing ceiling paint in the Biology Building and accept certain invoices previously submitted totaling \$12,513.73, (5) that Basic would have to agree to pay 'around \$70,000' (possibly more) due to change in ceiling painting specifications, and \$14,438 (possibly more) for trim operation being advanced due to ceiling holdup, (6) that Basic should accept responsibility for painting and removing paint on metal partitions which should have come with factory finish, and (7) other miscellaneous items. Johnson estimated that these items would increase the sums due under the contract around \$98,000 (possibly more) and if the painting crew were increased to 60 men the acceleration would reduce the efficiency by an additional \$42,000. Johnson concluded by saying he was 'not in a position to continue paying the men during these negotiations after February 15, 1966.' Basic received this letter and on February 16, 1966 and at 9 A.M. told Johnson that his 'demands * * * were completely unacceptable to (Basic) * * * and that (Basic) * * * could not go along with them.' (Emphasis added.) Thereupon Johnson had his men pulled off the job.

FN7. This total of \$140,000 for extra work is comparable to the \$165,000 sought by the counterclaim of Basic against Johnson.

Johnson's problem was largely one of financing the additional work that was being demanded of him on an accelerated basis. This was aggravated by the fact that he had not been paid for some past expenditures he claimed were due him. The assurances Johnson demanded were not forthcoming, and Johnson on February 17, 1966 pulled his men off the job.

Upon the above facts Johnson brought suit against Basic and Stone for damages resulting from breach of contract alleging that Basic refused to issue change orders and make payments in accordance with the contract and wrongfully terminated Johnson's subcontract in order to conform to Stone's wrongful direction and thereby made it impossible for Johnson to perform his subcontract. The court below held for Johnson against Basic and entered damages in the amount of \$66,399.68 in payment for work done by Johnson before it abandoned the job, and for \$5,367.57 in payment for certain material left at the job site by Johnson which was seized by Basic after Johnson abandoned work and Basic's counterclaim for damages for breach was also denied. *John W. Johnson, Inc. v. Basic Construction Co.*, 292 F.Supp. 300 (D.D.C.1968). Basic is here appealing this decision. On Johnson's suit against the architect, Stone, for cancelling its subcontract, the trial court held for the architect on the ground that Johnson had abandoned the work because it had not received assurance of payment rather than because of the architect's cancellation of its subcontract. Johnson is here appealing this decision. We affirm both decisions below, and turn first to Johnson's suit against Basic.

I

Appellant's brief asserts that the first issue is:

Whether Basic was required to give Johnson a commitment for payment for the extra painting when it had received none from the Fund and when it had received no definite statement from Johnson of the amount claimed?

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[1] The subcontract contained two references to Extra Work. The first was a sentence at the bottom of Exhibit 'A' to the subcontract stating:

Subcontractor's particular attention is called to Article X of the Specifications relative to Extra Work.

This article of the Specifications reserved in the Fund the right to modify or change the contract between the Fund and Basic 'by supplement thereto providing for extra work in order to carry out and complete more fully and accurately the work called for herein.' The Article further provided that if the changes 'increased the work * * * the contract consideration shall be increased * * *' and the completion date extended as the Fund may determine; that unless the parties agreed on the amount of the increase or a unit price was contained in the contractor's proposal, the amount of the increase shall be calculated and determined by the Fund according to (1) the fair and reasonable cost generally plus profit, or (2) the actual cost, provided the Fund gives the contractor notice that it intends to exercise this option before the extra work commences. Basic gave no such notice. The last sentence in the Article provided, 'Nothing in this article shall excuse the contractor from proceeding with the extra work as directed.'^{FN8}

FN8. This sentence must be read in conjunction with the provision of Article X providing for a 'supplement' to the contract for extra work and if the subcontract provision on 'Changes' is applicable it must be read in conjunction with the requirement therein for a written direction for any change involving an 'addition' to the contract. So read, this sentence does not impose a requirement on the subcontractor that he perform the extra work under a direction which does not satisfy either requirement because it failed to increase the consideration or make allowance for the increased cost. Clearly, Basic could not just order extra work and refuse

to recognize it was extra work by specifically failing to meet the contract requirements that it undertake in some manner a commitment to pay therefor.

*770 **91 [2] The second reference in the subcontract to extra work is contained in a printed paragraph at the bottom of the contract just ahead of the signatures. It provides:

The Contractor may at any time during the progress of the work and without notice to any surety require any alteration, deviation, addition or omission from the work contemplated by this contract; in the event of either case the increase or decrease of cost occasioned thereby shall be estimated according to the price fixed by this contract for the whole work, and allowance shall be made on the one side or the other as the case may be; where Owner is the Government,^{FN9} adjustments and allowances for changes in the work provided herein shall be made in conformity with the method established by the Government; but no such change shall be made, nor shall demand be made on the Contractor on account of any such change, unless the same be ordered in writing signed by the Contractor.

FN9. Government refers to the United States or to the State of New York as bodies exercising sovereignty and not to subordinate divisions thereof. In *re Stillman's Estate, Sur.*, 53 N.Y.S.2d 718, 732 (1945). The State University Construction Fund is a corporate governmental agency constituting a public benefit corporation created within the University of New York. L.1962, c. 251 § 2 et seq. effective April 1, 1962. McKinney's Consolidated Laws of New York Annotated Book 16, Education Law, § 370 et seq. The University is a continuation of a corporation created in 1784 under the name of The Regents of the University of the State of New York. Thus the Fund is not 'Government.'

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[3] Regardless of which extra work provision is deemed controlling, Article X or the 'Changes' provision of the subcontract, they both required something more than was given here to Johnson. Under Article X a 'supplement' to the contract was required and the subcontract required an order in writing signed by the contractor.

[4][5] We consider the interpretation Basic gave to its own contract with the Fund in a letter it wrote the Architect.^{FN10} with respect to an order to perform the extra work is equally applicable to the relationship between Johnson and Basic whether Article X or the subcontract provision controls. On December 15, 1965, in reply to a letter from the Architect calling for an extra third coat system without more elaboration, Basic wrote to Stone (the Architect) stating:

FN10. The Architect was the agent of the Fund in many contract matters.

We do not consider that your letter constitutes a specific directive to us to proceed with the work in accordance with the recommendations in Moore Laboratory's Report dated December 13, 1965. We will not proceed without such specific instructions, as it is the responsibility of the Architect to specify and direct the work, and ours only to execute the work.

Further, we cannot proceed with the work without a commitment from you that we will be reimbursed for additional costs due to application of the special primer sealer, application of the additional coat of paint, and removal of the peeling paint. (Emphasis added.)

Whether we consider the extra work controlled by the terms of Article X or by the last paragraph of the subcontract makes no substantial difference because Basic did not comply with either requirement and because the requirement of the subcontract for a written change order is applicable in both instances, since it is not in conflict with Article *771 **92 X.^{FN11} We construe that provision of the

subcontract to require substantially the same type of financial commitment as Basic outlined in its December 15th letter to the architect. In the phrasology of the subcontract the situation required an 'order' (1) for the 'addition' to the 'work contemplated by this contract'; (2) that 'allowance shall be made' for the 'increase' in the cost (this requires the commitment to pay);^{FN12} and (3) that same be 'in writing signed by the contractor.' Johnson thus had at least equal rights under its contract arrangement with Basic as Basic had under its prime contract with the Fund and possibly more because the closing provision of the subcontract was stronger than the prime contract provision.

FN11. A written 'supplement' to the contract in accordance with Article X would have satisfied this requirement. Article X and the subcontract provided three alternative methods for fixing the price and all of these indicated that there would be some commitment by Basic to pay for extra work. If Basic were in doubt as to the amount they were always free to specify in accordance with Article X that the amount of the increase in the contract consideration would be the actual cost of the extra work. What Basic could not do was to order the extra work and contend that it had no obligation to pay therefor. To the extent that these methods were in conflict, all ambiguities were created by Basic and would be construed most strongly against it.

FN12. Article X also required that the 'contract consideration shall be increased.'

[6] Johnson was accordingly fully within its rights when it wrote Basic on January 3, 1966 with respect to its own extra work situation stating:

You have been unwilling in accordance with the paragraph referring to changes on the bottom of page 2 of our subcontract^{FN13} and you apparently expect us to do the work which is required to resolve your dispute with the owner, or architect

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without being compensated therefore (sic).

FN13. This referred to the additional work provision of the 'Changes' paragraph.

We are not financially (sic) able to bear that burden even if we were inclined to do so and insistence on your part, if complied with, would put us out of business. (Emphasis added).

The provisions of the subcontract referred to in the letter justified Johnson's action in making this request.^{FN14} It was never honored by Basic.^{FN15} Instead, *772 **93 they contended then, and they contend now, that they were not required to give Johnson a commitment for payment for the extra painting since it had received none from the Fund. But the subcontract clearly required a specific direction in writing to do any work that was in addition to the original contract and that allowance be made for the increase in cost. It was not a sufficient compliance with Article X or the 'Changes' provision of the subcontract for Basic to order the extra work and at the same time to refuse to admit or recognize that it was extra work that was being ordered. Nevertheless, such was the effect of Basic's actions when they refused Johnson's demands for a commitment to pay the cost of the extra painting and the costs incurred by accelerating the contract.

FN14. Article X gave him an equivalent right to demand a 'supplement' to the contract, if Article X is considered as controlling.

FN15. Testimony of Basic's Vice President, Henry S. Read, proved that Basic never issued a change order:

Q Now, did the Johnson Company make a demand upon Basic for a change order on account of the requests of Basic to have Johnson Company apply that third coat of paint?

A Oh, yes, sir.

Q Did Basic ever issue one?

A No, sir.

Read's testimony also was equivocal as to why Basic had not informed Johnson that the Fund had agreed to pay for the third coat of paint:

Q Why did you not tell Mr. Johnson at the time that the Fund had agreed to pay for the third coat, and why did you not render him a change order for that cost?

A Well, to answer that question in sequence, I think I did tell Mr. Johnson (the Fund) had agreed in principal to pay him for the third coat. I didn't issue a change order because we do not issue change orders to a sub-contractor on work assigned by the owner until we receive their official change order.

THE COURT: Well, now, isn't there a provision in the contract that no payment shall be made for extras except pursuant to change orders?

A Yes, sir.

THE COURT: And yet you expect Johnson to do extra work without a change order? Is that so?

THE WITNESS: Yes, Sir.

THE COURT: Well, you mean that the contractor and subcontractor should go ahead and do the extra work on the chance that the change order will be issued later?

THE WITNESS: Yes, sir, that was the obligation we undertook.

THE COURT: And if a change order was not issued later, what would happen?

THE WITNESS: Then if they didn't our

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only recourse would be an appeal or inter-litigation against them.

THE COURT: In other words, you wanted the sub-contractor to take the risk of the possibility of a change order not being issued? That is what this amounts to, does it not?

THE WITNESS: Sir, we had some three-quarters of a million dollars of work that we had to do under this fashion under this contract.

[7][8][9][10][11] This brings us to consider whether the fact that Basic had not received a commitment from the Fund operated in any way to relieve Basic of its obligation to furnish Johnson with a 'supplement' to the contract or with a written order stating that the work being required was an 'addition' from the work originally contemplated by the contract and making 'allowance' for the increased cost or providing that the 'contract consideration shall be increased.' Basic contends that it was relieved of the obligation of furnishing such commitment under the circumstances because the subcontract fully integrated the terms and conditions of the prime contract and thus operated to bind Johnson to the same terms, including the Disputes Clause ^{FN16} of the prime contract. We do not so construe either the prime contract or the subcontract for two reasons.^{FN17} First, because basic never satisfied the requirement of Article X that there be a 'supplement' to the contract providing that the contract consideration be increased. Second, because even if the prime contract were fully incorporated into the subcontract, its general provisions would not overcome the specific provision of the subcontract dealing with 'Changes' which required Basic to give a written order for the work which made 'allowance' for the increased cost. ^{FN18} Furthermore, the prime contract was only incorporated for the limited purpose of requiring compliance with the terms and provisions of the prime contract insofar as same were applicable to the work to be performed and did not extend to require adherence

by the subcontractors to administrative remedies and decisions thereunder by the parties to the prime contract. ^{FN19}

FN16. See page 774 *infra*.

FN17. When the Fund held on January 10, 1966, that the contract did not require the removal of the stearic acid residue that decision necessarily determined without explicitly saying so, that 'the fault lay in the requirement combining the use of stearic acid with the type of paint specified' in the contract specifications (Appellant's Reply Brief, p. 7). The fault was thus found to exist in the Specifications for which Johnson was in no way responsible. It is hard to see how, in view of such admissions, that Basic can contend there was any bona fide dispute between Basic and Johnson over Basic being obligated to furnish a supplement or change order agreeing to pay for the extra work.

FN18. General language in a written document is limited by more particular words. *Bock v. Perkins*, 139 U.S. 628, 635-638, 11 S.Ct. 677, 35 L.Ed. 314 (1891); *G.T. Schjeldahl Co., Packaging Mach. Div. v. Local Lodge 1680, etc.*, 393 F.2d 502, 504 (1st Cir. 1968); 4 S. Williston, *contracts* § 619 n. 7 (1961); *Restatement, Contracts* § 236(c) (1932).

FN19. See p. 776 *infra*.

The provision in the subcontract incorporating the prime contract by reference was required by the General Conditions*773 **94 of Basic's contract with the Fund which provided:

17. Subcontractors. * * * The Contractor shall execute with each of his subcontractors * * * a written agreement which shall bind the latter to the terms and provisions of this contract insofar as such terms and provisions are applicable to the work to

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be performed by such subcontractors. (Emphasis added).

This binds the subcontractor to the terms and provisions applicable 'to the work,' and we construe this to mean to the character and manner of the work to be done by the subcontractor. *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 240 U.S. 264, 277, 36 S.Ct. 300, 60 L.Ed. 636 (1916). Also, the subcontractor was not a party to the prime contract and he was not made privy to its provisions by having it incorporated by reference into its subcontract. In fact, the prime contract specifically provided that none of its provisions shall be construed as creating any contractual relation between the Fund and any subcontractor. (General Conditions, 17, Subcontractors.) Under such circumstances we have no difficulty in concluding that the fact that the prime contract was incorporated by reference into the subcontract did not justify an interpretation that would excuse Basic from the requirement of issuing a change order committing itself to pay for the extra work or require that Johnson be bound to Basic's position in any dispute vis-a-vis the Fund.

[12] We will deal further with the interrelation of the two contracts in Part II wherein we discuss the Disputes Clause, but now we consider a subsidiary argument of appellant's first issue, i.e., the claim that somehow Basic had not received a definite statement from Johnson of the amount claimed for the extra work and that somehow this excused Basic's refusal to issue the commitment to pay for the extra work. In this respect we find that Johnson did comply with the requirements of the subcontract.

[13] When Basic on December 15, 1965 first wrote Johnson enclosing a copy of the Architect's letter directing extra work it requested an estimate. Johnson replied the very next day and estimated a cost for ceilings only of \$38,240 which he said would be increased in buildings where the painting followed trim and cabinets. On January 4, 1966, Johnson withdrew its estimate saying the actual

cost was exceeding the estimate. All of this may have been premature because the final directions for the extra painting were not given to Johnson until January 14, 1966. If the Disputes Clause of the prime contract was applicable to Johnson (as Basic contends), it was required:

Within thirty (30) calendar days after such extra work was required to be performed * * * the contractor must submit to the Fund a verified detailed statement * * * of the items of extra work or of the details and amounts of any damage claimed by the contractor * * *

Johnson complied with this requirement within the 30-day period by submitting the required information in a letter to Basic dated February 14, 1966. ^{FN20} So there is nothing to appellant's point in this respect.

FN20. This would be within 30 days of the date Johnson received the January 14, 1966 letter which was addressed to him at Washington, D.C. and would presumably have been actually received by him on January 17th, a Monday, and the first business day following the date of the letter.

These estimates were all that was required of Johnson and there was ample time after they were received by Basic for it to issue its change order, but instead it refused to act on the first estimate and rejected the second estimate out of hand and at all times refused to issue any commitment to Johnson to compensate for the 'addition' of extra or increased work. Actually, it seems quite clear on this point that Basic is *774 **95 now trying to hide behind the claim that initially it needed a specific quotation from Johnson. This is not correct. Basic could have issued the change order for a fixed price or they could have directed the work and established or negotiated the method of computing the price. Had Basic really been withholding the change order because they were waiting for a specific figure from Johnson, they could have issued it immediately after they received Johnson's \$38,240

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estimate on December 16th, or if they did not consider that sufficiently definite, they could have negotiated further at that time. Or they could have directed the work on the January 14th estimates or in accordance with Article X could have given notice that they would pay the 'cost' thereof or made definite counter offers on the price. That they followed none of these alternatives plainly indicates that they did not intend to issue any commitment, and they still contend they were not required to do so. We will discuss in Part II whether this position was justified by the Disputes Clause.

[14] But before doing so we deal with Basic's contention that Johnson broke its contract when it abandoned the job eight weeks following the original breach by Basic after having accepted in the meantime certain advances and payments. We find that this point is not available to Basic as the parties had agreed at the time of the subsequent agreement that same would not constitute a waiver of their contract position or a relinquishment of any rights or claims against the other.

II

The second issue framed by Basic's brief is:

Whether Johnson without following the Disputes Clause procedures, was entitled to abandon the job because of Basic's refusal to give a commitment for payment for the extra painting.

To a certain extent this involves many of the aspects of the issue discussed in Part I but is directed more specifically to the Disputes Clause which provides:

Article XI. DISPUTES

A. If the Contractor claims * * * that any work he has been ordered to do shall be considered extra work * * * he must within five (5) calendar days after being ordered to perform the work claimed by him to be extra work and before proceeding to execute such work * * * file a written statement with the Fund of the basis of his claim and request a de-

termination thereof:

B. Except as otherwise provided above with respect to work claimed by the Contractor to be extra work, the Contractor, pending and subsequent to the determination of the Fund with respect to any such disputed matter, shall proceed diligently with the performance of the Contract and in accordance with all instructions of the Fund and the architect.

C. The Fund shall notify the Contractor in writing of its determination of the validity of his claims. If the Contractor disagrees with such determination of the Fund he must, in order to reserve his rights based upon his said claims, within five (5) calendar days after receiving notice of the Fund's determination, file a written statement with the Fund that he reserves his rights in connection with such claims.

The critical question here is whether this clause was in any way applicable to Johnson.

In arguing for applicability, Basic relies on the following language in its subcontract with Johnson:

The subcontractor * * * agrees to * * * perform all work required by the above mentioned contract (the prime contract) * * * for furnishing and performing painting, finishing, vinyl wall covering work, etc., in accordance with the requirements of the prime contract documents, plans, specifications, general *775 **96 conditions, special conditions, addenda * * * and alternates * * * and as described more completely in Exhibit A * * *

This incorporates the prime contract into the subcontract by reference, but we have previously noted in discussing the extra work provisions, that this was for the limited purpose of specifying 'the work' to be performed. However, that holding did not control our decision with respect to the contract requirements for extra work because substantially the same result would have been reached under either extra work provision since both were subject to an additional written order or writing that was

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never furnished by Basic. So we consider the Disputes Clause in a slightly different context from the extra work provision, i.e., the Disputes Clause was not specifically incorporated by reference and it relates to a procedural matter which is farther removed from 'the work' contemplated by the contracts.

The Disputes Clause basically provides the procedural means for the determination of liability between the owner and prime contractor in case a dispute arises. However, Johnson, as a subcontractor, is not a party to that contract, even though it is incorporated by reference into his subcontract, he had no rights thereunder, and there is no provision in the prime contract which would allow a subcontractor to appear or participate in any way before the Fund in a dispute which affected it. Indeed, the Fund, ^{FN21} as any other owner, ^{FN22} may not wish to deal with a subcontractor at all, and we do not criticize this mode of doing business. However, since there is no clear contractual language requiring Johnson to relinquish its right of abandonment in return for its questionable right to recover its extra cost through the hazards of litigation, and since the contract was drafted by Basic and ambiguities are to be construed most strongly against it, and since the Disputes Clause by its terms relates to administrative remedies between the owner and the prime contractor without any reference to the subcontractor, we conclude that the Disputes Clause is not applicable to disputes between Basic and Johnson.^{FN23}

FN21. The Fund expressly avoided any contractual relationship with any subcontractor in the prime contract: 'No provision of this Contract shall, however, be construed as creating any contractual relation between the Fund and any subcontractor * * *'

FN22. For example, the United States may similarly avoid a contractual relationship with subcontractors. See, e.g., *United States v. Blair*, 321 U.S. 730, 737, 64 S.Ct.

820, 88 L.Ed. 1039 (1944); *United States for Use of B's Co. v. Cleveland Electric Co.*, 373 F.2d 585, 588 (4th Cir. 1967); *Fanderlik-Locke Co. v. United States for Use of Morgan*, 285 F.2d 939, 942 (10th Cir. 1960), cert. denied, 365 U.S. 860, 81 S.Ct. 826, 5 L.Ed.2d 823 (1961).

FN23. An additional reason for deciding that the Disputes Clause in the prime contract was not applicable to the subcontractor may exist in that provision of the subcontract providing 'All general language or requirements contained in the specifications (including General Conditions or General Provisions) are superseded by this agreement * * *'. It is clear from a number of references in the testimony and documents that the Disputes Clause was one of the requirements that the parties considered to be 'contained in the specifications.' The reference in Exhibit A to the general contract calling attention to Article X (Extra Work) describes it as being part 'of the specifications.' The architect in his letter of February 9, 1966 to Basic directing cancellation of Johnson's contract indicated he considered Article 17 of the General Conditions entitled 'Subcontractors' to be part of the Specifications (App. 182); Read, the Executive Vice President for Basic, in testimony referred to the Disputes Clause as being a requirement of the Specifications (App. 52); and Read also in testimony referred to Article 17 (Subcontractors) as being in the Specifications (App. 63). We note that the term 'specification' is generally taken to be 'the particulars or details of the plan * * *' 13 Am.Jur.2d Building and Construction Contracts § 12 n. 12 (1964). The parties, of course, are free to define this term as they will, and we may not imply a different meaning in the face of a clear indication of the meaning of the term in the contract it-

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self. Were there any doubts on this point, it would still be necessary to reach this result in accordance with the rule that contracts are to be most strictly construed against the drafter. See generally 17 Am.Jur.2d Contracts § 276 (1964).

*776 **97 A similar result has been reached in other circuits. In *United States for Use of B's Co. v. Cleveland Electric Co.*, 373 F.2d 585, 588 (4th Cir.1967), the court stated;

The basic error of the prime contractor in this appeal is his contention that the subcontractor is bound in every way and exactly as the prime contractor is bound by the terms of the prime contract. It is true that the terms of the subcontract stated that the subcontractor was bound by the terms of the prime contract and that it assumed the prime contractor's obligations to the Government insofar as applicable to the work performed by the subcontractor, but this identical language has been held, and we think properly, not to require the subcontractor to pursue the administrative remedies given the prime contractor in the disputes article. * * * We think that that agreement was intended to cover the quality and manner of performance of the subcontractor, not the rights and remedies between the prime contractor and the subcontractor. Thus the obligation to pursue and to exhaust the administrative remedies provided in the disputes article of the prime contract is the prime contractor's obligation alone * * *

See also *Central Steel Erection Co. v. Will*, 304 F.2d 548, 551 (9th Cir.1962); *Fanderlik-Locke Co. v. United States for Use of Morgan*, 285 F.2d 939 (10th Cir.1960), cert. denied, 365 U.S. 860, 81 S.Ct. 826, 5 L.Ed.2d 823 (1961). Special provisions of a subcontract prevail over provisions of a general contract incorporated by reference. *Perry v. United States for Use of Newell*, 146 F.2d 398, 400 (5th Cir.1945); *Hill & Combs v. First Nat. Bank of San Angelo*, 139 F.2d 740, 742 (5th Cir.1944).

The cases cited by Basic are not to the contrary. Several of these cases stand only for the proposition that a subcontractor is bound by the plans and specifications of the prime contract. See, e.g., *Ehret Magnesia Mfg. Co. v. Gothwaite*, 80 U.S.App.D.C. 127, 149 F.2d 829 (1945); *Linde Dredging Co. v. Southwest L. E. Myers Co.*, 67 F.2d 969 (5th Cir.1933). Other cases cited by the appellee hold only that the architect's or engineer's decisions as to the quality or quantity of the work done under the specifications of a contract are binding on the subcontractor when there is a specific provision in the subcontract to such effect. See *Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp.*, 311 F.2d 389, 395, 397 (4th Cir. 1962); *Warner Construction Co. v. Louis Hanssen's Sons*, 20 F.2d 483, 489-490 (8th Cir. 1927);^{FN24} *Charles S. Wood & Co. v. Alvord & Smith*, 258 N.Y. 611, 180 N.E. 354 (1932), affg 232 App.Div. 603, 251 N.Y.S. 35 (1931); *Sweet v. Morrison*, 116 N.Y. 19, 22 N.E. 276 (1889). There is no such provision here and the decision by the Fund went further and attempted to adjudicate legal rights and liabilities between itself and Basic. Johnson could have bound itself to the outcome of this determination, but our interpretation of the subcontract persuades us that it did not.^{FN25}

FN24. The decision was binding only as to 'matters of fact' but not as to 'legal rights or liability.'

FN25. Basic in its December 31, 1965 letter to Johnson admitted in effect that Johnson was not bound by the outcome of Basic's dispute with the Fund when it informed Johnson that it was appealing the architect's determination to the Fund and then said:

We further recognize and agree that whatever the result of this claim against the Owner may be, it will in no way prejudice any rights you may have against Basic under your subcontract agreement. (Emphasis added).

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We accordingly decide that Basic was required to give Johnson a commitment for payment for the extra painting even though it had received none from the Fund, that it breached the contract when it refused to do so, that Johnson's *777 **98 abandonment was fully justified and that it is entitled to be compensated for the work it performed.

III

[15] As for Johnson's suit against the architect Stone, the court below found on substantial evidence that Johnson did not abandon its contract because of the architect's directive to Basic to discharge him, but rather because it had not received assurance of payment from Basic. Thus the requisite legal clause between the architect's directive and Johnson's abandonment of its subcontract has not been proven.

The court's finding below is not clearly erroneous and we affirm.

Affirmed.

C.A.D.C. 1970.
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802 N.E.2d 901
(Cite as: 802 N.E.2d 901)



Supreme Court of Indiana.
MPACT CONSTRUCTION GROUP, LLC, Appel-
lant (Defendant below),

v.

SUPERIOR CONCRETE CONSTRUCTORS,
INC., Appellee (Plaintiff below),

and

Flying J, Inc., FJI Plaza Company III, LLC, Leh-
man Brothers Holdings, Inc. d/b/a Lehman Capital,
a Division of Lehman Brothers Holdings, Inc.,
Gary's Plumbing Service, Inc., Koberstein Truck-
ing, Inc., Combs Landscape & Nursery, Inc, B & B
Electric Co., Inc., June Rinsch, in her capacity as
the Gibson County Treasurer, Appellees
(Defendants below),

and

J.D. Music Tile Company, Inc., and E & B Paving,
Inc., Appellees (Intervenors below).

No. 26S01-0307-CV-349.
Feb. 4, 2004.

Background: Subcontractor filed action to fore-
close its mechanic's lien. General contractor filed
cross-claim against owner for breach of contract
and to foreclose its mechanic's lien. General con-
tractor filed motion to stay litigation and compel ar-
bitration. The Gibson Circuit Court, Keith A. Meier
, Special Judge, summarily denied motion. General
contractor appealed. The Court of Appeals, 785
N.E.2d 632, affirmed in part and reversed in part.

Holdings: Upon granting petition to transfer, the
Supreme Court, Sullivan, J., held that:

- (1) Federal Arbitration Act (FAA) did not preempt
application of Indiana law to determine whether
subcontractors agreed to arbitrate;
- (2) federal policy favoring arbitration could not in-
fluence question of whether general contractor and
subcontractors agreed to arbitrate;
- (3) arbitration clause in contract between property
owner and general contractor was not incorporated

by reference into subcontracts; and
(4) general contractor's participation in litigation
did not result in waiver of right to arbitrate.

Decision of Court of Appeals affirmed.

Boehm, J., filed dissenting opinion in which
Shepard, C.J., joined.

West Headnotes

[1] Alternative Dispute Resolution 25T 117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption
or supersession. Most Cited Cases
Federal Arbitration Act (FAA) did not preempt
application of Indiana law to determine whether
subcontractors agreed to arbitrate with general con-
tractor, although construction project constituted in-
terstate commerce; no state statutes explicitly made
certain arbitration clauses unenforceable or placed
serious burdens on enforceability of arbitration pro-
visions, and Indiana law was not hostile to arbitra-
tion. 9 U.S.C.A. §§ 1, 2.

[2] Alternative Dispute Resolution 25T 112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual
basis. Most Cited Cases
(Formerly 33k1.1 Arbitration)

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Federal Arbitration Act (FAA) applies only if parties agree to arbitrate. 9 U.S.C.A. § 1 et seq.

[3] Alternative Dispute Resolution 25T 117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
Federal Arbitration Act (FAA) contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. 9 U.S.C.A. § 1 et seq.

[4] States 360 18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases
State law may be preempted to the extent that it actually conflicts with federal law, that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[5] Alternative Dispute Resolution 25T 113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration favored; public policy. Most Cited Cases
(Formerly 33k1.2 Arbitration)
Indiana policy favors arbitration. West's A.I.C. 34-57-2-1.

[6] Alternative Dispute Resolution 25T 117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
If a court, fairly applying generally applicable state law contract principles and not singling out arbitration agreements for hostile treatment, finds that the parties did not agree to arbitrate, then federal law does not preempt that finding. 9 U.S.C.A. § 1 et seq.

[7] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
Federal policy favoring arbitration could not influence question of whether general contractor and subcontractors agreed to arbitrate; only after it had been determined that parties intended to arbitrate would federal policy play important role in determining scope of arbitration agreement. 9 U.S.C.A. § 1 et seq.

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Federal Arbitration Act (FAA) applies only if parties agree to arbitrate. 9 U.S.C.A. § 1 et seq.

[3] Alternative Dispute Resolution 25T ⚡117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚡18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
Federal Arbitration Act (FAA) contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. 9 U.S.C.A. § 1 et seq.

[4] States 360 ⚡18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases
State law may be preempted to the extent that it actually conflicts with federal law, that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[5] Alternative Dispute Resolution 25T ⚡113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration favored; public policy. Most Cited Cases
(Formerly 33k1.2 Arbitration)
Indiana policy favors arbitration. West's A.I.C. 34-57-2-1.

[6] Alternative Dispute Resolution 25T ⚡117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚡18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
If a court, fairly applying generally applicable state law contract principles and not singling out arbitration agreements for hostile treatment, finds that the parties did not agree to arbitrate, then federal law does not preempt that finding. 9 U.S.C.A. § 1 et seq.

[7] Alternative Dispute Resolution 25T ⚡143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚡18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
Federal policy favoring arbitration could not influence question of whether general contractor and subcontractors agreed to arbitrate; only after it had been determined that parties intended to arbitrate would federal policy play important role in determining scope of arbitration agreement. 9 U.S.C.A. § 1 et seq.

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[8] Alternative Dispute Resolution 25T 137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In general. Most Cited

Cases

(Formerly 33k7 Arbitration)

Whether the parties agreed to arbitrate any disputes is a matter of contract interpretation, and most importantly, a matter of the parties' intent.

[9] Alternative Dispute Resolution 25T 113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration favored; public policy. Most Cited Cases
(Formerly 33k7.1 Arbitration)

Alternative Dispute Resolution 25T 139

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 k. Construction in favor of arbitration. Most Cited Cases
(Formerly 33k7.1 Arbitration)

In determining the scope of an arbitration agreement, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration. 9 U.S.C.A. § 1 et seq.

[10] Alternative Dispute Resolution 25T 137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In general. Most Cited

Cases

(Formerly 33k6.2 Arbitration)

Alternative Dispute Resolution 25T 144

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement

25Tk144 k. Building contracts disputes. Most Cited Cases

(Formerly 33k6.2 Arbitration)

Arbitration clause in contract between property owner and general contractor was not incorporated by reference into subcontracts, and thus subcontractors were not required to arbitrate their disputes with general contractor, although subcontracts contained provision stating that contract documents were complementary and what was required by any one would be a binding as if required by all; provision came from section of subcontract dealing with work to be performed, general contractor did not ensure that subcontracts conformed to requirements of general conditions concerning general contractor and property owner, and arbitration was not sufficiently discussed by parties.

[11] Contracts 95 143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General

95k143(1) k. In general. Most Cited Cases

Courts are required to give effect to parties' contracts, and to do so, courts look to the words of a contract.

[12] Contracts 95 155

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k155 k. Construction against party using words. Most Cited Cases

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When there is ambiguity in a contract, it is construed against its drafter.

[13] Alternative Dispute Resolution 25T 182(2)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) k. Suing or participating in suit. Most Cited Cases
(Formerly 33k23.3(2) Arbitration)

General contractor's participation in subcontractor's action to foreclose mechanic's lien did not result in waiver of general contractor's right to arbitrate any disputes with subcontractor, although general contractor filed cross-claim against property owner for breach of contract and filed cross-claims and counterclaims to foreclose its own mechanic's lien; counterclaims were compulsory, filing of non-compulsory cross-claims was insufficient to establish waiver, and general contractor stated in its answer that it was not waiving its right to arbitration and requested in its affirmative defenses that claims be submitted to arbitration. Trial Procedure Rule 13.

