

FILED: January 27, 2005

IN THE SUPREME COURT OF THE STATE OF OREGON

WALSH CONSTRUCTION CO.,

Petitioner on Review,

v.

MUTUAL OF ENUMCLAW,

Respondent on Review.

(CC 0104-03398; CA A117368; SC S51104)

En Banc

On review from the Court of Appeals.*

Argued and submitted November 4, 2004.

James C. Chaney, of The Chaney Firm LLC, Eugene, argued the cause and filed the briefs for petitioner on review.

Thomas M. Christ, of Cosgrave Vergeer Kester LLP, Portland, argued the cause and filed the brief for respondent on review. With him on the brief was Thomas W. Brown.

William H. Walters, of Miller Nash LLP, Portland, argued the cause and filed the briefs on behalf of *amici curiae* Oregon-Columbia Chapter of Associated General Contractors, Associated Oregon Industries, Pacific Northwest Regional Council of Carpenters, Oregon Building Industry Association, Columbia Corridor Association, Hoffman Construction Company, Senator Frank Morse, Oregon Remodelers Association, Howard S. Wright Construction Co., and Skanska USA Building, Inc. With him on the briefs was D. Gary Christensen.

Christopher A. Rycewicz, of Rycewicz & Chenoweth, Portland, filed the brief on behalf of *amicus curiae* American Subcontractors Association.

CARSON, C.J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*Appeal from Multnomah County Circuit Court, Jeffrey M. Kilmer, Judge pro tempore. 189 Or App 400, 76 P3d 164 (2003).

CARSON, C.J.

This action for breach of an insurance contract involves the meaning of ORS 30.140(1). That statute prohibits construction agreements from requiring a person or that person's insurer to indemnify another party against liability caused in whole or in part by the indemnitee's negligence. The question on review is whether that prohibition extends to an additional

insured endorsement that plaintiff Walsh Construction Co. (Walsh) obtained from a subcontractor on a policy that defendant Mutual of Enumclaw (Enumclaw) had issued to the subcontractor. Both the trial court and the Court of Appeals concluded that the prohibition applies. We agree and affirm the decision of the Court of Appeals and the judgment of the trial court.

The facts are straightforward. Walsh, a general contractor, entered into a subcontract with Ron Rust Drywall, Inc. (Rust) to perform work on a Walsh project. The subcontract required Rust to procure liability insurance coverage naming Walsh and its agents as additional insureds on Rust's liability policy. Rust's policy, which Enumclaw earlier had issued, already contained a blanket additional insured endorsement that automatically extended the coverage that the subcontract required.

Later, a Rust employee was injured on the job and made a claim against Walsh; Walsh tendered the claim to Enumclaw. Enumclaw, however, refused the tender, arguing, in part, that the additional insured provision of the subcontract violated ORS 30.140. Walsh then settled the case with the employee and brought this breach of contract action against Enumclaw as an additional insured under Rust's policy.

Both parties moved for summary judgment. Enumclaw argued that, because the additional insured provision of the subcontract was void under ORS 30.140, Walsh was not a legally cognizable additional insured and, therefore, was not entitled to defense or indemnity from Enumclaw. Walsh countered by arguing that ORS 30.140 applies to only agreements to indemnify and that an agreement to procure insurance is something different. The trial court rejected that argument, as did the Court of Appeals. [*Walsh Construction Co. v. Mutual of Enumclaw*](#), 189 Or App 400, 76 P3d 164 (2003).⁽¹⁾ We allowed Walsh's petition for review.

ORS 30.140(1) provides:

"Except to the extent provided under subsection (2) of this section, *any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another* against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void."

(Emphasis added.)

Walsh focuses on the emphasized part of the statutory wording set out above and argues that its subcontract with Rust did not require either Rust or Rust's insurer, Enumclaw, to indemnify Walsh. Instead, in Walsh's view, the subcontract required only that Rust procure insurance for Walsh's benefit. Walsh continues by arguing that the term "indemnity" connotes unlimited liability exposure, whereas insurance limits the insurer's liability to the amount of coverage purchased. As support for its argument that the distinction makes a difference, Walsh relies primarily upon *Montgomery Elevator Co. v. Tuality Community Hosp.*, 101 Or App 299, 790 P2d 1148, *rev den*, 310 Or 243 (1990), a split, en banc Court of Appeals decision interpreting a workers' compensation statute, along with the decisions from other jurisdictions upon which the majority opinion in that case relied.

Enumclaw argues that *Montgomery Elevator Co.* is inapposite and otherwise disagrees with Walsh's analysis, asserting:

