REL: October 26, 2018

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170299

Keller Construction Company of Northwest Florida, Inc.

v.

Hartford Fire Insurance Company

Appeal from Baldwin Circuit Court
(CV-16-900612)

PITTMAN, Judge.

Keller Construction Company of Northwest Florida, Inc. ("Keller Construction"), appeals from a judgment of the Baldwin Circuit Court ("the trial court") in favor of Hartford

Fire Insurance Company ("Hartford") in an action brought against Hartford by Keller Construction. We affirm.

Facts

The facts material to the decision of this appeal are undisputed. In August 2012, the City of Spanish Fort ("the city") and J.F. Pate & Associates Contractors, Inc. ("Pate"), entered into a contract ("the general contract") in which Pate agreed to act as the general contractor in the construction of a community center for the city. Because the general contract was subject to § 39-1-1(a), Ala. Code 1975,[1] a part of Alabama's Little Miller Act, in October 2012, Pate, as principal, and Hartford, as surety, executed a payment bond ("the bond") in which they bound themselves, jointly and severally, "to pay for labor, materials and equipment furnished for use in the performance of the [general contract]," subject to the proviso that, with respect to subcontractors furnishing labor, materials, and equipment for performance of the general contract, "this obligation shall be

[1]Section 39-1-1(a) requires persons entering into contracts with government entities for the construction of public works to execute a payment bond in an amount not less than 50% of the contract price.

null and void if [Pate] promptly makes payment directly or indirectly, for all sums due."

In December 2012, Pate and Keller Construction executed a subcontract ("the subcontract") pursuant to which Keller Construction agreed to perform specified work ("Keller Construction's work") that was necessary for the performance of the general contract. With respect to Pate's payment of Keller Construction, Section 2 of the subcontract provided, in pertinent part:

> "[Pate] shall pay [Keller Construction] for performance of the subcontract [$405,000], subject to the additions and deductions as provided in the subcontract documents. [Pate] shall make progress payments on account of the [$405,000] to [Keller Construction] as specified above based upon applications for payment submitted to [Pate] by [Keller Construction], corresponding to applications for payment submitted by [Pate] to the architect, and certificates for payment issued by the architect. [Pate] shall be entitled to withhold from all periodic payments and the final payment an amount as retainage which shall be equal to the same proportion of the amount of retainage held by the [city] with respect to payments made by the [city] to [Pate] and shall not be less than [5%]."

Section 2.2 of the subcontract ("Section 2.2") provided:

> "[Pate] and [Keller Construction] acknowledge and agree that the source of funding for payment to [Keller Construction] for [Keller Construction's] work will be progress draws and final payment and retainage received by [Pate] from the [city]. The

> [city] will be billed for [Keller Construction's] work in progress payments as set out in the [general] contract between the [city] and [Pate]. The parties further agree that the receipt by [Pate] of payment from [the city] for the work performed by [Keller Construction] is a condition precedent to the obligation of [Pate] to pay [Keller Construction]. [Keller Construction] further acknowledges that it is assuming the risk of delay in payment or non-payment by the [city] to [Pate]. Both the condition precedent for payment and the assumption of this risk are bargained for considerations in this agreement, without which [Pate] would not have entered into this agreement with [Keller Construction]. The assumption of this risk is reflected in the price contained in this subcontract for the labor and material to be furnished by [Keller Construction].
>
> "Furthermore, [Keller Construction] agrees that [Pate's] surety is intended to be a beneficiary of the provisions of this section and that any defense available to [Pate] as to claims made by [Keller Construction] hereunder shall inure to the benefit of [Pate's] surety."

(Emphasis added.)

David Keller, the president of Keller Construction, who had executed the subcontract on behalf of Keller Construction, testified that, as a matter of company policy, Keller Construction's attorney reviews all subcontracts before Keller executes them; that the attorney provides Keller with the attorney's "comments" regarding those subcontracts; that Keller then discusses the attorney's comments with the general

contractor; and that sometimes those discussions result in changes being made to the subcontract and sometimes they do not. Keller further testified that he has been in the construction business approximately 30 years; that he can read English; that Keller Construction has worked on other public-works contracts in Alabama; that he understood that Pate's receipt of payment from the city for Keller Construction's work was a condition precedent to Pate's obligation to pay Keller Construction for that work; that he understood that Keller Construction was assuming the risk that the city would not pay Pate for Keller Construction's work; that he understood that both the provision stating that the city's paying Pate for Keller Construction's work was a condition precedent to Pate's obligation to pay Keller Construction for that work and the provision stating that Keller Construction was assuming the risk that the city would not pay Pate for Keller Construction's work were bargained-for considerations in the subcontract; and that he understood that, in exchange for Keller Construction's assuming the risk that the city would not pay Pate, Pate had agreed to pay Keller Construction

more than Pate would otherwise have agreed to pay Keller Construction.

Keller Construction performed all of its obligations under the subcontract in a satisfactory and timely manner. When the general contract had been fully performed, the city did not pay Pate any of the retainage the city had withheld from the progress payments the city had made to Pate. That retainage included $12,189.58 ("the $12,189.58") that Pate had billed the city for work performed by Keller Construction. Because the city did not pay Pate the $12,189.58, Pate did not pay Keller the $12,189.58. Keller Construction conceded that it was bound by Section 2.2.

Procedural History

In June 2016, Keller Construction sued Hartford, claiming that Hartford was obligated to pay Keller Construction the $12,189.58 pursuant to the bond. Hartford asserted that it was not obligated to pay Keller Construction the $12,189.58 because, Hartford said, Pate was not obligated to pay Keller Construction the $12,189.58 under Section 2.2 because the city had not paid Pate the $12,189.58. Hartford further asserted that, because Pate was not obligated to pay Keller

Construction the $12,189.58 under Section 2.2, Hartford was not obligated to pay Keller Construction for two reasons: (1) because, Hartford said, Keller Construction had specifically agreed in Section 2.2 that Hartford was entitled to assert any defense to a claim by Keller Construction that Pate was entitled to assert and (2) because, Hartford said, under Alabama surety law, a surety on a payment bond is liable to a claimant, such as Keller Construction, only to the extent that the principal on the bond, which in this case was Pate, is liable to the claimant. Hartford also asserted a counterclaim alleging that Keller Construction was liable to Hartford for the attorney fees and expenses incurred by Hartford in defending Keller Construction's action because, Hartford said, Keller Construction and its counsel knew when Keller Construction commenced this action that the city had not paid Pate the $12,189.58 and that, therefore, neither Pate nor Hartford were liable to Keller for the $12,189.58.

The trial court held a bench trial at which it received evidence ore tenus. Thereafter, it entered a judgment stating: "Judgment is entered in favor of the Defendant[, i.e., Hartford,] and against the Plaintiff[, i.e., Keller

Construction]." Keller Construction then timely appealed to this court.

Finality of the Trial Court's Judgment

The trial court's reference to the parties as "Plaintiff" and "Defendant" in its judgment, without also referring to them as "Counter-defendant" and "Counter-plaintiff" and without awarding attorney's fees to Hartford, indicates that the trial court's judgment did not expressly adjudicate Hartford's counterclaim. Moreover, the judgment did not retain jurisdiction for the trial court to adjudicate the counterclaim later. Ordinarily, the failure to adjudicate a pending claim would render a judgment nonfinal and, therefore, nonappealable. However, although the counterclaim did not expressly refer to the Alabama Litigation Accountability Act ("the ALAA"), § 12-19-270 et seq., Ala. Code 1975, the counterclaim was, in essence, a claim under the ALAA because the gravamen of the counterclaim was that Keller Construction had brought this action without substantial justification. See § 12-19-272, Ala. Code 1975 (authorizing, among other things, a trial court to award, as part of its judgment, reasonable attorney fees and costs if it finds that a civil action was

brought without substantial justification). "[W]hen a trial court enters an otherwise final judgment on the merits of a case but fails to address a pending ALAA claim or to reserve jurisdiction to later consider that claim, the ALAA claim is implicitly denied by the judgment on the merits." Klinger v. Ros, 33 So. 3d 1258, 1260 (Ala. Civ. App. 2009). Accordingly, in this case, we conclude that the trial court's judgment implicitly denied the counterclaim and that, therefore, the trial court's judgment is final and appealable.

Standard of Review

As noted above, the facts material to the decision of this appeal are undisputed. "The presumption of correctness accorded the trial court, hearing a case ore tenus, has no application where the facts are undisputed; and, under such circumstances, it is solely for the appellate court to determine whether the trial court misapplied the law to the undisputed facts." Home Indem. Co. v. Reed Equip. Co., 381 So. 2d 45, 47 (Ala. 1980).

Analysis

Citing Federal Insurance Co. v. I. Kruger, Inc., 829 So. 2d 732 (Ala. 2002), and Hartford Accident & Indemnity Co. v.

Cochran Plastering Co., 935 So. 2d 462 (Ala. Civ. App. 2006), Keller Construction first argues that the trial court erred because, Keller Construction says, Kruger and Cochran Plastering held that a surety cannot assert a clause such as Section 2.2 as a defense to a claim by a subcontractor on a payment bond executed pursuant to § 39-1-1(a). However, Kruger and Cochran Plastering are distinguishable from this case.

First, in each of those cases, a general contractor and a surety asserted, as a defense to a subcontractor's claim under a payment bond executed pursuant to § 39-1-1(a), that a final-payment clause in the subcontract between the general contractor and the subcontractor made the general contractor's receipt of payment from the owner for the subcontractor's work a condition precedent to the general contractor's obligation to pay the subcontractor for that work. The final-payment clauses at issue in Kruger and Cochran Plastering are materially different from Section 2.2. The final-payment clause at issue in Kruger provided:

> "'A final payment, consisting of the unpaid balance of the [price specified by Kruger's subcontract for its products and services], shall be made thirty (30) days after the last of the following to occur, (a) ... receipt of all Products [provided by Kruger

> to Bill Harbert Construction Company, the general contractor,] in satisfactory condition, (b) final payment by [the water board, the owner,] to [Harbert] on account of the Products [provided by Kruger] including retainage, (c) delivery of all guarantees, certifications and information required under Contract Documents, and (d) delivery of a general release, in a form satisfactory to [Harbert], executed by [Kruger] running to and in favor of [Harbert] and [the water board].'"

829 So. 2d at 733-34. The final-payment clause at issue in Cochran Plastering provided:

> "'Final payment constituting the entire balance of the [amount due Cochran Plastering under this subcontract] shall be made by [Lee L. Saad Construction Co., the general contractor,] to [Cochran Plastering] when [Cochran Plastering's] work is fully performed in accordance with the requirements of the contract documents, the Architect has issued a Certificate for Payment covering [Cochran Plastering's] completed work, and [Saad] has received payment from the owner. Final payment shall then be made to [Cochran Plastering] within fifteen (15) days following [Saad's] receipt of payment from [the owner].'"

935 So. 2d at 467 (emphasis omitted). The Kruger and Cochran Plastering courts held that the final-payment clauses at issue in those cases merely specified a time for payment and that they did not make the general contractor's receipt of payment from the owner for the subcontractor's work a condition

precedent to the general contractor's obligation to pay the subcontractor for that work. 829 So. 2d at 741; and 935 So. 2d at 468.

Section 2.2, however, is more akin to paragraph 5 ("paragraph 5") of the subcontract at issue in Lemoine Co. of Alabama, L.L.C. v. HLB Constructors, Inc., 62 So. 3d 1020 (Ala. 2010), than it is to the final-payment clauses at issue in Kruger and Cochran Plastering. Paragraph 5 provided:

> "'Notwithstanding anything else in this Subcontract or the Contract Documents, the obligation of [the general contractor] to make any payment under this Subcontract ... is subject to the express and absolute condition precedent of payment by [the owner]. It is expressly agreed that [the general contractor] and its surety shall have no obligation to pay for any work done on this Project, until [the general contractor] has received payment for such work from [the owner]. ... [The subcontractor] expressly assumes the risk of nonpayment by [the owner].'"

"(Emphasis added.)"

62 So. 3d at 1026. Our supreme court held that paragraph 5 made the general contractor's receipt of payment from the owner for the subcontractor's work a condition precedent to the general contractor's obligation to pay the subcontractor for that work, stating:

"'"[I]t is well-established that condition precedents are not favored in contract law, and will not be upheld unless there is clear language to support them."' Federal Ins. Co. v. I. Kruger, Inc., 829 So. 2d 732, 740 (Ala. 2002) (quoting Koch v. Construction Tech., Inc., 924 S.W.2d 68, 71 (Tenn. 1996)). '"In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk."' Kruger, 829 So. 2d at 739 (quoting Restatement (Second) Contracts § 227 (1981)) (emphasis added).

"Although conditions precedent are not favored in contract law,

> "'"[t]his Court has consistently held that the freedom to contract is an inviolate liberty interest.
>
> "'"....
>
> "'"... The ban on impairing the obligations of contracts provided in Ala. Const. 1901, § 22, is obviously one that shall forever remain inviolate. Alabama caselaw has maintained the constitutional prohibition on impairing contracts by consistently upholding the intent of the contracting parties."
>
> "'....
>
> "'... [I]f two parties knowingly, clearly, and unequivocally enter into an agreement whereby they agree that the respective liability of the parties will be

> determined by some type of agreed-upon formula, then Alabama law will permit the enforcement of that agreement as written.'
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> "Holcim (US), Inc. v. Ohio Cas. Ins. Co., 38 So. 3d 722, 728–29 (Ala. 2009) (quoting Shoney's LLC v. MAC East, LLC, 27 So. 3d 1216, 1221–22 (Ala. 2009)).
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> "[The general contractor] argues that the language of paragraph 5 of the subcontract clearly indicates that [the subcontractor] assumed the risk of nonpayment by [the owner] and that, therefore, the condition precedent in that paragraph is enforceable. We agree.
>
> "....
>
> "'"'When a court construes a contract, "the clear and plain meaning of the terms of the contract are to be given effect, and the parties are presumed to have intended what the terms clearly state."'"' State v. Lorillard Tobacco Co., 1 So. 3d 1, 7 (Ala. 2008) (quoting H & S Homes, L.L.C. v. Shaner, 940 So. 2d 981, 988 (Ala. 2006), quoting in turn Polaris Sales, Inc. v. Heritage Imports, Inc., 879 So. 2d 1129, 1133 (Ala. 2003), quoting in turn Strickland v. Rahaim, 549 So. 2d 58, 60 (Ala. 1989)). [The subcontractor] does not contest the validity of the subcontract, nor does it argue that the language of paragraph 5 is, standing alone, ambiguous. Moreover, Harrell Lloyd Harrellson, the owner of [the subcontractor], testified at trial that, although he 'ma[de] certain changes or alterations' to the terms of the proposed subcontract with [the general contractor] before it was executed, he made no changes to the language of paragraph 5, and he raised no concerns at that time regarding the assignment of the risk of nonpayment [by the owner] from [the general contractor] to [the subcontractor]. Thus, '"the circumstances [surrounding the execution of the subcontract] indicate that [the subcontractor] has assumed the

risk."' Kruger, 829 So. 2d at 739 (quoting Restatement (Second) Contracts § 227).

"The facts of this case indicate that [the general contractor] and [the subcontractor] 'knowingly, clearly, and unequivocally enter[ed] into [the subcontract] whereby they agree[d] that the respective liability of the parties [would] be determined by some type of agreed-upon formula,' Holcim, 38 So. 3d at 729, namely, the condition precedent of paragraph 5; therefore, 'Alabama law will permit the enforcement of [the subcontract] as written,' id., and [the owner's] payment to [the general contractor] under the general contract is an enforceable condition precedent to [the subcontractor's] right to payment under the subcontract.

"[The subcontractor] argues that '[t]he subcontract here does not clearly indicate that [the subcontractor] intended to shift the risk of loss from [the general contractor] to itself.' [The subcontractor's] brief, at 21. More specifically, [the subcontractor] argues that the condition precedent in paragraph 5 conflicts with the 'pay-when-paid' clause of paragraph 4 of the subcontract and that 'the conflict should be resolved in favor of the prior clause.' [The subcontractor's] brief, at 22. Paragraph 4 provides, in pertinent part, that 'a final payment, consisting of the unpaid balance of the Price, shall be made within 45 days after the last of the following to occur: (a) ...; (b) ...; (c) Final payment by [the owner] to [the general contractor] under the Contract on account of the Work.'

"This Court has stated:

"'A reasonable interpretation of [a pay-when-paid clause, like the one in paragraph 4,] is that it creates on the part of [the general contractor] an

> absolute obligation to pay; the language that follows -- "within thirty (30) days after the last of the following to occur: (a) ..., (b) ..., (c) ..., (d) ..." -- is reasonably read as merely specifying a time for payment, rather than as creating a condition precedent to payment.'

"Kruger, 829 So. 2d at 738. [The subcontractor] appears to argue that paragraph 4 of the subcontract creates an absolute right to payment and is, therefore, in conflict with paragraph 5, which makes the right to payment dependent upon a condition precedent.

"However, this Court's analysis in Kruger of the effect of a pay-when-paid clause does not apply in this case. In Kruger, the general contractor and its surety relied solely on the pay-when-paid clause in arguing that payment by the owner was a condition precedent to payment to Kruger under a subcontract. This Court rejected that argument, stating:

> "'Can it be reasonably supposed, without express evidence in support thereof, that Harbert [the general contractor] and Kruger entered into an agreement pursuant to which Kruger was expected to perform a significant amount of work and to provide a substantial amount of materials under the terms of the subcontract, without an absolute agreement from Harbert to pay Kruger for its services and materials? We think not, and nothing in the record indicates that Kruger agreed to assume the risk of nonpayment [by the owner] for events completely outside its control or influence.'

"Kruger, 829 So. 2d at 739 (emphasis added).

"Here, however, the subcontract includes both a pay-when-paid clause, setting forth the timing of payment, and a pay-if-paid clause, setting forth the conditions under which [the subcontractor's] right to payment arises. Unlike the pay-when-paid clause in Kruger, the pay-if-paid clause in this case expressly indicates that [the subcontractor's] right to payment under the subcontract depends on [the owner's] payment under the general contract. Indeed, here, [the subcontractor] has 'expressly assume[d] the risk of nonpayment by [the owner].' Therefore, Kruger is distinguishable, and its analysis is inapposite in this case.

"Moreover, this Court has held

> "'that to ascertain the intent of the parties [to a contract] "we must first look to the contract itself, because while '[t]he intention of the parties controls in construing a written contract,' 'the intention of the parties is to be derived from the contract itself where the language is plain and unambiguous.'"'

"Locke v. Ozark City Bd. of Educ., 910 So. 2d 1247, 1251 (Ala. 2005) (quoting H.R.H. Metals, Inc. v. Miller, 833 So. 2d 18, 24 (Ala. 2002), quoting in turn Loerch v. National Bank of Commerce of Birmingham, 624 So. 2d 552, 553 (Ala. 1993)).

"Here, the plain and unambiguous language of paragraph 5 provides that, '[n]otwithstanding anything else in this Subcontract or the Contract Documents, the obligation of [the general contractor] to make any payment under this Subcontract ... is subject to the express and absolute condition precedent of payment by [the owner].' Nothing in the subcontract contradicts the provisions of paragraph 5 or indicates that the parties intended to assign the risk of nonpayment in a manner different from that set forth in paragraph

5. Therefore, pursuant to the express terms of the subcontract, the timing mechanism of paragraph 4 is subject to the condition precedent of paragraph 5, and the two paragraphs are not in conflict.

"Having determined that the condition precedent in paragraph 5 is enforceable, we now consider whether that condition has been satisfied. As noted previously, [the subcontractor] does not dispute that [the general contractor] has paid all it owes [the subcontractor] under the subcontract, 'except the final retainage payment and payment for the disputed extra work.' [The general contractor's] brief, at 43. [The general contractor] argues that '[it] is not obligated to make final payment to [the subcontractor] because [the general contractor] has not received final payment from [the owner].' Id., at 43-44. [The subcontractor] argues, however, that it is 'entitled to its full payment because the uncontradicted evidence was that [the general contractor] had been paid $90,000 to $100,000 for [the subcontractor's] work above the cost of [the subcontractor's] subcontract.' [The subcontractor's] brief, at 27.