[14] Alternative Dispute Resolution 25T 182(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) k. In general. Most Cited Cases
(Formerly 33k23.3(1) Arbitration)

Whether a party has waived the right to arbitration depends primarily upon whether that party has

acted inconsistently with its right to arbitrate.

[15] Alternative Dispute Resolution 25T 182(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) k. In general. Most Cited Cases
(Formerly 33k23.3(1) Arbitration)

Determining whether a party waived its right to arbitration requires an analysis of the specific facts in each case.

[16] Alternative Dispute Resolution 25T 182(2)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) k. Suing or participating in suit. Most Cited Cases
(Formerly 33k23.3(2) Arbitration)

Party should not be held to have waived its right to arbitrate when, in response to a complaint filed against it, it raises counterclaims in order to preserve them. Trial Procedure Rule 13.

*903 Steven S. Hoar, Evansville, IN, Don L. Smith, Nashville, TN, Attorneys for Appellant.

Angela L. Freel, James D. Johnson, R. Steven Krohn, James E. Stoltz, Robert F. Stayman, Evansville, IN, Jerry D. Stilwell, Princeton, IN, Attorneys for Appellees.

ON PETITION TO TRANSFER FROM THE IN-

802 N.E.2d 901
(Cite as: 802 N.E.2d 901)

DIANA COURT OF APPEALS, NO.
26A01-0209-CV-345.

SULLIVAN, Justice.

When the owner failed to pay for work and supplies on its travel plaza, a subcontractor foreclosed on its mechanic's lien. The general contractor sought to compel arbitration among the owner, general, and all subcontractors. While we acknowledge arbitration's utility in this kind of multiparty dispute, our inspection of the contract documents indicates that the subcontractors did not agree to arbitrate the issues in dispute here.

Background

MPACT Construction Group, LLC, a general contractor, entered into a contract with Flying J, Inc. to construct a travel plaza in Gibson County, Indiana. ^{FN1} Flying J was the owner of the construction plaza at the time, and it is now owned by FJI Plaza III, LLC. MPACT entered into several contracts with subcontractors ^{FN2} ("Subcontractors") to do the project work. Flying J failed to pay for all of the work and supplies, and so MPACT and some of the Subcontractors recorded mechanic's liens against Flying J. One of the Subcontractors, Superior Concrete Constructors, Inc., filed an action to foreclose its mechanic's lien. Several counterclaims and cross-claims for the foreclosure of mechanic's liens and for breach of contract were filed among the various parties.

FN1. MPACT and Flying J also entered into a contract to construct a travel plaza in Oklahoma. The Court of Appeals stated: "Because the Oklahoma contract does not appear to have bearing on the present appeal, and based upon counsel's statements at oral argument, we do not expressly address it herein." *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 785 N.E.2d 632, 635 n. 3 (Ind.Ct.App.2003). Similarly, we do not address that contract here.

FN2. The subcontractors are Superior Concrete Constructors, Inc., Gary's Plumbing

Service, Inc., Koberstein Trucking, Inc., Combs Landscape & Nursery, Inc., B & B Electric Co., Inc., J.D. Music Tile Company, Inc., and E & B Paving, Inc.

The contract between MPACT and Flying J is an American Institute of Architects ("AIA") Standard Form Agreement Between Owner and Contractor ("General Contract"). Articles 1 and 9 of the General Contract incorporate by reference the AIA General Conditions of the Contract for Construction ("General Conditions"), and the General Conditions contain an arbitration clause. However, the subcontracts were not AIA standard form contracts *904 but instead were contracts prepared by MPACT. After approximately six months of preparing for litigation, MPACT filed a motion to stay litigation and compel arbitration. The trial court summarily denied its motion. The Court of Appeals reversed in part, granting the motion as to Flying J, and affirmed in part, denying the motion as to the Subcontractors. *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 785 N.E.2d 632, 639, 640 (Ind.Ct.App.2003). We reach the same result as the Court of Appeals.

Discussion

The main issue is whether MPACT and the Subcontractors agreed to arbitrate disputes arising out of their business dealings. Because no explicit arbitration provision is contained in the subcontracts, we must determine if the arbitration provision in the General Conditions was incorporated by reference into the subcontracts.

I

[1] The Federal Arbitration Act ("FAA") applies to written arbitration provisions contained in contracts involving interstate commerce. 9 U.S.C. §§ 1, 2 (2000). MPACT, Flying J, FJI Plaza III, LLC, and many of the Subcontractors are from different states, and so this project constitutes interstate commerce. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-01, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); *Univ. Casework Sys., Inc. v. Bahre*, 172 Ind.App. 624, 634-35, 362

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N.E.2d 155, 162 (1977); *Pathman Constr. Co. v. Knox County Hosp. Ass'n*, 164 Ind.App. 121, 133-34, 326 N.E.2d 844, 852-53 (1975).

[2] The FAA applies only if parties agree to arbitrate. The Supreme Court has stated that both state law contract principles and federal substantive law of arbitration apply to answering this question. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (state law); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (federal law). In dicta, the Court has said:

[T]he text of § 2 [of the FAA] provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, 'save upon such grounds as exist at law or in equity for the revocation of any contract.' Thus state law ... is applicable *if* that law arose to govern issues concerning the validity, revocability, or enforceability of contracts generally.

Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (quoting 9 U.S.C. § 2). Recently, the Court clarified this statement, declaring that laws generally applicable to contracts may be applied to arbitration agreements, but "[c]ourts may not ... invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *see also PaineWebber Inc. v. Elahi*, 87 F.3d 589, 593 (1st Cir.1996) (referring to *Doctor's Associates*, the court stated "the Supreme Court explained that if a state law is applicable to contracts generally, it may be applied to arbitration agreements, but a state law that is specifically and solely applicable to arbitration agreements is displaced by the FAA").

The Court of Appeals, the Seventh Circuit, a

federal district court applying Indiana law, and most other federal circuit courts of appeal have concluded that state law contract principles apply to determine whether parties have agreed to arbitrate. *905 *St. John Sanitary Dist. v. Town of Schererville*, 621 N.E.2d 1160, 1162 (Ind.Ct.App.1993); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir.1997); *Ziegler v. Whale Sec. Co., L.P.*, 786 F.Supp. 739, 741 (N.D.Ind.1992); *Fazio v. Lehman Bros.*, 340 F.3d 386, 393 (6th Cir.2003); *Bank One, N.A. v. Shumake*, 281 F.3d 507, 513 (5th Cir.2002), *cert. denied*, 537 U.S. 818, 123 S.Ct. 94, 154 L.Ed.2d 25 (2002); *Mirra Co. v. Sch. Admin. Dist. # 35*, 251 F.3d 301, 304 (1st Cir.2001); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 n. 4 (4th Cir.2000); *Schooley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 133 Lab. Cas. (CCH) ¶ 58,234, 1997 WL 45271, at * 2, 1997 U.S.App. LEXIS 1884, at * 5 (10th Cir. Feb. 5, 1997); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2nd Cir.1996).

MPACT contends, however, that whenever state law presents an obstacle to arbitration, federal law preempts the application of state law. It argues that the Court of Appeals, in finding no agreement to arbitrate, either misconstrued Indiana law or properly construed Indiana law but should have applied federal law instead. The Subcontractors respond that the "FAA only pre-empts state law which requires the parties to resolve their disputes in a judicial forum when the contracting parties have agreed to resolve their disputes through arbitration." (Joint Br. in Resp. to Pet. for Transfer at 6.) That is not the case here, they argue, because there was no agreement to arbitrate.

[3][4][5] "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Nevertheless, "state law may ... be pre-empted to the extent that it actually

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conflicts with federal law—that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ ” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Preemption has been found in cases where state statutes explicitly made certain arbitration clauses unenforceable or placed serious burdens on the enforceability of arbitration provisions. *See, e.g., Doctor's Assocs.*, 517 U.S. at 683, 688, 116 S.Ct. 1652 (finding preemption where Montana law made arbitration clauses unenforceable unless the first page of the contract contained in underlined capital letters a statement that the contract was subject to arbitration); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269, 272–73, 282, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (reversing Alabama Supreme Court's denial of arbitration based on a state statute rendering predispute arbitration agreements invalid and unenforceable); *Southland Corp. v. Keating*, 465 U.S. 1, 10–16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (holding invalid on preemption grounds state statute making agreements to arbitrate franchise claims unenforceable). But no such statute is involved here. Nor is it the case that state law is hostile to arbitration. Indeed, Indiana policy favors arbitration. *PSI Energy, Inc. v. AMAX, Inc.*, 644 N.E.2d 96, 98 (Ind.1994) (stating that “Indiana was surely among the first jurisdictions to sanction arbitration as a means of dispute resolution” as it had a law allowing arbitration before Indiana became a state in 1816); *Ind. CPA Soc'y v. GoMembers, Inc.*, 777 N.E.2d 747, 750 (Ind.Ct.App.2002) (“Indiana recognizes a strong policy favoring enforcement of arbitration agreements.”); *see also* Uniform Arbitration Act, Ind.Code § 34–57–2–1 (1998).

[6] MPACT focuses solely on the result. It is just not true, however, that *906 preemption occurs every time a court finds that the parties did not agree to arbitrate. If a court, fairly applying generally applicable state law contract principles and not singling out arbitration agreements for hostile treatment, finds that the parties did not agree to arbitrate, then federal law does not preempt. *See Perry*,

482 U.S. at 492 n. 9, 107 S.Ct. 2520 (“A court may not, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.”); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (the intention of the FAA was to put arbitration agreements “upon the same footing as other contracts”) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

For these reasons, we will apply Indiana law to determine whether the Subcontractors agreed to arbitrate.^{FN3}

FN3. Some of the subcontracts included a choice of law clause stating that Indiana law would apply and others stating that Tennessee law would apply. Ind.Code § 32–28–3–17 (Supp.2002), however, makes void any provision in “a contract for the improvement of real estate in Indiana” that “makes the contract subject to the laws of another state.” Therefore, we will apply only Indiana law.

[7] MPACT further argues that even if Indiana law applies, the federal policy favoring arbitration should influence the question whether the parties agreed to arbitrate. The Subcontractors respond that a court “must first determine whether the parties generally agreed to arbitrate disputes.” (Joint Br. in Resp. to Pet. for Transfer at 2.) We agree with the Subcontractors.

[8] Whether the parties agreed to arbitrate any disputes is a matter of contract interpretation, and most importantly, a matter of the parties' intent. *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir.2000) (“As with any contract, the touchstone for interpreting an arbitration clause must be the intention of the parties.”). “Courts in Indiana have long recognized the freedom of parties to enter into contracts and have presumed that contracts represent the freely bargained agreement of the parties.”

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Trimble v. Ameritech Publ'g, Inc., 700 N.E.2d 1128, 1129 (Ind.1998); *Cont'l Basketball Ass'n v. Ellenstein Enters.*, 669 N.E.2d 134, 140 (Ind.1996). Consequently, imposing on parties a policy favoring arbitration before determining whether they agreed to arbitrate could frustrate the parties' intent and their freedom to contract. The Supreme Court has made this clear—"arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quotations and citations omitted); *accord Homes by Pate, Inc. v. DeHaan*, 713 N.E.2d 303, 306 (Ind.Ct.App.1999).

[9] Additionally, courts have regularly distinguished the treatment given questions of the existence of an agreement to arbitrate and questions of the scope of an agreed-to arbitration clause. In determining the *scope* of an arbitration agreement, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 476, 109 S.Ct. 1248; *accord Moses H. Cone*, 460 U.S. at 24-25, 103 S.Ct. 927; *Bank One*, 281 F.3d at 513-14 n. 24.^{FN4} Because there was already an *907 agreed-to arbitration clause in these cases, applying federal policy in construing the arbitration clause would not have frustrated the parties' intent. Using the policy favoring arbitration to decide whether the parties did in fact agree to arbitrate does not answer the question but rather avoids having to decide it. Only after it has been determined that the parties agreed to arbitrate their disputes does the policy favoring arbitration play an important role. We must determine, therefore, whether MPACT and the Subcontractors agreed to arbitrate without resort to the federal policy favoring arbitration.

FN4. *Cf. First Options*, 514 U.S. at 944-45, 115 S.Ct. 1920 (requiring "clear and unmistakable" evidence that parties agreed to submit to an arbitrator the ques-

tion who should decide whether the parties agreed to arbitrate, because it is different from the question involving the scope of an arbitration provision, in which "the parties [already] have a contract that provides for arbitration of some issues").

II

[10] Whether MPACT and the Subcontractors agreed to arbitrate their disputes depends on whether the arbitration clause in the General Conditions of the General Contract was incorporated by reference into the subcontracts. "It is well settled that, under the Federal Arbitration Act, an agreement to arbitrate may be validly incorporated into a subcontract by reference to an arbitration provision in a general contract." *Maxum Found., Inc. v. Salus Corp.*, 779 F.2d 974, 978 (4th Cir.1985); *R.J. O'Brien & Assocs. v. Pipkin*, 64 F.3d 257, 260 (7th Cir.1995); *cf. Wilson Fertilizer & Grain, Inc. v. ADM Milling Co.*, 654 N.E.2d 848, 854-55 (Ind.Ct.App.1995) (finding that under the Uniform Commercial Code § 2-207, a party cannot claim surprise to an arbitration clause incorporated by reference into the contract), *trans. denied*. In deciding whether the subcontracts incorporated by reference the arbitration provision, we must look to the language of the contract documents.

MPACT points to two clauses in the subcontracts to support its contention that the arbitration provision was incorporated by reference into the subcontracts. The first reads:

[Article VI(b)] The Sub-contractor acknowledges that he has read the General contract and all plans and specifications, together with all amendments and addenda thereto, and is familiar therewith and agrees to comply with and perform all provisions thereof applicable to the Sub-Contractor. The intent of the Contract documents is to include all items necessary for the proper execution and completion of the work. The contract documents are complementary and what is required by any one shall be as binding as if required by all. Work not covered in the Contract documents will

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not be required, unless it is consistent therewith and is reasonable [sic] inferable therefrom as being necessary to produce the intended results.

The second reads:

Contractor has heretofore entered into a General Contract with [Flying J], hereinafter called the Owner, to furnish and pay for all necessary and required labor, materials ... to perform all work required ... inclusive of, but not limited to the project plans and specifications ... schedules, drawings and amendments by addenda, as prepared by ... the Architect, and known as Flying "J" Travel Plaza, which are hereby made a part of the General Contract between the Owner and the Contractor and are hereby, made a part of this subcontract, as applicable to the work stated therein and pursuant to this subcontractor's intent to enter into this sub-contractual agreement, with reference to any and all of said work.

*908 MPACT argues that these provisions, and particularly the sentence, "The contract documents are complementary and what is required by any one shall be as binding as if required by all," show that the General Conditions, which were incorporated into the General Contract between MPACT and Flying J, were incorporated into the subcontracts. The Subcontractors respond, and the Court of Appeals agreed, that provisions of the General Contract were incorporated for the limited purpose of governing the work to be performed. They emphasize that the sentence MPACT relies on is preceded and followed by sentences pertaining specifically to work, and that this limits the effect of that sentence.

While the cited provisions support both arguments, the larger context suggests that the Subcontractors' construction is correct. *Allied Structural Steel Co. v. State*, 148 Ind.App. 283, 288, 265 N.E.2d 49, 52 (1970) ("The true meaning of a contract is to be ascertained from a consideration of all its provisions, and a liberal or technical construction of an isolated clause should not be indulged to defeat the true meaning."); *Gen. Ins. Co. of Am. v. Hutchison*, 143 Ind.App. 250, 254, 239 N.E.2d 596,

598-99 (1968) ("It is the general rule of law in our State that words, phrases, sentences, paragraphs and sections of a contract cannot be read alone."). Of particular importance is the language surrounding Article VI(b). Not only do the sentences within that provision specifically discuss the work to be performed, but all other provisions in the article of which it is a part relate to the work to be performed. Clause (a) of Article VI requires that the Subcontractor "supply adequate tools, appliances, and equipment, [and] a sufficient number of properly skilled workmen" to ensure that the work gets done "efficiently and promptly." Clause (c) discusses the Architect's control over the work to be performed. Clause (d) addresses the Subcontractors need to get permits and licenses. Taken as a whole, this article is about the work to be performed and nothing more. If the parties intended to bind the Subcontractors to arbitration, logic dictates that an incorporation by reference clause clearly apply to the entire contract—or be in a separate section on rights and remedies or at least with contract provisions on liability and indemnification—rather than with provisions relating to the work.

Other provisions are telling as well, though not conclusive. Article 5.3.1 of the General Conditions states:

By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract ... shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner.