"However, any amount that [the general contractor] had been paid 'for [the subcontractor's] work above the cost of [the subcontractor's] subcontract' is irrelevant to the question whether the condition precedent in paragraph 5 has been satisfied with regard to the retainage. The record indicates that, throughout the construction of the project, [the owner] withheld a 5% retainage on the work performed under the general contract. That retainage included amounts [the owner] owed [the general contractor] for plumbing work performed on the project, including the work done by [the subcontractor] under the subcontract. The record also indicates that, during the course of construction, [the general contractor] withheld a 5% retainage with respect to the work performed by [the subcontractor] under the subcontract. Thus, the

> retainage withheld under the terms of the subcontract appears to be part of the retainage withheld under the terms of the general contract.
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> "It is undisputed that [the owner] never paid [the general contractor] the retainage due under the general contract. Paragraph 5 of the subcontract provides that [the general contractor] 'ha[s] no obligation to pay for any work done on this Project, until [it] has received payment for such work from [the owner].' (Emphasis added.) Because [the general contractor] has not been paid the retainage under the general contract, the condition precedent in paragraph 5 has not been satisfied, and [the subcontractor] is not entitled to final payment under the subcontract. Therefore, [the general contractor] has not breached the subcontract, and the trial court erred in awarding [the subcontractor] damages on the [subcontractor's] breach-of-contract claim."

62 So. 3d at 1025-28.

Like paragraph 5 in Lemoine, Section 2.2 expressly, clearly, and unambiguously provided that Pate's receipt of payment from the city for Keller Construction's work was a condition precedent to Pate's obligation to pay Keller Construction for that work and that Keller Construction was assuming the risk that the city would not pay Pate. Moreover, Keller testified that he understood that the subcontract with Pate made Pate's receipt of payment from the city for Keller Construction's work a condition precedent to Pate's obligation to pay Keller Construction for that work and that Keller

Construction was assuming the risk that the city would not pay Pate for that work. Accordingly, we conclude that those provisions of Section 2.2, like the corresponding provisions of paragraph 5 in Lemoine, are enforceable. It is undisputed that, when this action was tried, the city had not paid Pate the $12,189.58, which the city had withheld as retainage from its progress payments to Pate for Keller Construction's work. Therefore, under Section 2.2, Pate was not obligated to pay Keller Construction the $12,189.58.

The nonexistence of an obligation on the part of Pate to pay Keller Construction the $12,189.58 is the second distinction between this case, on the one hand, and Kruger and Cochran Plastering, on the other. In both Kruger and Cochran Plastering, the general contractors, under the subcontracts, were obligated to pay the subcontractors the amounts the subcontractors sought to recover from the sureties and, therefore, the holdings in those cases that the sureties were liable under the payment bonds did not violate the general principle of surety law that a surety is only liable to the extent that the principal is liable. The Kruger court acknowledged this general principle, stating:

> "It is true that if Kruger[, i.e., the subcontractor] has no right of recovery against the principal -- in this case, Harbert -- Kruger may not recover against the surety -- in this case, Federal -- on the payment bond. See A.G. Gaston Constr. Co. [v. Hicks], 674 So. 2d [545,] 547 [(Ala. Civ. App. 1995)] ('The [general] contractor must be liable for some claim ... before the surety can be liable.'). Thus, in order to determine whether Kruger is entitled to recover under the terms of the payment bond, we must first determine whether Kruger is entitled to recover under the Harbert-Kruger subcontract."

829 So. 2d at 736-37. The Cochran Plastering court also acknowledged this general principle of surety law, stating:

> "Initially, we note that we agree with [the surety's] argument on appeal that [the surety] cannot be liable to [the subcontractor] unless [the subcontractor] was entitled to recover from [the general contractor]. See Federal Ins. Co. v. I. Kruger, Inc., 829 So. 2d 732, 736 (Ala. 2002) (if there is no right of recovery against the principal, there is no right of recovery against the surety on the payment bond); and Magic City Paint & Varnish Co. v. American Surety Co. of New York, 228 Ala. 40, 43, 152 So. 42, 44 (1934) ('if liability be not shown against the [general] contractor, clearly none can be established against the surety')."