Viewing this provision with the language of the

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subcontract that, “[t]he Sub-contractor acknowledges that he has read the General contract ... and is familiar therewith and agrees to comply with and perform all provisions thereof applicable to the Sub-Contractor,” suggests that the Subcontractors are required to submit to arbitration. The Subcontractors agreed to comply with provisions of the General Contract applicable to them, and Article 5.3.1 of the General Conditions, as part of the General Contract, is applicable to subcontractors.*909 Although Article 5.3.1 was probably intended to bind subcontractors directly, the language itself puts the burden on the contractor to obtain an agreement from subcontractors to assume the same responsibilities as the contractor assumes toward the owner. A comment from the American Institute of Architects, drafters of the General Conditions, provides some guidance. It first states, “A basic requirement of the contract is that subcontractors be bound by the terms of the contract documents. AIA Document A401 Standard Form Agreement Between Contractor and Subcontractor, so provides.” Am. Inst. of Architects, *A201 Commentary* (1997). But the next sentence reads, “If other subcontract forms are utilized, care must be taken to coordinate them with Subparagraph 5.3.1.” *Id.* This indicates that if the general contractor uses subcontract forms other than those provided by the AIA—which MPACT did in this case—it must in its own contract include a provision requiring the subcontractors to assume the same responsibilities that it assumes toward the owner.

MPACT may well have believed the language it used was sufficient to bind the Subcontractors to arbitration. It cites several cases to support its contention that the language in its subcontracts validly incorporated the arbitration clause by reference. The Subcontractors respond that all of those cases can be distinguished from this one. *Uniroyal, Inc. v. A. Epstein & Sons, Inc.*, 428 F.2d 523, 524 (7th Cir.1970) (in section of contract discussing general obligations, the subcontract stated that the subcontractor agrees “to assume toward [the contractor] all the obligations and responsibilities that [the con-

tractor], by those documents, assumes toward the Owner,” and that “[i]n the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in this Contract”); *Kvaerner ASA v. Bank of Tokyo—Mitsubishi Ltd.*, 210 F.3d 262, 265 (4th Cir.2000) (subcontract used the phrase the “the same rights and remedies” and in a provision concerning default); *Maxum*, 779 F.2d at 979 (subcontract stated that “the Subcontractor shall be bound by, and expressly assumes for the benefit of the Contractor, all obligations and liabilities which the Contract Documents impose upon the Contractor”); *Exch. Mut. Ins. Co. v. Haskell Co.*, 742 F.2d 274, 275 (6th Cir.1984) (“Subcontractor hereby assumes the same obligations and responsibilities with respect to his performance under this Subcontract, that Contractor assumes towards Owner....”); *J.S. & H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212, 213–14 n. 3 (5th Cir.1973) (“Subcontractor agrees to be bound to the Contractor by all of the terms of the agreement between the Contractor and the Owner and by the Contract Documents and to assume toward the Contractor all of the obligations and the responsibilities that the Contractor by those instruments assumes toward the Owner.”); *Vespe Contracting Co. v. Anvan Corp.*, 399 F.Supp. 516, 520 n. 4 (E.D.Pa.1975) (“Subcontractor ... shall assume towards Contractor all the obligations and responsibilities that the Contractor ... assumes towards Owner.”). We agree that these cases are distinct from the case here. In all of the other cases, the language incorporating the arbitration provision is more clear and explicit than in the subcontracts here.^{FN5}

FN5. MPACT also cited *U.S. Fid. & Guar. Co. v. West Point Constr. Co.*, 837 F.2d 1507 (11th Cir.1988), but the language in that case is conclusory and as such, does not aid MPACT’s argument. Additionally, MPACT cited *J & S Constr. Co. v. Travelers Indem. Co.*, 520 F.2d 809 (1st Cir.1975), but it is not on point.

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*910 [11][12] Courts are required to give effect to parties' contracts and to do so, courts look to the words of a contract. In contracting, clarity of language is key. Here, however, provisions in the subcontracts support both arguments, at least in part. When there is ambiguity in a contract, it is construed against its drafter. *Philco Corp. v. Automatic Sprinkler Corp. of Am.*, 337 F.2d 405, 408 (7th Cir.1964); *Smith v. Sparks Milling Co.*, 219 Ind. 576, 603, 39 N.E.2d 125, 135 (1942); *Bicknell Minerals, Inc. v. Tilly*, 570 N.E.2d 1307, 1313 (Ind.Ct.App.1991), *trans. denied*. In this instance, the AIA Standard Form of Agreement Between Contractor and Subcontractor was not used. MPACT instead drafted its own subcontracts. It was therefore MPACT's responsibility to ensure that its subcontracts conformed to the requirements of the General Conditions and incorporated the arbitration clause. MPACT did not do so.

The problem in this case seems to have resulted from poor contract drafting and inadequate contract negotiations. Each side believed at the time of contract execution that the contract provided for what it wanted—in MPACT's case, for arbitration, and in the Subcontractors' case, not for arbitration. Regardless, it is clear that arbitration was not sufficiently discussed by the parties. This leads to one conclusion, that there was no meeting of the minds between the parties on the issue of arbitration. Consequently, we find that there was no agreement to arbitrate between MPACT and the Subcontractors and the Subcontractors are not required to arbitrate their disputes with MPACT.

MPACT also sought arbitration of its disputes with Flying J. The Court of Appeals found that the disputes were governed by the arbitration provision in the General Conditions of the General Contract, and held that MPACT was entitled to arbitration with Flying J. We summarily affirm the Court of Appeals on this point. Ind. Appellate Rule 58(A)(2).

III

[13][14][15] The Subcontractors additionally

argue that MPACT waived its right to arbitrate, if such a right actually exists. Whether a party has waived the right to arbitration depends primarily upon whether that party has acted inconsistently with its right to arbitrate. *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634, 637 (7th Cir.2002); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir.1992); *Kilkenny v. Mitchell Hurst Jacobs & Dick*, 733 N.E.2d 984, 986 (Ind.Ct.App.2000), *trans. denied*, 753 N.E.2d 8 (Ind.2001). This requires an analysis of the specific facts in each case. *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir.2002); *St. Mary's Med. Ctr.*, 969 F.2d at 588; *Kilkenny*, 733 N.E.2d at 986.

Some facts suggest that MPACT may have waived its right to arbitrate by actively participating in the litigation. *Ernst & Young LLP*, 304 F.3d at 757–58; *St. Mary's Med. Ctr.*, 969 F.2d at 589. MPACT filed a cross-claim against Flying J for breach of contract and filed cross- and counterclaims against Flying J and the Subcontractors to foreclose its own mechanic's lien. MPACT also participated in telephone conferences and a scheduling conference where summary judgment deadlines and a trial date were set.

[16] The filing of counterclaims and cross-claims does not always indicate active participation in litigation. While all cross-claims are permissive, some counterclaims are compulsory, that is, a party must bring them or waive them. Ind. Trial Rule 13. A party should not be held to have waived its right to arbitrate when, in response to a complaint filed against it, *911 it raises counterclaims in order to preserve them. *Cf. Underwriting Members of Lloyds of London v. United Home Life Ins. Co.*, 549 N.E.2d 67, 71 (Ind.Ct.App.1990) (stating that participation in discovery did not result in a waiver of arbitration because defendant was required by court order to do so), *adopted by*, 563 N.E.2d 609 (Ind.1990). MPACT's counterclaims in this case are compulsory. The cross-claims are not, and to that extent, MPACT could be seen as actively particip-

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ating in the litigation. But that alone is not sufficient to establish a waiver, particularly in light of the other facts.

In its answer filed March 29, 2002, MPACT stated that it was not waiving its right to arbitration and in its affirmative defenses, requested that the claims be submitted to arbitration. *St. Mary's Med. Ctr.*, 969 F.2d at 589 (finding that defendant waived the right to arbitrate because in the ten months that passed since being sued, defendant filed a motion to dismiss or for summary judgment and then did not raise arbitration until losing its motion); *Kilkenny*, 733 N.E.2d at 987 (“This is clearly not a case where a request for arbitration was plead in the initial complaint and then not again asserted until discovery was complete or an unfavorable result on the individual claims was imminent.”); *Lloyds*, 549 N.E.2d at 71 (finding no waiver because defendant “asserted its right to arbitrate throughout the proceedings”). MPACT also did not file motions to dismiss or for summary judgment before asserting its right to arbitrate. These facts show that MPACT acted consistently with its right to arbitrate, if it had one, and so its actions would not have constituted a waiver of that right.

Conclusion

We grant transfer, summarily affirm the decision of the Court of Appeals reversing the trial court's denial of MPACT's motion to stay proceedings and compel arbitration as to Flying J, and affirm the trial court's denial of MPACT's motion as to the Subcontractors. This case is remanded to the trial court for further proceedings consistent with this opinion.

DICKSON and RUCKER, JJ., concur.
BOEHM, J., dissents with a separate opinion in which SHEPARD, C.J., joins.

BOEHM, J., dissenting.

I respectfully dissent. This is a typical multi-party construction litigation, where various parties are pointing fingers in various directions and claim-

ing that whatever went wrong with the project is somebody else's—anybody else's—problem. I agree that state law governs the formation of the contract and that nothing in the Federal Arbitration Act requires that these disputes between subcontractors and the general contractor be arbitrated unless the parties agreed to that method of dispute resolution. I believe, however, that these agreements do call for arbitration of the entire multiparty dispute among the owner, the general contractor, and these several subcontractors.

The agreement between the general contractor and the owner is a standard printed form AIA construction agreement. All agree that that contract includes an enforceable arbitration clause, and an undertaking to bind subcontractors to the same terms that obligate the general. The general's agreements with the subs provide that each sub acknowledges the principal agreement and agrees to be bound by it. The principal agreement provides, *inter alia*, that the general will impose conforming conditions on all subs. These agreements are among businesses fully familiar with this sort of arrangement, and fully cognizant that the last thing either the general or the owner wants is piecemeal litigation with different subs. The result the majority reaches produces an arbitration between the owner and the general and litigation with one or more subs in a separate forum. The majority concedes that the general intended to bind the subs to arbitration, but points to imprecision in the language used to accomplish that. It seems to me that the subs did understand, or should have, that arbitration was intended. They should be held to have accepted arbitration when they accepted these agreements. Accordingly, I would require arbitration of this entire dispute in one proceeding.

The majority points to what I agree is less than elegant phrasing of the agreement, and what it describes as “inadequate contract negotiations.” I think these agreements, given the context, were sufficient to make clear to the subs that they were expected to arbitrate their disputes with the general or

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the owner. Particularly in an industry where arbitration is widely used, ambiguity does not necessarily lead to the conclusion that no meeting of the minds occurred. Rather, I would conclude that ambiguity should be construed in favor of finding an agreement to arbitrate where that is commonplace in the industry. We have on several occasions expressed support for the policy under Indiana law favoring arbitration. *PSI Energy, Inc. v. AMAX, Inc.*, 644 N.E.2d 96, 99 (Ind.1994); *Sch. City v. East Chicago Fed'n of Teachers, Local No. 511*, 622 N.E.2d 166, 169 (Ind.1993). These rulings also support finding an agreement to arbitrate where the documents support that conclusion, albeit with less than precision.

SHEPARD, C.J., joins.

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United States District Court,
S.D. New York.

UNITED STATES STEEL CORPORATION,
Plaintiff,

v.

TURNER CONSTRUCTION COMPANY, Defendant.

No. 82 Civ. 6747 (CLB).
April 13, 1983.

Subcontractor brought action against general contractor seeking to recover the balance due under its subcontract as well as the additional costs incurred as result of general contractor's alleged breach of the subcontract. Upon general contractor's motion to dismiss the complaint, the District Court, Briant, J., held that forum selection clause contained in prime contract was not incorporated by reference into subcontract and therefore subcontractor was not bound by forum selection clause in general contractor's prime contract so as to be required to litigate its claims in a New York state court.

Motion denied.

West Headnotes

[1] Contracts 95 ↪206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Under New York law, application and relevant scope of a forum selection clause is determined by an objective consideration of the language of the provision, not the subjective, undisclosed intention of its draftsman.

[2] Contracts 95 ↪206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Forum selection clause contained in prime contract was not incorporated by reference into subcontract and therefore subcontractor was not bound by forum selection clause and general contractor's prime contract so as to be required to litigate its claims to recover balance due under subcontract as well as additional costs incurred as result of general contractor's alleged breach of subcontract in a New York state court.

*871 Roger S. Markowitz; Berman, Paley, Goldstein & Berman, New York City, for plaintiff.

Frederick Ellison, French, Fink, Markle & McCallion, New York City, for defendant.

MEMORANDUM AND ORDER

BRIANT, District Judge.

Pursuant to Rule 12(b)(1)(3) and (6), F.R.Civ.P., defendant Turner Construction Com*872 pany ("Turner") moves to dismiss the complaint of plaintiff United States Steel Corporation ("U.S. Steel") in this diversity case, on the ground that plaintiff is required by contract to litigate this claim only in the Supreme Court of the State of New York, County of New York.

This litigation arises out of the construction of an office building for International Business Machines Corporation (the "IBM project") at 590 Madison Avenue, New York, New York. Pursuant to an agreement with IBM (the "prime contract"), Turner agreed to act as the general contractor for this construction project. On August 11, 1978, Turner and U.S. Steel, through its American Bridge Division, entered into a written sub-contract whereby U.S. Steel agreed to furnish, fabricate, de-

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liver and erect structural steel for the IBM project.

After commencing work on the IBM project, U.S. Steel encountered extensive work related delays and disruptions, allegedly caused by Turner, and suffered substantial cost overruns. Other subcontractors on the project experienced similar delays. Despite these difficulties, U.S. Steel completed performance under the subcontract with Turner, and the quality of this work is not in issue here.

In April of 1981, U.S. Steel submitted a fully documented claim to Turner for the additional costs said to have been incurred as a result of the delays in construction. Over the next few months, despite the overtures of U.S. Steel, Turner refused to engage in discussions concerning this claim. Eventually, Turner informed U.S. Steel of its intent to include the claim of U.S. Steel in its own overall claim for extras to be submitted to IBM. Turner refused to permit U.S. Steel to participate in its subsequent negotiations with IBM. In March of 1982, despite the objections of U.S. Steel, Turner settled all outstanding claims on the project with IBM.

In subsequent negotiations between Turner and U.S. Steel, Turner has refused to supply U.S. Steel with a copy of the settlement agreement with IBM or to identify the amount of the settlement proceeds, if any, apportioned to the outstanding claim of U.S. Steel against Turner. In addition, Turner also refused to pay U.S. Steel the balance of the contract price due and owing.

As a result of these disputes, U.S. Steel commenced this lawsuit to recover the balance due under the subcontract as well as the additional costs incurred as a result of the defendant's alleged breach of the subcontract.

In support of this motion, Turner contends that the terms of the prime contract with IBM, specifically the forum selection clause set forth in Article 11 of the "General Conditions for Construction and Fitting-Up of IBM's Office Building" ("IBM Gen-

eral Conditions"), are incorporated by reference into the U.S. Steel subcontract obligating U.S. Steel to litigate all claims arising out of the subcontract in the New York Supreme Court, New York County. Turner asserts that if the forum selection clause is not enforced, it may be faced with the burden of simultaneously defending various lawsuits involving the same or similar issues in two or more different state and federal courts.

U.S. Steel asserts that it is not bound by the forum selection clause since it appears only in the prime contract and relates solely to disputes arising between IBM and Turner. U.S. Steel contends that only the prime contract terms which relate to the character and manner of the work to be performed by it as subcontractor are incorporated by reference into the subcontract. It argues that as a matter of New York contract law, all additional, unrelated provisions of the prime contract, such as the forum selection clause, are not incorporated into the subcontract and therefore not binding upon U.S. Steel.

The forum selection clause is set forth in Article 11 of the IBM General Conditions entitled "Monetary Claims and Demands Upon IBM." Article 11 provides in full:

"ARTICLE 11—Monetary Claims and Demands
Upon IBM

11.1 Monetary claims and demands *upon IBM* arising out of this Contract or *873 in connection with the work, for any reason whatsoever, must be presented by the Contractor to IBM in writing, within 14 days from the date of first occurrence of the cause giving rise thereto.

11.2 All such monetary claims and demands presented by the Contractor must refer to this Article and shall be fully detailed and substantiated as to the nature and extent thereof, so as to permit prompt resolution.

11.3 The Contractor hereby expressly waives all such claims and demands whether oral or written, and the right to present claims and demands,

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which are not made upon IBM in the time and manner set forth in this Article.

11.4 The parties hereby agree that the proper venue of any lawsuit arising out of this Contract or in connection with the work based on a claim by the Contractor, shall be the Supreme Court of the State of New York, County of New York.” (Emphasis added).

Turner contends that Article I and II of the subcontract agreement incorporate Paragraph 11.4 of this article into the subcontract. Article I of the subcontract requires U.S. Steel to perform all work “in accordance with the Plans, Specifications, General Conditions, Special Conditions and Addenda thereto ... and with the terms and provisions of the General Contract.”

Article II of the subcontract states:

“ARTICLE II. The Plans, Specifications, General Conditions, Addenda and General Contract, hereinabove mentioned, are available for examination by the Subcontractor at all reasonable times at the office of Turner; all of the aforesaid, including this Agreement, being hereinafter sometimes referred to as the Contract Documents. The Subcontractor represents and agrees that it has carefully examined and understands this Agreement and the other Contract Documents, has investigated the nature, locality and site of the Work and the conditions and difficulties under which it is to be performed, and that it enters into this Agreement on the basis of its own examination, investigation and evaluation of all such matters and not in reliance upon any opinions or representations of Turner, or of the Owner, or of any of their respective officers, agents, servants, or employees.

With respect to the Work to be performed and furnished by the Subcontractor hereunder, the Subcontractor agrees to be bound to the Owner and to Turner by each and all of the terms and provisions of the General Contract and the other Contract Documents, and to assume toward the

Owner and Turner all of the duties, obligations and responsibilities that Turner by those Contract Documents assumes toward the Owner, and the Subcontractor agrees further that the Owner and Turner shall have the same rights and remedies as against the Subcontractor as the Owner under the terms and provisions of the General Contract and the other Contract Documents has against Turner with the same force and effect as though every such duty, obligation, responsibility, right or remedy were set forth herein in full. The terms and provisions of this Agreement with respect to the Work to be performed and furnished by the Subcontractor hereunder are intended to be and shall be in addition to and not in substitution for any of the terms and provisions of the General Contract and the other Contract Documents.”

[1] Under New York law, the application and relevant scope of a forum selection clause is determined by an objective consideration of the language of the provision, not the subjective, undisclosed intention of its draftsman. *City of New York v. Pullman, Inc.*, 477 F.Supp. 438, 442 (S.D.N.Y.1979). Courts which have construed similar contractual provisions have held under analogous factual situations that absent clear language to the contrary, similar incorporation clauses in a construction subcontract bind a subcontractor only to the prime contract provisions which relate to the scope, *874 quality, character and manner of the work to be performed by the subcontractor. Prime contract provisions unrelated to the work of the subcontractor, such as a “dispute” clause governing the resolution of monetary claims between the project owner and general contractor, are not incorporated by reference into a subcontract. *Washington Metropolitan Area Transit Authority v. Norair Engineering Corporation*, 553 F.2d 233, 235, (D.C.Cir.1977); *John W. Johnson, Inc. v. Basic Construction Company*, 429 F.2d 764, 775 (D.C.Cir.1970); *United States v. Fryd Construction Corporation*, 423 F.2d 980, 983 (5th Cir.1970); *Caldwell v. United States for John H. Moon*, 407 F.2d 21 (5th Cir.1969); *United States for the Use of*

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B's Company v. Cleveland Electric Company, 373 F.2d 585, 588 (4th Cir.1967).

[2] Efforts of Turner to distinguish these cases are unavailing. Although in each instance the project owner was not a private party but a state or federal entity, each case considered whether a subcontract incorporated by reference a dispute clause contained in the prime contract. In addition, in each case like the present, the subcontractor was neither in privity with the project owner nor granted any rights under the prime contract. Here, plaintiff has no claim against IBM. Its claims do not "arise out of the [prime] contract" nor is this lawsuit "based on a claim by the [prime] Contractor" within the italicized portion of Article 11 of the prime contract, quoted *supra*, pp. 872-873. While IBM might have a legitimate purpose, in light of the New York Lien Law, especially § 3, in providing that the venue or forum selection clause should also apply to claims or demands of the subcontractor, it did not so provide. "If the purpose [were] to preclude [access to] a federal forum, explicit language [in the subcontract] to that effect would have foreclosed any issue on the matter." *City of New York v. Pullman, Inc.*, *supra*, at 442. There is no forum selection clause in the subcontract and, as noted above, the incorporation by reference of the conditions of the prime contract does not, as a matter of construction, extend beyond the scope, quality, character and manner of performance of the subcontracted work.

Article 11 of the prime contract merely sets forth the administrative procedures to be followed by Turner in presenting and resolving its own monetary claims against IBM, arising under the prime contract. In this regard, it merely requires that if the parties fail to resolve a claim amicably, any subsequent litigation must be commenced in the court specified. On its face, Article 11 applies only to claims asserted by Turner, on its own behalf, against IBM.

The subcontract itself contains no express reference either to Article 11 of the prime contract, or the forum selection clause contained therein.

However, the subcontract does incorporate expressly Article 6 of the IBM General Conditions, which establishes the method of payment. Neither Article 6 nor 11 are related to the scope, quality, character or manner of the work performed by U.S. Steel. Had the parties intended Article II of the subcontract to incorporate *all* of the provisions of the prime contract, as is now asserted by Turner, the express incorporation of Article 6 of the IBM General Conditions would not have been necessary. The express incorporation of this clause and the absence of any similar express provision concerning Article 11, suggests the parties did not intend to incorporate the forum selection clause into the subcontract, or that if Turner did so intend, it did not communicate its intention to U.S. Steel.

Therefore, plaintiff is not required to bring this action only in the Supreme Court of the State of New York, County of New York. Notwithstanding the possibility that the defendant may be forced to defend similar or related lawsuits in different forums, this lawsuit is properly before this Court.

The motion is denied.

Counsel for the parties shall hold an office conference at their earliest convenience to ascertain and if possible agree upon any necessary pre-trial discovery. A pre-trial conference will be held before me on June 16, 1983 in Courtroom 705 at 9:30 A.M.

So Ordered.

D.C.N.Y., 1983.
U.S. Steel Corp. v. Turner Const. Co.
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RELATED TOPICS

Construction and Operation
 Inherent or Common Law Contractual
 Obligation of Contractor

§ 3:32. Determining reasonableness of interpretation: Interpretation preference standards—Incorporation of upper tier contract provisions into lower tier agreements: “Flow down” clause

Bruner and O'Connor on Construction Law CONTRACT INTERPRETATION (Approx. 3 pages)

Bruner and O'Connor on Construction Law
 Database updated December 2012

Philip L. Bruner and Patrick J. O'Connor, Jr.

Chapter 3. CONTRACT INTERPRETATION

References

§ 3:32. Determining reasonableness of interpretation: Interpretation preference standards—Incorporation of upper tier contract provisions into lower tier agreements: “Flow down” clause

Some contracts often contain a clause that require incorporation of the provisions of the prime agreement into subcontracts.¹ Subcontractor clauses that incorporate prime agreement duties into subcontracts are known as “flow down” or “incorporation by reference” provisions. The general purpose behind these provisions is to bind the subcontractor to the contractor in the same manner and to the same extent (subject of course to the scope of the subcontractor’s work) as the contractor is bound unto the owner. Flow down clauses seldom create interpretation problems where the transferred obligation relates directly to the subcontractor’s work. If, for example, the contractor is required by its agreement to perform masonry work pursuant to specifically incorporated masonry specifications, then the subcontractor will in turn be required to perform to those specifications. Interpretation issues arise where the obligation in question is more general in nature. For example, if the prime contractor is required to arbitrate its disputes with the owner, is the subcontractor similarly bound to arbitrate? There is little uniformity to how the courts treat the enforceability of flow down provisions as they relate to such general obligations.²

Incorporation by reference can include not only referenced paper documents but electronic documents as well. Illustrative is *One Beacon Ins. Co. v. Crowley Marine Services, Inc.*,³ in which a work order for barge repair incorporated by reference terms and conditions available on the owner’s Web site. During the course of the contracted work, a subcontractor’s employee was injured and sued the owner and contractor for personal injury damages. When the owner demanded indemnity from the contractor pursuant to an indemnification clause contained in the Web site terms and conditions, the contractor’s insurer argued that the indemnity clause was unenforceable because it was not expressly included in the work order and was not specific and conspicuous as required by law. The trial court nevertheless concluded that the work order’s reference to the terms and conditions on the owner’s Web site was sufficient to incorporate the electronic document by reference. The United States Court of Appeals for the Fifth Circuit affirmed.

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Footnotes

- 1 See AIA Document A201-1997, ¶ 5.3.1 (“By appropriate agreement written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor by these Documents assumes toward the Owner and Architect...”).

Prime Tree and Landscaping Services v. American Services Co., Inc., 2011 WL 947004 (Tex. App. Houston 1st Dist. 2011) (holding that a supplier’s estimate unambiguously incorporated by reference the plasticity index set forth in the subcontractor’s purchase order).
- 2 Compare *John F. Harkins Co., Inc. v. Waldinger Corp.*, 796 F.2d 657 (3d Cir. 1986) (subcontractor bound to arbitrate under broad interpretation of clause incorporating prime contract); *Thomas O'Connor & Co., Inc. v. Insurance Co. of*

North America, 697 F. Supp. 563 (D. Mass. 1988) (prime arbitration clause effective against subcontractor so that surety entitled to stay payment bond suit); L & B Const. Co. v. Ragan Enterprises, Inc., 267 Ga. 809, 482 S.E.2d 279 (1997) (prime contract's no-damages-for-delay provision incorporated into subcontract); Saturn Const. Co., Inc. v. Landis & Gyr Powers, Inc., 238 A.D.2d 428, 656 N.Y.S.2d 367 (2d Dep't 1997) (subcontractor unable to arbitrate dispute with general contractor as flow down clause did not mean that contractor waived its right to litigate disputes with subcontractor); Frycek v. Corning Inc., 171 Misc. 2d 220, 654 N.Y.S.2d 264 (Sup 1997) (flow down clause did not apply to indemnification agreement contained in prime contract and therefore subcontractor not bound to indemnify contractor where subcontract did not expressly contain an indemnity clause); Mountain States Const. Co. v. Tyee Elec., Inc., 43 Wash. App. 542, 718 P.2d 823 (Div. 3 1986) (incorporation of prime contract by reference into subcontract cannot be accomplished by general language but only by specific reference to obligations in question). For a fairly comprehensive listing of incorporation by reference cases involving subcontractor agreements, see 5 Corbin on Contracts § 24.21. See also §§ 21:76, 21:118. Compare Fox v. Mountain West Elec., Inc., 137 Idaho 703, 52 P.3d 848, 48 U.C.C. Rep. Serv. 2d 505 (2002) (awarding quantum meruit compensation under an implied-in-fact contract based on the construction industry's standard "flow down method of compensation").

See also Larry Snyder and Co. v. Miller, 2010 WL 830616 (N.D. Okla. 2010) (holding that specific subcontract clauses that conflicted with flow down clauses incorporated by reference from the prime agreement were controlling).

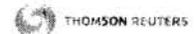
- 3 One Beacon Ins. Co. v. Crowley Marine Services, Inc., 648 F.3d 258, 2011 A.M.C. 2113 (5th Cir. 2011).

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RELATED TOPICS

Construction and Operation

General and Specific Provisions of Contract Deal

§ 32:10. Specific and general words; the *Ejusdem Generis* Doctrine
 Williston on Contracts Rules of Interpretation (Approx. 15 pages)

Williston on Contracts
 Database updated July 2012

Richard A. Lord

Chapter 32. Rules of Interpretation
 III. Secondary Rules

References Correlation Table

§ 32:10. Specific and general words; the *Ejusdem Generis* Doctrine

West's Key Number Digest

West's Key Number Digest, Contracts ¶¶ 161, 162, 164

Legal Encyclopedias

Am. Jur. 2d, Contracts §§ 363, 364

C.J.S., Contracts § 416

When general and specific clauses conflict, the specific clause governs the meaning of the contract.¹

Applying this rule, one court resolved a dispute between the parties to a construction contract, one provision of which specified that the contractor would be responsible for its own negligence, while another provided that the owner would maintain fire insurance and contained a waiver of the owner's rights against the contractor for fire damage. Despite the fact that the contractor's negligence later started a fire, the court ruled that there was no cause of action in favor of the owner's insurer against the contractor to recover sums paid to compensate the owner. The owner's agreement to obtain insurance and waive its rights was deemed more specific than the contractor's promise to be responsible for its own negligence, and thus controlled the question of liability.²

Even absent a true conflict, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate.³ Thus, it is an accepted principle that general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given.⁴ Despite this, however, the meaning which arises from a particular, even more specific clause cannot control the contract when that meaning defeats the agreement's overall scheme or purpose.⁵

The rule of *ejusdem generis*, literally meaning "of the same kind or class,"⁶ applies when there is an enumeration or listing of specific things, followed by more general words relating to the same subject matter, in which case the general words are interpreted as meaning things of the same kind as the specific matters to which the parties refer.⁷

However, the rule is subject to the contrary agreement of the parties; thus, the doctrine will not preclude the inclusion of things not of the same class or kind when it appears the parties so intended.⁸

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Footnotes

- 1 Restatement Second, Contracts § 203(c).
- First Circuit**
 G. T. Schjeldahl Co., *Packaging Machinery Division v. Local Lodge 1680 of Dist. Lodge No. 64 of Intern. Ass'n of Machinists*, 393 F.2d 502 (1st Cir. 1968) (citing text)
 Lincoln Pulp & Paper Co., Inc. v. Dravo Corp., 436 F. Supp. 262, 22 U.C.C. Rep. Serv. 407 (D. Me. 1977) (the specific-governs-general rule is a secondary rule of construction, applicable only if the contract is ambiguous, the parties' intent cannot otherwise be ascertained from the circumstances of the transaction and the contract has inconsistent and conflicting provisions)
- Second Circuit**
 County of Suffolk v. Alcorn, 266 F.3d 131 (2d Cir. 2001) (applying New York law)
 Aramony v. United Way of America, 254 F.3d 403 (2d Cir. 2001) (quoting text)
 John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co., 717 F.2d 664 (2d Cir. 1983) (applying New York law, definitive, particularized language takes precedence over expressions of intent that are general, summary or preliminary)
 Cf. *Netherlands Curacao Co., N. V. v. Kenton Corp.*, 366 F. Supp. 744 (S.D. N.Y. 1973) (in construing a series of interrelated agreements, the court would assume that a particular clause was not intended to be nullified by a general one)
- Third Circuit**

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subcontract that, “[t]he Sub-contractor acknowledges that he has read the General contract ... and is familiar therewith and agrees to comply with and perform all provisions thereof applicable to the Sub-Contractor,” suggests that the Subcontractors are required to submit to arbitration. The Subcontractors agreed to comply with provisions of the General Contract applicable to them, and Article 5.3.1 of the General Conditions, as part of the General Contract, is applicable to subcontractors.*909 Although Article 5.3.1 was probably intended to bind subcontractors directly, the language itself puts the burden on the contractor to obtain an agreement from subcontractors to assume the same responsibilities as the contractor assumes toward the owner. A comment from the American Institute of Architects, drafters of the General Conditions, provides some guidance. It first states, “A basic requirement of the contract is that subcontractors be bound by the terms of the contract documents. AIA Document A401 Standard Form Agreement Between Contractor and Subcontractor, so provides.” Am. Inst. of Architects, *A201 Commentary* (1997). But the next sentence reads, “If other subcontract forms are utilized, care must be taken to coordinate them with Subparagraph 5.3.1.” *Id.* This indicates that if the general contractor uses subcontract forms other than those provided by the AIA—which MPACT did in this case—it must in its own contract include a provision requiring the subcontractors to assume the same responsibilities that it assumes toward the owner.

MPACT may well have believed the language it used was sufficient to bind the Subcontractors to arbitration. It cites several cases to support its contention that the language in its subcontracts validly incorporated the arbitration clause by reference. The Subcontractors respond that all of those cases can be distinguished from this one. *Uniroyal, Inc. v. A. Epstein & Sons, Inc.*, 428 F.2d 523, 524 (7th Cir.1970) (in section of contract discussing general obligations, the subcontract stated that the subcontractor agrees “to assume toward [the contractor] all the obligations and responsibilities that [the con-

tractor], by those documents, assumes toward the Owner,” and that “[i]n the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in this Contract”); *Kvaerner ASA v. Bank of Tokyo—Mitsubishi Ltd.*, 210 F.3d 262, 265 (4th Cir.2000) (subcontract used the phrase the “the same rights and remedies” and in a provision concerning default); *Maxum*, 779 F.2d at 979 (subcontract stated that “the Subcontractor shall be bound by, and expressly assumes for the benefit of the Contractor, all obligations and liabilities which the Contract Documents impose upon the Contractor”); *Exch. Mut. Ins. Co. v. Haskell Co.*, 742 F.2d 274, 275 (6th Cir.1984) (“Subcontractor hereby assumes the same obligations and responsibilities with respect to his performance under this Subcontract, that Contractor assumes towards Owner....”); *J.S. & H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212, 213–14 n. 3 (5th Cir.1973) (“Subcontractor agrees to be bound to the Contractor by all of the terms of the agreement between the Contractor and the Owner and by the Contract Documents and to assume toward the Contractor all of the obligations and the responsibilities that the Contractor by those instruments assumes toward the Owner.”); *Vespe Contracting Co. v. Anvan Corp.*, 399 F.Supp. 516, 520 n. 4 (E.D.Pa.1975) (“Subcontractor ... shall assume towards Contractor all the obligations and responsibilities that the Contractor ... assumes towards Owner.”). We agree that these cases are distinct from the case here. In all of the other cases, the language incorporating the arbitration provision is more clear and explicit than in the subcontracts here.^{FN5}

FN5. MPACT also cited *U.S. Fid. & Guar. Co. v. West Point Constr. Co.*, 837 F.2d 1507 (11th Cir.1988), but the language in that case is conclusory and as such, does not aid MPACT’s argument. Additionally, MPACT cited *J & S Constr. Co. v. Travelers Indem. Co.*, 520 F.2d 809 (1st Cir.1975), but it is not on point.

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*910 [11][12] Courts are required to give effect to parties' contracts and to do so, courts look to the words of a contract. In contracting, clarity of language is key. Here, however, provisions in the subcontracts support both arguments, at least in part. When there is ambiguity in a contract, it is construed against its drafter. *Philco Corp. v. Automatic Sprinkler Corp. of Am.*, 337 F.2d 405, 408 (7th Cir.1964); *Smith v. Sparks Milling Co.*, 219 Ind. 576, 603, 39 N.E.2d 125, 135 (1942); *Bicknell Minerals, Inc. v. Tilly*, 570 N.E.2d 1307, 1313 (Ind.Ct.App.1991), *trans. denied*. In this instance, the AIA Standard Form of Agreement Between Contractor and Subcontractor was not used. MPACT instead drafted its own subcontracts. It was therefore MPACT's responsibility to ensure that its subcontracts conformed to the requirements of the General Conditions and incorporated the arbitration clause. MPACT did not do so.

The problem in this case seems to have resulted from poor contract drafting and inadequate contract negotiations. Each side believed at the time of contract execution that the contract provided for what it wanted—in MPACT's case, for arbitration, and in the Subcontractors' case, not for arbitration. Regardless, it is clear that arbitration was not sufficiently discussed by the parties. This leads to one conclusion, that there was no meeting of the minds between the parties on the issue of arbitration. Consequently, we find that there was no agreement to arbitrate between MPACT and the Subcontractors and the Subcontractors are not required to arbitrate their disputes with MPACT.

MPACT also sought arbitration of its disputes with Flying J. The Court of Appeals found that the disputes were governed by the arbitration provision in the General Conditions of the General Contract, and held that MPACT was entitled to arbitration with Flying J. We summarily affirm the Court of Appeals on this point. Ind. Appellate Rule 58(A)(2).

III

[13][14][15] The Subcontractors additionally

argue that MPACT waived its right to arbitrate, if such a right actually exists. Whether a party has waived the right to arbitration depends primarily upon whether that party has acted inconsistently with its right to arbitrate. *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634, 637 (7th Cir.2002); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir.1992); *Kilkenny v. Mitchell Hurst Jacobs & Dick*, 733 N.E.2d 984, 986 (Ind.Ct.App.2000), *trans. denied*, 753 N.E.2d 8 (Ind.2001). This requires an analysis of the specific facts in each case. *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir.2002); *St. Mary's Med. Ctr.*, 969 F.2d at 588; *Kilkenny*, 733 N.E.2d at 986.

Some facts suggest that MPACT may have waived its right to arbitrate by actively participating in the litigation. *Ernst & Young LLP*, 304 F.3d at 757–58; *St. Mary's Med. Ctr.*, 969 F.2d at 589. MPACT filed a cross-claim against Flying J for breach of contract and filed cross- and counterclaims against Flying J and the Subcontractors to foreclose its own mechanic's lien. MPACT also participated in telephone conferences and a scheduling conference where summary judgment deadlines and a trial date were set.

[16] The filing of counterclaims and cross-claims does not always indicate active participation in litigation. While all cross-claims are permissive, some counterclaims are compulsory, that is, a party must bring them or waive them. Ind. Trial Rule 13. A party should not be held to have waived its right to arbitrate when, in response to a complaint filed against it, *911 it raises counterclaims in order to preserve them. *Cf. Underwriting Members of Lloyds of London v. United Home Life Ins. Co.*, 549 N.E.2d 67, 71 (Ind.Ct.App.1990) (stating that participation in discovery did not result in a waiver of arbitration because defendant was required by court order to do so), *adopted by*, 563 N.E.2d 609 (Ind.1990). MPACT's counterclaims in this case are compulsory. The cross-claims are not, and to that extent, MPACT could be seen as actively particip-

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ating in the litigation. But that alone is not sufficient to establish a waiver, particularly in light of the other facts.

In its answer filed March 29, 2002, MPACT stated that it was not waiving its right to arbitration and in its affirmative defenses, requested that the claims be submitted to arbitration. *St. Mary's Med. Ctr.*, 969 F.2d at 589 (finding that defendant waived the right to arbitrate because in the ten months that passed since being sued, defendant filed a motion to dismiss or for summary judgment and then did not raise arbitration until losing its motion); *Kilkenny*, 733 N.E.2d at 987 (“This is clearly not a case where a request for arbitration was plead in the initial complaint and then not again asserted until discovery was complete or an unfavorable result on the individual claims was imminent.”); *Lloyds*, 549 N.E.2d at 71 (finding no waiver because defendant “asserted its right to arbitrate throughout the proceedings”). MPACT also did not file motions to dismiss or for summary judgment before asserting its right to arbitrate. These facts show that MPACT acted consistently with its right to arbitrate, if it had one, and so its actions would not have constituted a waiver of that right.

Conclusion

We grant transfer, summarily affirm the decision of the Court of Appeals reversing the trial court's denial of MPACT's motion to stay proceedings and compel arbitration as to Flying J, and affirm the trial court's denial of MPACT's motion as to the Subcontractors. This case is remanded to the trial court for further proceedings consistent with this opinion.

DICKSON and RUCKER, JJ., concur.

BOEHM, J., dissents with a separate opinion in which SHEPARD, C.J., joins.

BOEHM, J., dissenting.

I respectfully dissent. This is a typical multiparty construction litigation, where various parties are pointing fingers in various directions and claim-

ing that whatever went wrong with the project is somebody else's—anybody else's—problem. I agree that state law governs the formation of the contract and that nothing in the Federal Arbitration Act requires that these disputes between subcontractors and the general contractor be arbitrated unless the parties agreed to that method of dispute resolution. I believe, however, that these agreements do call for arbitration of the entire multiparty dispute among the owner, the general contractor, and these several subcontractors.

The agreement between the general contractor and the owner is a standard printed form AIA construction agreement. All agree that that contract includes an enforceable arbitration clause, and an undertaking to bind subcontractors to the same terms that obligate the general. The general's agreements with the subs provide that each sub acknowledges the principal agreement and agrees to be bound by it. The principal agreement provides, *inter alia*, that the general will impose conforming conditions on all subs. These agreements are among businesses fully familiar with this sort of arrangement, and fully cognizant that the last thing either the general or the owner wants is piecemeal litigation with different subs. The result the majority reaches produces an arbitration between the owner and the general and litigation with one or more subs in a separate forum. The majority concedes that the general intended to bind the subs to arbitration, but points to imprecision in the language used to accomplish that. It seems to me that the subs did understand, or should have, that arbitration was intended. They should be held to have accepted arbitration when they accepted these agreements. Accordingly, I would require arbitration of this entire dispute in one proceeding.

The majority points to what I agree is less than elegant phrasing of the agreement, and what it describes as “inadequate contract negotiations.” I think these agreements, given the context, were sufficient to make clear to the subs that they were expected to arbitrate their disputes with the general or

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the owner. Particularly in an industry where arbitration is widely used, ambiguity does not necessarily lead to the conclusion that no meeting of the minds occurred. Rather, I would conclude that ambiguity should be construed in favor of finding an agreement to arbitrate where that is commonplace in the industry. We have on several occasions expressed support for the policy under Indiana law favoring arbitration. *PSI Energy, Inc. v. AMAX, Inc.*, 644 N.E.2d 96, 99 (Ind.1994); *Sch. City v. East Chicago Fed'n of Teachers, Local No. 511*, 622 N.E.2d 166, 169 (Ind.1993). These rulings also support finding an agreement to arbitrate where the documents support that conclusion, albeit with less than precision.

SHEPARD, C.J., joins.

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MPACT Const. Group, LLC v. Superior Concrete Constructors, Inc.
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United States District Court,
S.D. New York.

UNITED STATES STEEL CORPORATION,
Plaintiff,
v.
TURNER CONSTRUCTION COMPANY, Defendant.

No. 82 Civ. 6747 (CLB).
April 13, 1983.

Subcontractor brought action against general contractor seeking to recover the balance due under its subcontract as well as the additional costs incurred as result of general contractor's alleged breach of the subcontract. Upon general contractor's motion to dismiss the complaint, the District Court, Brieant, J., held that forum selection clause contained in prime contract was not incorporated by reference into subcontract and therefore subcontractor was not bound by forum selection clause in general contractor's prime contract so as to be required to litigate its claims in a New York state court.

Motion denied.

West Headnotes

[1] Contracts 95 ↪206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Under New York law, application and relevant scope of a forum selection clause is determined by an objective consideration of the language of the provision, not the subjective, undisclosed intention of its draftsman.

[2] Contracts 95 ↪206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Forum selection clause contained in prime contract was not incorporated by reference into subcontract and therefore subcontractor was not bound by forum selection clause and general contractor's prime contract so as to be required to litigate its claims to recover balance due under subcontract as well as additional costs incurred as result of general contractor's alleged breach of subcontract in a New York state court.

*871 Roger S. Markowitz; Berman, Paley, Goldstein & Berman, New York City, for plaintiff.

Frederick Ellison, French, Fink, Markle & McCallion, New York City, for defendant.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

Pursuant to Rule 12(b)(1)(3) and (6), F.R.Civ.P., defendant Turner Construction Company ("Turner") moves to dismiss the complaint of plaintiff United States Steel Corporation ("U.S. Steel") in this diversity case, on the ground that plaintiff is required by contract to litigate this claim only in the Supreme Court of the State of New York, County of New York.

This litigation arises out of the construction of an office building for International Business Machines Corporation (the "IBM project") at 590 Madison Avenue, New York, New York. Pursuant to an agreement with IBM (the "prime contract"), Turner agreed to act as the general contractor for this construction project. On August 11, 1978, Turner and U.S. Steel, through its American Bridge Division, entered into a written sub-contract whereby U.S. Steel agreed to furnish, fabricate, de-

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liver and erect structural steel for the IBM project.

After commencing work on the IBM project, U.S. Steel encountered extensive work related delays and disruptions, allegedly caused by Turner, and suffered substantial cost overruns. Other subcontractors on the project experienced similar delays. Despite these difficulties, U.S. Steel completed performance under the subcontract with Turner, and the quality of this work is not in issue here.

In April of 1981, U.S. Steel submitted a fully documented claim to Turner for the additional costs said to have been incurred as a result of the delays in construction. Over the next few months, despite the overtures of U.S. Steel, Turner refused to engage in discussions concerning this claim. Eventually, Turner informed U.S. Steel of its intent to include the claim of U.S. Steel in its own overall claim for extras to be submitted to IBM. Turner refused to permit U.S. Steel to participate in its subsequent negotiations with IBM. In March of 1982, despite the objections of U.S. Steel, Turner settled all outstanding claims on the project with IBM.

In subsequent negotiations between Turner and U.S. Steel, Turner has refused to supply U.S. Steel with a copy of the settlement agreement with IBM or to identify the amount of the settlement proceeds, if any, apportioned to the outstanding claim of U.S. Steel against Turner. In addition, Turner also refused to pay U.S. Steel the balance of the contract price due and owing.

As a result of these disputes, U.S. Steel commenced this lawsuit to recover the balance due under the subcontract as well as the additional costs incurred as a result of the defendant's alleged breach of the subcontract.

In support of this motion, Turner contends that the terms of the prime contract with IBM, specifically the forum selection clause set forth in Article 11 of the "General Conditions for Construction and Fitting-Up of IBM's Office Building" ("IBM Gen-

eral Conditions"), are incorporated by reference into the U.S. Steel subcontract obligating U.S. Steel to litigate all claims arising out of the subcontract in the New York Supreme Court, New York County. Turner asserts that if the forum selection clause is not enforced, it may be faced with the burden of simultaneously defending various lawsuits involving the same or similar issues in two or more different state and federal courts.

U.S. Steel asserts that it is not bound by the forum selection clause since it appears only in the prime contract and relates solely to disputes arising between IBM and Turner. U.S. Steel contends that only the prime contract terms which relate to the character and manner of the work to be performed by it as subcontractor are incorporated by reference into the subcontract. It argues that as a matter of New York contract law, all additional, unrelated provisions of the prime contract, such as the forum selection clause, are not incorporated into the subcontract and therefore not binding upon U.S. Steel.

The forum selection clause is set forth in Article 11 of the IBM General Conditions entitled "Monetary Claims and Demands Upon IBM." Article 11 provides in full:

"ARTICLE 11—Monetary Claims and Demands
Upon IBM

11.1 Monetary claims and demands *upon IBM* arising out of this Contract or *873 in connection with the work, for any reason whatsoever, must be presented by the Contractor to IBM in writing, within 14 days from the date of first occurrence of the cause giving rise thereto.

11.2 All such monetary claims and demands presented by the Contractor must refer to this Article and shall be fully detailed and substantiated as to the nature and extent thereof, so as to permit prompt resolution.

11.3 The Contractor hereby expressly waives all such claims and demands whether oral or written, and the right to present claims and demands,

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which are not made upon IBM in the time and manner set forth in this Article.

11.4 The parties hereby agree that the proper venue of any lawsuit arising out of this Contract or in connection with the work based on a claim by the Contractor, shall be the Supreme Court of the State of New York, County of New York.” (Emphasis added).

Turner contends that Article I and II of the subcontract agreement incorporate Paragraph 11.4 of this article into the subcontract. Article I of the subcontract requires U.S. Steel to perform all work “in accordance with the Plans, Specifications, General Conditions, Special Conditions and Addenda thereto ... and with the terms and provisions of the General Contract.”

Article II of the subcontract states:

“ARTICLE II. The Plans, Specifications, General Conditions, Addenda and General Contract, hereinabove mentioned, are available for examination by the Subcontractor at all reasonable times at the office of Turner; all of the aforesaid, including this Agreement, being hereinafter sometimes referred to as the Contract Documents. The Subcontractor represents and agrees that it has carefully examined and understands this Agreement and the other Contract Documents, has investigated the nature, locality and site of the Work and the conditions and difficulties under which it is to be performed, and that it enters into this Agreement on the basis of its own examination, investigation and evaluation of all such matters and not in reliance upon any opinions or representations of Turner, or of the Owner, or of any of their respective officers, agents, servants, or employees.

With respect to the Work to be performed and furnished by the Subcontractor hereunder, the Subcontractor agrees to be bound to the Owner and to Turner by each and all of the terms and provisions of the General Contract and the other Contract Documents, and to assume toward the

Owner and Turner all of the duties, obligations and responsibilities that Turner by those Contract Documents assumes toward the Owner, and the Subcontractor agrees further that the Owner and Turner shall have the same rights and remedies as against the Subcontractor as the Owner under the terms and provisions of the General Contract and the other Contract Documents has against Turner with the same force and effect as though every such duty, obligation, responsibility, right or remedy were set forth herein in full. The terms and provisions of this Agreement with respect to the Work to be performed and furnished by the Subcontractor hereunder are intended to be and shall be in addition to and not in substitution for any of the terms and provisions of the General Contract and the other Contract Documents.”

[1] Under New York law, the application and relevant scope of a forum selection clause is determined by an objective consideration of the language of the provision, not the subjective, undisclosed intention of its draftsman. *City of New York v. Pullman, Inc.*, 477 F.Supp. 438, 442 (S.D.N.Y.1979). Courts which have construed similar contractual provisions have held under analogous factual situations that absent clear language to the contrary, similar incorporation clauses in a construction subcontract bind a subcontractor only to the prime contract provisions which relate to the scope, *874 quality, character and manner of the work to be performed by the subcontractor. Prime contract provisions unrelated to the work of the subcontractor, such as a “dispute” clause governing the resolution of monetary claims between the project owner and general contractor, are not incorporated by reference into a subcontract. *Washington Metropolitan Area Transit Authority v. Norair Engineering Corporation*, 553 F.2d 233, 235, (D.C.Cir.1977); *John W. Johnson, Inc. v. Basic Construction Company*, 429 F.2d 764, 775 (D.C.Cir.1970); *United States v. Fryd Construction Corporation*, 423 F.2d 980, 983 (5th Cir.1970); *Caldwell v. United States for John H. Moon*, 407 F.2d 21 (5th Cir.1969); *United States for the Use of*

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B's Company v. Cleveland Electric Company, 373 F.2d 585, 588 (4th Cir.1967).

[2] Efforts of Turner to distinguish these cases are unavailing. Although in each instance the project owner was not a private party but a state or federal entity, each case considered whether a subcontract incorporated by reference a dispute clause contained in the prime contract. In addition, in each case like the present, the subcontractor was neither in privity with the project owner nor granted any rights under the prime contract. Here, plaintiff has no claim against IBM. Its claims do not "arise out of the [prime] contract" nor is this lawsuit "based on a claim by the [prime] Contractor" within the italicized portion of Article 11 of the prime contract, quoted *supra*, pp. 872-873. While IBM might have a legitimate purpose, in light of the New York Lien Law, especially § 3, in providing that the venue or forum selection clause should also apply to claims or demands of the subcontractor, it did not so provide. "If the purpose [were] to preclude [access to] a federal forum, explicit language [in the subcontract] to that effect would have foreclosed any issue on the matter." *City of New York v. Pullman, Inc.*, *supra*, at 442. There is no forum selection clause in the subcontract and, as noted above, the incorporation by reference of the conditions of the prime contract does not, as a matter of construction, extend beyond the scope, quality, character and manner of performance of the subcontracted work.

Article 11 of the prime contract merely sets forth the administrative procedures to be followed by Turner in presenting and resolving its own monetary claims against IBM, arising under the prime contract. In this regard, it merely requires that if the parties fail to resolve a claim amicably, any subsequent litigation must be commenced in the court specified. On its face, Article 11 applies only to claims asserted by Turner, on its own behalf, against IBM.

The subcontract itself contains no express reference either to Article 11 of the prime contract, or the forum selection clause contained therein.

However, the subcontract does incorporate expressly Article 6 of the IBM General Conditions, which establishes the method of payment. Neither Article 6 nor 11 are related to the scope, quality, character or manner of the work performed by U.S. Steel. Had the parties intended Article II of the subcontract to incorporate *all* of the provisions of the prime contract, as is now asserted by Turner, the express incorporation of Article 6 of the IBM General Conditions would not have been necessary. The express incorporation of this clause and the absence of any similar express provision concerning Article 11, suggests the parties did not intend to incorporate the forum selection clause into the subcontract, or that if Turner did so intend, it did not communicate its intention to U.S. Steel.

Therefore, plaintiff is not required to bring this action only in the Supreme Court of the State of New York, County of New York. Notwithstanding the possibility that the defendant may be forced to defend similar or related lawsuits in different forums, this lawsuit is properly before this Court.

The motion is denied.

Counsel for the parties shall hold an office conference at their earliest convenience to ascertain and if possible agree upon any necessary pre-trial discovery. A pre-trial conference will be held before me on June 16, 1983 in Courtroom 705 at 9:30 A.M.

So Ordered.

D.C.N.Y., 1983.
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RELATED TOPICS

Construction and Operation
 Inherent or Common Law Contractual
 Obligation of Contractor

§ 3:32. Determining reasonableness of interpretation: Interpretation preference standards—Incorporation of upper tier contract provisions into lower tier agreements: “Flow down” clause

Bruner and O'Connor on Construction Law CONTRACT INTERPRETATION (Approx. 3 pages)

Bruner and O'Connor on Construction Law
 Database updated December 2012

Philip L. Bruner and Patrick J. O'Connor, Jr.

Chapter 3. CONTRACT INTERPRETATION

References

§ 3:32. Determining reasonableness of interpretation: Interpretation preference standards—Incorporation of upper tier contract provisions into lower tier agreements: “Flow down” clause

Some contracts often contain a clause that require incorporation of the provisions of the prime agreement into subcontracts.¹ Subcontractor clauses that incorporate prime agreement duties into subcontracts are known as “flow down” or “incorporation by reference” provisions. The general purpose behind these provisions is to bind the subcontractor to the contractor in the same manner and to the same extent (subject of course to the scope of the subcontractor’s work) as the contractor is bound unto the owner. Flow down clauses seldom create interpretation problems where the transferred obligation relates directly to the subcontractor’s work. If, for example, the contractor is required by its agreement to perform masonry work pursuant to specifically incorporated masonry specifications, then the subcontractor will in turn be required to perform to those specifications. Interpretation issues arise where the obligation in question is more general in nature. For example, if the prime contractor is required to arbitrate its disputes with the owner, is the subcontractor similarly bound to arbitrate? There is little uniformity to how the courts treat the enforceability of flow down provisions as they relate to such general obligations.²

Incorporation by reference can include not only referenced paper documents but electronic documents as well. Illustrative is *One Beacon Ins. Co. v. Crowley Marine Services, Inc.*,³ in which a work order for barge repair incorporated by reference terms and conditions available on the owner’s Web site. During the course of the contracted work, a subcontractor’s employee was injured and sued the owner and contractor for personal injury damages. When the owner demanded indemnity from the contractor pursuant to an indemnification clause contained in the Web site terms and conditions, the contractor’s insurer argued that the indemnity clause was unenforceable because it was not expressly included in the work order and was not specific and conspicuous as required by law. The trial court nevertheless concluded that the work order’s reference to the terms and conditions on the owner’s Web site was sufficient to incorporate the electronic document by reference. The United States Court of Appeals for the Fifth Circuit affirmed.

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Footnotes

1 See AIA Document A201-1997, ¶ 5.3.1 (“By appropriate agreement written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor by these Documents assumes toward the Owner and Architect...”).

Prime Tree and Landscaping Services v. American Services Co., Inc., 2011 WL 947004 (Tex. App. Houston 1st Dist. 2011) (holding that a supplier’s estimate unambiguously incorporated by reference the plasticity index set forth in the subcontractor’s purchase order).

2 Compare *John F. Harkins Co., Inc. v. Waldinger Corp.*, 796 F.2d 657 (3d Cir. 1986) (subcontractor bound to arbitrate under broad interpretation of clause incorporating prime contract); *Thomas O'Connor & Co., Inc. v. Insurance Co. of*

North America, 697 F. Supp. 563 (D. Mass. 1988) (prime arbitration clause effective against subcontractor so that surety entitled to stay payment bond suit); L & B Const. Co. v. Ragan Enterprises, Inc., 267 Ga. 809, 482 S.E.2d 279 (1997) (prime contract's no-damages-for-delay provision incorporated into subcontract); Saturn Const. Co., Inc. v. Landis & Gyr Powers, Inc., 238 A.D.2d 428, 656 N.Y.S.2d 367 (2d Dep't 1997) (subcontractor unable to arbitrate dispute with general contractor as flow down clause did not mean that contractor waived its right to litigate disputes with subcontractor); Frycek v. Corning Inc., 171 Misc. 2d 220, 654 N.Y.S.2d 264 (Sup 1997) (flow down clause did not apply to indemnification agreement contained in prime contract and therefore subcontractor not bound to indemnify contractor where subcontract did not expressly contain an indemnity clause); Mountain States Const. Co. v. Tye Elec., Inc., 43 Wash. App. 542, 718 P.2d 823 (Div. 3 1986) (incorporation of prime contract by reference into subcontract cannot be accomplished by general language but only by specific reference to obligations in question). For a fairly comprehensive listing of incorporation by reference cases involving subcontractor agreements, see 5 Corbin on Contracts § 24.21. See also §§ 21:76, 21:118. Compare Fox v. Mountain West Elec., Inc., 137 Idaho 703, 52 P.3d 848, 48 U.C.C. Rep. Serv. 2d 505 (2002) (awarding quantum meruit compensation under an implied-in-fact contract based on the construction industry's standard "flow down method of compensation").

See also Larry Snyder and Co. v. Miller, 2010 WL 830616 (N.D. Okla. 2010) (holding that specific subcontract clauses that conflicted with flow down clauses incorporated by reference from the prime agreement were controlling).

- 3 One Beacon Ins. Co. v. Crowley Marine Services, Inc., 648 F.3d 258, 2011 A.M.C. 2113 (5th Cir. 2011).

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RELATED TOPICS

Construction and Operation

General and Specific Provisions of Contract Deal

§ 32:10. Specific and general words; the *Ejusdem Generis* Doctrine.
 Williston on Contracts Rules of Interpretation (Approx. 15 pages)

Williston on Contracts
 Database updated July 2012

Richard A. Lord

Chapter 32. Rules of Interpretation
 III. Secondary Rules

References Correlation Table

§ 32:10. Specific and general words; the *Ejusdem Generis* Doctrine

West's Key Number Digest

West's Key Number Digest, Contracts 161, 162, 164

Legal Encyclopedias

Am. Jur. 2d, Contracts §§ 363, 364

C.J.S., Contracts § 416

When general and specific clauses conflict, the specific clause governs the meaning of the contract.¹

Applying this rule, one court resolved a dispute between the parties to a construction contract, one provision of which specified that the contractor would be responsible for its own negligence, while another provided that the owner would maintain fire insurance and contained a waiver of the owner's rights against the contractor for fire damage. Despite the fact that the contractor's negligence later started a fire, the court ruled that there was no cause of action in favor of the owner's insurer against the contractor to recover sums paid to compensate the owner. The owner's agreement to obtain insurance and waive its rights was deemed more specific than the contractor's promise to be responsible for its own negligence, and thus controlled the question of liability.²

Even absent a true conflict, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate.³ Thus, it is an accepted principle that general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given.⁴ Despite this, however, the meaning which arises from a particular, even more specific clause cannot control the contract when that meaning defeats the agreement's overall scheme or purpose.⁵

The rule of *ejusdem generis*, literally meaning "of the same kind or class,"⁶ applies when there is an enumeration or listing of specific things, followed by more general words relating to the same subject matter, in which case the general words are interpreted as meaning things of the same kind as the specific matters to which the parties refer.⁷

However, the rule is subject to the contrary agreement of the parties; thus, the doctrine will not preclude the inclusion of things not of the same class or kind when it appears the parties so intended.⁸

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Footnotes

- 1 Restatement Second, Contracts § 203(c).
- First Circuit**
 G. T. Schjeldahl Co., Packaging Machinery Division v. Local Lodge 1680 of Dist. Lodge No. 64 of Intern. Ass'n of Machinists, 393 F.2d 502 (1st Cir. 1968) (citing text)
 Lincoln Pulp & Paper Co., Inc. v. Dravo Corp., 436 F. Supp. 262, 22 U.C.C. Rep. Serv. 407 (D. Me. 1977) (the specific-governs-general rule is a secondary rule of construction, applicable only if the contract is ambiguous, the parties' intent cannot otherwise be ascertained from the circumstances of the transaction and the contract has inconsistent and conflicting provisions)
- Second Circuit**
 County of Suffolk v. Alcorn, 266 F.3d 131 (2d Cir. 2001) (applying New York law)
 Aramony v. United Way of America, 254 F.3d 403 (2d Cir. 2001) (quoting text)
 John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co., 717 F.2d 664 (2d Cir. 1983) (applying New York law; definitive, particularized language takes precedence over expressions of intent that are general, summary or preliminary)
 Cf. Netherlands Curacao Co., N. V. v. Kanton Corp., 366 F. Supp. 744 (S.D. N.Y. 1973) (in construing a series of interrelated agreements, the court would assume that a particular clause was not intended to be nullified by a general one)

Third Circuit

Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556 (3d Cir. 1973)
Garvey v. Prudential Ins. Co. of America, 596 F. Supp. 1119 (E.D. Pa. 1984) (quoting text)
Brennan v. D. J. McNichol Co., 439 F. Supp. 499 (E.D. Pa. 1977) (while a contract's provisions must be interpreted with reference to the whole, the specific controls the general)

Fourth Circuit

U. S. for Use of Westinghouse Elec. Corp. v. Marietta Mfg. Co., 339 F. Supp. 18 (S.D. W. Va. 1972)

Fifth Circuit

Baton Rouge Oil and Chemical Workers Union v. ExxonMobil Corp., 289 F.3d 373 (5th Cir. 2002)
(it is a fundamental axiom of contract interpretation that specific provisions control general provisions)

Western Oil Fields, Inc. v. Pennzoil United, Inc., 421 F.2d 387 (5th Cir. 1970) (a special or more particularized clause in a contract must prevail over a general clause)

Sixth Circuit

B. F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d 587, 2001 FED App. 0088P (6th Cir. 2001)
(applying New York law)

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Corso v. Creighton University, 731 F.2d 529, 17 Ed. Law Rep. 76 (8th Cir. 1984) (when general and specific terms of a contract relate to the same matter, the more specific provision should control)

Missouri Pac. R. Co. v. Winburn Tile Mfg. Co., 461 F.2d 984 (8th Cir. 1972) (applying Arkansas law)

Pillsbury Flour Mills Co. v. Great Northern Ry. Co., 25 F.2d 66 (C.C.A. 8th Cir. 1928)

Ninth Circuit

Kollman v. National Union Fire Ins. Co. of Pittsburgh, 2007 WL 865679 (D. Or. 2007) (quoting text)

Tenth Circuit

In re Universal Service Fund Telephone Billing Practice Litigation, 619 F.3d 1188 (10th Cir. 2010)
(both majority and dissent citing text and quoting Williston)

Eleventh Circuit

Itel Container Corp. v. M/V Titan Scan, 139 F.3d 1450 (11th Cir. 1998)

U.S. v. Pielago, 135 F.3d 703 (11th Cir. 1998)

D.C. Circuit

Cf. Ohio Power Co. v. F.E.R.C., 744 F.2d 162 (D.C. Cir. 1984) (the rule of construction that specific clauses prevail over general clauses in a contract presumes that the clauses stand in irreconcilable conflict, and if both the specific and general clauses can be given reasonable effect, both must be retained)

Court of Claims

Franchi Const. Co., Inc. v. U. S., 221 Ct. Cl. 796, 609 F.2d 984 (1979) (citing text)

Jennie-O Foods, Inc. v. U. S., 217 Ct. Cl. 314, 580 F.2d 400 (1978) (citing text)

Dravo Corp. v. U. S., 202 Ct. Cl. 500, 480 F.2d 1331 (1973) (when general and specific provisions are in any way inconsistent, the specific provisions control over the general)

Ala.

Lewis v. Oakley, 847 So. 2d 307 (Ala. 2002)

Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33 (Ala. 1998)

Alaska

Norville v. Carr-Gottstein Foods Co., 84 P.3d 996 (Alaska 2004) (when one section of a contract deals with a subject in general terms and another deals in a detail with all or part of the same subject, the two should be harmonized if possible, but failing that, the specific will govern the general)

Ariz.

Autonumerics, Inc. v. Bayer Industries, Inc., 144 Ariz. 181, 696 P.2d 1330, 39 U.C.C. Rep. Serv. 802 (Ct. App. Div. 1 1984)

Ark.

English v. Shelby, 116 Ark. 212, 172 S.W. 817 (1915)

Colo.

Matter of May, 756 P.2d 362 (Colo. 1988) (citing text)

Conn.

Miller Bros. Const. Co. v. Maryland Cas. Co., 113 Conn. 504, 155 A. 709 (1931)

Del.

DCV Holdings, Inc. v. ConAgra, Inc., 889 A.2d 954 (Del. 2005) (specific language governs general language, and when the two provisions conflict, the specific provision typically qualifies the general one)

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Iowa

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Kan.

Desbien v. Penokee Farmers Union Co-op. Ass'n, 220 Kan. 358, 552 P.2d 917, 20 U.C.C. Rep. Serv. 102 (1976) (in ambiguous contracts, when there is uncertainty between general and specific provisions relating to the same thing, the specific provisions ordinarily qualify the meaning of the general ones based on the reasonable inference that the specific provisions express more exactly the parties' intention)

Md.

National Housing Partnership v. Municipal Capital Appreciation Partners I, L.P., 935 A.2d 300 (D.C. 2007) (when two clauses or parts of an agreement conflict, and one is general while the other is specific, the specific will govern the general)

Mass.

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Minn.

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Burgi v. Eckes, 354 N.W.2d 514 (Minn. Ct. App. 1984) (the specific expressions of a writing govern over the general expressions)

Miss.

Union Planters Bank, Nat. Ass'n v. Rogers, 912 So. 2d 116, 57 U.C.C. Rep. Serv. 2d 236 (Miss. 2005) (specific language controls over general inconsistent language)

Mo.

In re Marriage of Buchmiller, 566 S.W.2d 256 (Mo. Ct. App. 1978) (when one clause is general and inclusive and another is more limited and specific, the latter operates as a modification and *pro tanto* nullification of the former)
Cades v. Mosberger Lumber Co., 291 S.W. 178 (Mo. Ct. App. 1927)

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Bernkopf Goodman, LLP v. Sheepshead Landing LLC, 29 Misc. 3d 1229(A), 920 N.Y.S.2d 239 (Sup 2010) (citing Williston; when one section of a contract has specific language providing for attorney's fees, and another section does not, it is improper to imply the term where it does not appear)

N.C.

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Ohio

Insurance Co. of North America v. Wells, 35 Ohio App. 2d 173, 64 Ohio Op. 2d 274, 300 N.E.2d 460 (10th Dist. Franklin County 1973)

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U.K.

Hesse v. Stevenson, 1803 WL 1093 (U.K. CCP 1803)

Browning v. Wright, 1709 WL 2 (K.B. 1799)

U.S. Supreme Court

Cf: Hollerbach v. U.S., 49 Ct. Cl. 686, 233 U.S. 165, 34 S. Ct. 553, 58 L. Ed. 898 (1914) (holding that a positive statement in a contract would prevail over general terms used in another part of the contract, the Court said: "We think this positive statement of the specifications must be taken as true and binding upon the Government ... We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt.")

First Circuit

G. T. Schjeldahl Co., Packaging Machinery Division v. Local Lodge 1680 of Dist. Lodge No. 64 of Intern. Ass'n of Machinists, 393 F.2d 502 (1st Cir. 1968) (a subsequent specification impliedly limits the meaning of a preceding generalization)

Second Circuit

Aramony v. United Way of America, 254 F.3d 403 (2d Cir. 2001) (quoting text)

Keyfield Construction Corp. v. United States, 278 F.2d 217 (2d Cir. 1960)

Third Circuit

J. E. Faltin Motor Transp., Inc. v. Eazor Exp., Inc., 273 F.2d 444 (3d Cir. 1959) (citing text)

Fifth Circuit

Friedrich v. Local No. 780, IUE-AFL-CIO-CLC, 515 F.2d 225 (5th Cir. 1975) (a contractual clause must be read in context, and a subsequent specification impliedly limits the meaning of a preceding generalization)

Tenth Circuit

In re Universal Service Fund Telephone Billing Practice Litigation, 619 F.3d 1188 (10th Cir. 2010) (both majority and dissent citing text and quoting Williston; considering several rules of interpretation)

Conn.

Miller Bros. Const. Co. v. Maryland Cas. Co., 113 Conn. 504, 155 A. 709 (1931) (citing text)

Kan.

Davis v. Plunkett, 187 Kan. 121, 353 P.2d 514 (1960) (a mining lease given for the purpose of removing volcanic ash and all other minerals did not entitle the lessee to remove oil and gas)

Mass.

M. L. Shaloo, Inc. v. Ricciardi & Sons Const., Inc., 348 Mass. 682, 205 N.E.2d 239 (1965)
 State Co. v. Bikesh, 343 Mass. 172, 177 N.E.2d 780 (1961) (the interpretation of a general covenant "not to prejudice good will" may be aided by a consideration of a companion covenant specifically not to compete with the business sold)
 Linton v. Allen, 154 Mass. 432, 28 N.E. 780 (1891)

N.Y.

Di Leo v. Pecksto Holding Corporation, 304 N.Y. 505, 109 N.E.2d 600 (1952) (quoting text)
 Whallon v. Kauffman, 19 Johns. 97, 1821 WL 1577 (N.Y. Sup 1821)

Ohio

Bricker v. Bricker, 11 Ohio St. 240, 1860 WL 45 (1860)

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U.K.

London & South Western Railway Co v. Blackmore, 1869 WL 10216 (HL 1870)

U.S. Supreme Court

Fire Ins. Ass'n v. Wickham, 141 U.S. 564, 12 S. Ct. 84, 35 L. Ed. 860 (1891)

Sixth Circuit

Lumley v. Wabash R. Co., 76 F. 66 (C.C.A. 6th Cir. 1896), aff'd, 96 F. 773 (C.C.A. 6th Cir. 1899)

D.C. Circuit

Wells v. Rau, 393 F.2d 362 (D.C. Cir. 1968) (general release orally limited to a specific kind of injury did not preclude a later claim for other injuries unknown at time of release)

Cal.

Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785 (1933)

D.C.

Patterson v. District of Columbia, 795 A.2d 681 (D.C. 2002), opinion amended on denial of reh'g, 819 A.2d 320 (D.C. 2003)

Ind.

French v. Arnett, 15 Ind. App. 674, 44 N.E. 551 (1896)

Ky.

Cf. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99 (Ky. 2003)

Md.

Hashmi v. Bennett, 416 Md. 707, 7 A.3d 1059 (2010) (declining to determine that the release was ambiguous regarding the number of tortfeasors concerned so as to reduce the pro rata share of liability of a nonsettling joint tortfeasor)

Mich.

Shay v. Aldrich, 487 Mich. 648, 790 N.W.2d 629 (2010)

Miss.

Cf. Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc., 857 So. 2d 748 (Miss. 2003)

Mo.

Blair v. Chicago & A.R. Co., 89 Mo. 383, 1 S.W. 350 (1886)

N.Y.

McIntyre v. Williamson, 1 Edw. Ch. 34, 6 N.Y. Ch. Ann. 50, 1831 WL 2830 (N.Y. Ch. 1831)

N.C.

Jeffreys v. Southern Ry. Co., 127 N.C. 377, 37 S.E. 515 (1900)

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Del.

E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co., 498 A.2d 1108 (Del. 1985) (the meaning arising from a particular part of an agreement cannot control when the meaning runs counter to the agreement's overall scheme or plan)

Ind.

Pickett v. Pelican Service Associates, 481 N.E.2d 1113 (Ind. Ct. App. 1985) (a technical construction should not be given to an isolated clause to defeat the contract's true meaning)

Wis.

Capital Investments, Inc. v. Whitehall Packing Co., Inc., 91 Wis. 2d 178, 280 N.W.2d 254 (1979) (the rule of construction that specific clauses of a contract should control over its general provisions was not applicable when, under the circumstances of the case, application of the rule

would support an interpretation contrary to the parties' intention, foster an unreasonable result and foster a result contrary to public policy)

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Third Circuit

Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc., 63 F.3d 262 (3d Cir. 1995) (under the rule of *ejusdem generis*, general words near a specific list apply only to things of the same kind as those specifically listed)

Fourth Circuit

Cleveland Trust Co. v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 55 F.2d 211

(C.C.A. 4th Cir. 1932) (quoting text)

Swift & Co. v. Columbia Ry., Gas & Elec. Co., 17 F.2d 46, 51 A.L.R. 983 (C.C.A. 4th Cir. 1927)

Sixth Circuit

Cintech Indus. Coatings, Inc. v. Bennett Industries, Inc., 85 F.3d 1198, 1996 FED App. 0163P

(6th Cir. 1996)

Seventh Circuit

U.S. v. Security Management Co., Inc., 96 F.3d 260 (7th Cir. 1996) (applying Wisconsin law; a general term need only be of the "same kind, class, character or nature" as enumerated specific terms in order for doctrine of *ejusdem generis* to apply; terms need not necessarily have all sprung from some common source)

Eighth Circuit

O'Connor v. Great Lakes Pipe Line Co., 63 F.2d 523 (C.C.A. 8th Cir. 1933)

Tenth Circuit

In re Universal Service Fund Telephone Billing Practice Litigation, 619 F.3d 1188 (10th Cir. 2010) (both majority and dissent citing text and quoting Williston; considering various rules of interpretation)

Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist., 226 F.3d 1170 (10th Cir. 2000)

Colorado Mill. & Elevator Co. v. Chicago, R.I. & P. R. Co., 382 F.2d 834 (10th Cir. 1967)

Court of Claims

Austin Co. v. U. S., 161 Ct. Cl. 76, 314 F.2d 518 (1963)

Ala.

Avis Rent A Car Systems, Inc. v. Heilman, 876 So. 2d 1111 (Ala. 2003)

Ark.

Union Bankers Ins. Co. v. National Bank of Commerce of Pine Bluff, 241 Ark. 554, 408 S.W.2d 898 (1966)

Colo.

Rohn v. Weld County Bank, 155 Colo. 490, 395 P.2d 1003 (1964) (a contract of guaranty)

Conn.

24 Leggett Street Ltd. Partnership v. Beacon Industries, Inc., 239 Conn. 284, 685 A.2d 305

(1996) (the principle of *ejusdem generis* applies when a clause in a contract contains list or enumeration of words, the words suggest a specific class, the class is not exhausted by the list, a general reference supplements the list and there is no clearly manifested intent that the doctrine should not apply)

D.C.

National Ass'n of Postmasters of U.S. v. Hyatt Regency Washington, 894 A.2d 471 (D.C. 2006) (when general words follow a list of specific words, the general words are construed to embrace only objects similar in nature to the specific words)

Fla.

St. Lucie County Bank & Trust Co. v. Aylin, 94 Fla. 528, 114 So. 438 (1927)

Ga.

Department of Transp. v. Montgomery Tank Lines, Inc., 276 Ga. 105, 575 S.E.2d 487 (2003)

(when a contract enumerates by name several things, and concludes with a general term of enlargement, the latter term is to be construed as being of the same kind or class, unless there is something to show a different intention)

Iowa

Maxim Technologies, Inc. v. City of Dubuque, 690 N.W.2d 896 (Iowa 2005) (under *ejusdem generis* which is sometimes known as "Lord Tenterden's Rule," when a listing of specific things in a written instrument is followed by some more general word or phrase, the latter word or phrase is deemed to refer to things of the same kind)

Shatzer v. Globe American Cas. Co., 639 N.W.2d 1 (Iowa 2001)

Hewitt v. Whattoff, 251 Iowa 171, 100 N.W.2d 24 (1959) (*ejusdem generis* was applied in connection with easement)

Gohlke v. Hawkeye Commercial Men's Ass'n, 198 Iowa 144, 197 N.W. 1004, 35 A.L.R. 1177 (1924)

Kan.

Trego WaKeeney State Bank v. Maier, 214 Kan. 169, 519 P.2d 743 (1974)

Keller v. Ely, 192 Kan. 698, 391 P.2d 132 (1964) (a reservation in a deed of "all oil, gas, casing-head gas and other liquid semi-solid and solid minerals," in an area where both gypsum and oil were being produced, did not reserve gypsum since a conveyance is construed strictly against the grantor, and the general term "solid minerals" refers only to things similar in nature to those specifically enumerated)

Mich.

Fisher Electric Co. v. Bath Iron Works, 116 Mich. 293, 74 N.W. 493 (1898)

Miss.

Dalton v. Cellular South, Inc., 20 So. 3d 1227 (Miss. 2009)

Mississippi Transp. Com'n v. Ronald Adams Contractor, Inc., 753 So. 2d 1077 (Miss. 2000) (the doctrine applies only when a contract is found to be ambiguous)

Yazoo Properties v. Katz & Besthoff No. 284, Inc., 644 So. 2d 429 (Miss. 1994) (the doctrine of *ejusdem generis* only applies when contract is found to be ambiguous)

Mo.

Myers v. Wood, 173 Mo. App. 564, 158 S.W. 909 (1913)

Mont

Mattson v. Montana Power Co., 2009 MT 286, 352 Mont. 212, 215 P.3d 675 (2009) (before the doctrine can apply, the general words must be associated with the specific words)

Neb.

Coral Production Corp. v. Central Resources, Inc., 273 Neb. 379, 730 N.W.2d 357 (2007) (stating the rule but holding it inapplicable)

Jensen v. Board of Regents of University of Nebraska, 268 Neb. 512, 684 N.W.2d 537 (2004)

N.M.

Maralex Resources, Inc. v. Gilbreath, 2003-NMSC-023, 134 N.M. 308, 76 P.3d 626 (2003)

N.Y.

Cf. Cohen v. E. & J. Bass, 246 N.Y. 270, 158 N.E. 618 (1927) (in holding that two clauses of a lease related to two distinct situations and were to be read disjunctively, the court said: "Words of general description do not follow words of particular description in relation to the same subject matter, and the rule of *ejusdem generis* has no application.")

Bristol v. Cornell University, 237 A.D. 771, 263 N.Y.S. 380 (3d Dep't 1933)

New York Metal Ceiling Co. v. City of New York, 133 A.D. 110, 117 N.Y.S. 632 (1st Dep't 1909)

N.D.

State ex rel. Stenehjem v. Philip Morris, Inc., 2007 ND 90, 732 N.W.2d 720 (N.D. 2007) (use of words such as "including, without limitation" renders the doctrine inapplicable)

Link v. Federated Mut. Ins. Co., 386 N.W.2d 897 (N.D. 1986) (the doctrine applies only to persons and things of the same kind, cost, nature, or genus as the particular words)

Okla.

State ex rel. Com'rs of Land Office v. Butler, 1987 OK 123, 753 P.2d 1334 (Okla. 1987) (the rule of *ejusdem generis*, like all rules of interpretation, exists to aid the trial court's determination of whether or not an ambiguity is present in a contract or conveyance, rather than as a rule to resolve an ambiguity; the phrase "oil, gas and other minerals" has a definite and unambiguous meaning in Oklahoma, and the doctrine is therefore inapplicable)

Cronkhite v. Falkenstein, 1960 OK 118, 352 P.2d 396 (Okla. 1960) (under *ejusdem generis* rule, words in mineral deed, "oil, gas and other minerals," were held to embrace only minerals of same generic class as oil and gas, and not to include gypsum rock)

Or.

ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co., 349 Or. 117, 241 P.3d 710 (2010), opinion adhered to as modified on reconsideration, 349 Or. 657, 249 P.3d 111 (2011) (ordinarily, courts interpreting a contract assume that a nonspecific term in a series shares the same qualities as the specific terms that precede it)

Pa.

In re Smith's Estate, 210 Pa. 604, 60 A. 255 (1905)

Tex.

Cf. Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50 (Tex. 1964) (a provision for royalty payments in an oil and gas lease based on net proceeds of "potash and other minerals" includes gas as a mineral, the rule of *ejusdem generis* as applied to minerals not being applicable in Texas, which holds that the word "minerals" is to be construed to include oil and gas as a matter of law)

Utah

Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC, 2009 UT 27, 207 P.3d 1235 (Utah 2009)

Daly v. Old, 35 Utah 74, 99 P. 460 (1909)

W. Va.

Murray v. State Farm Fire and Cas. Co., 203 W. Va. 477, 509 S.E.2d 1 (1998) (applying both *ejusdem generis* and *noscitur a sociis*)

Jones v. Island Creek Coal Co., 79 W. Va. 532, 91 S.E. 391 (1917)

Wis.

Bell v. American Ins. Co., 173 Wis. 533, 181 N.W. 733, 14 A.L.R. 179 (1921)

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Third Circuit

Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc., 63 F.3d 262 (3d Cir. 1995)
 Servomation Mathias, Inc. v. Englert, 333 F. Supp. 9 (M.D. Pa. 1971) (citing text)

Eighth Circuit

Lindeke v. Associates Realty Co., 146 F. 630 (C.C.A. 8th Cir. 1906)

Tenth Circuit

In re Universal Service Fund Telephone Billing Practice Litigation, 619 F.3d 1188 (10th Cir. 2010)
 (both majority and dissent citing text and quoting Williston)

Ala.

Nettles v. Lichtman, 228 Ala. 52, 152 So. 450, 91 A.L.R. 1455 (1934)

Conn.

24 Leggett Street Ltd. Partnership v. Beacon Industries, Inc., 239 Conn. 284, 685 A.2d 305 (1996) (the doctrine applies when there is no clearly manifested intent that a general term be given broader meaning)
 Shaw v. Pope, 80 Conn. 206, 67 A. 495 (1907)

Ill.

Hardware Mut. Cas. Co. v. Curry, 21 Ill. App. 2d 343, 157 N.E.2d 793 (2d Dist. 1959) (construing a liability policy)

Neb.

Nebraska Wheat Growers' Ass'n v. Smith, 115 Neb. 177, 212 N.W. 39 (1927)

N.Y.

C. Ludwig Baumann & Co., Brooklyn, v. Marwit Corporation, 213 A.D. 300, 207 N.Y.S. 437 (2d Dep't 1925)

N.D.

State ex rel. Stenehjem v. Philip Morris, Inc., 2007 ND 90, 732 N.W.2d 720 (N.D. 2007) (use of words such as "including, without limitation" renders the doctrine inapplicable)

Or.

In re Moore's Estate, 210 Or. 23, 307 P.2d 483, 65 A.L.R.2d 715 (1957) (mention of relinquishment of curtesy and dower rights under an antenuptial agreement did not exclude other property interests)

Pa.

Com. ex rel. Rodney v. Benton Tp. School Dist., 277 Pa. 13, 120 A. 661 (1923)

Va.

W. F. Magann Corp. v. Virginia-Carolina Elec. Works, Inc., 203 Va. 259, 123 S.E.2d 377 (1962)
 (the rule of *eiusdem generis* is invoked only for the purpose of ascertaining intent and the meaning of the language under consideration, and should not be applied to do violence to the language employed in the instrument under consideration)

Wis.

Carey v. Rathman, 55 Wis. 2d 732, 200 N.W.2d 591, 59 A.L.R.3d 1022 (1972) (the rules of *noscitur a sociis* and *eiusdem generis* are only aids to construction, that is, to determine what the intent of the parties was by use of the words they used, and are not to be applied arbitrarily or when they may restrict or be inconsistent with a broader intent gleaned from the general purpose of the contract and the circumstances surrounding its execution)

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