935 So. 2d at 467.

Citing obiter dicta in Kruger and Cochran Plastering, Keller Construction asserts that the subcontract and the bond are separate contracts and, therefore, the fact that Section 2.2 prevents Keller Construction from recovering the

$12,189.58 from Pate under the subcontract is irrelevant to a determination whether Keller Construction is entitled to recover the $12,189.58 from Hartford under the bond. However, allowing Keller Construction to recover from Hartford under the bond when Keller Construction has no right to recover the $12,189.58 from Pate under the subcontract would violate the aforementioned principle of surety law that a surety under a payment bond can be liable only to the extent that the principal is liable. Moreover, Keller Construction expressly agreed that Hartford was a third-party beneficiary of Section 2.2 and that Hartford was entitled to assert as a defense to a claim by Keller Construction for payment under the bond any defense that Pate was entitled to assert as a defense to a claim by Keller Construction against Pate under the subcontract. Keller testified that he knowingly agreed to that provision and that provision is clear and unambiguous. Therefore, we conclude that Hartford was entitled to assert as a defense to Keller Construction's claim under the bond that Hartford was not liable to Keller Construction for the $12,189.58 because the condition precedent to Pate's obligation to pay Keller Construction that $12,189.58 under

the subcontract, i.e., Pate's receipt of the $12,189.58 from the city, had not been met.

Citing Johnson Controls, Inc. v. Liberty Mutual Insurance Co., 160 So. 3d 249 (Ala. 2014), Keller Construction argues that the issue whether Pate is liable to Keller Construction for the $12,189.58 under the subcontract is immaterial to a determination whether Keller Construction is entitled to recover the $12,189.58 from Hartford under the bond because, Keller Construction says, it established all the elements of a claim under the bond. In Johnson Controls, our supreme court recited the elements of a claimant's prima facie case for recovery under a payment bond executed pursuant to § 39-1-1(a):

> "Under Federal Insurance Co. v. I. Kruger, Inc., supra, a supplier is entitled to recover under a payment bond issued pursuant to Alabama's little Miller Act if the supplier establishes:
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> > "'"'(1) that materials or labor were supplied for work on the public project at issue; (2) that the supplier was not paid for the materials or labor supplied; (3) that the supplier had a good faith belief that the materials furnished were for the project in question; and (4) that the jurisdictional requisites had been met.'"'
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> "829 So. 2d at 736 (quoting A.G. Gaston Constr. Co. v. Hicks, 674 So. 2d 545, 547 (Ala. Civ. App. 1995),

> quoting in turn United States ex rel. Krupp Steel Prods., Inc. v. Aetna Ins. Co., 831 F.2d 978, 980 (11th Cir. 1987))."

160 So. 3d at 259-60. There is no dispute that Keller Construction proved those elements; however, Johnson Controls does not stand for the proposition that Keller Construction's proving a prima facie case for recovery under the bond foreclosed Hartford from asserting and prevailing on its defense that Keller Construction cannot recover the $12,189.58 under the bond because a condition precedent to Pate's obligation to pay Keller Construction the $12,189.58 under the subcontract has not been satisfied.

In Johnson Controls, Roanoke Healthcare ("Roanoke"), a public entity that operated a medical center, had entered into a general contract with Batson-Cook Company ("Batson-Cook") for it to renovate Roanoke's medical center. To avoid the necessity of paying sales and use taxes on the tangible personal property used in the renovation, Roanoke and Batson-Cook entered into a purchasing-agent agreement in which they agreed that Batson-Cook would act as the purchasing agent of Roanoke, which was exempt from sales and use taxes, in purchasing tangible personal property for use in renovating

the medical center. Pursuant to § 39-1-1(a), Batson-Cook and Liberty Mutual Insurance Company ("Liberty Mutual") executed a payment bond for the renovation of the medical center. Hardy Corporation ("Hardy") submitted a bid to perform the mechanical work necessary for the performance of the general contract. Hardy's bid used a price quote of $147,000 from Johnson Controls, Inc. ("JCI"), for the materials and equipment needed to perform the subcontract. As a result of that bid, which included $147,000 for materials and equipment, Batson-Cook subcontracted with Hardy for it to perform the mechanical work necessary for the performance of the general contract; the price specified in the subcontract included $147,000 for materials and equipment. After entering into the subcontract, Hardy sent JCI a purchase order for the materials and equipment needed to perform the subcontract. The purchase order was on Hardy's letterhead but had the notation "P.O., [Roanoke], c/o Batson-Cook Company." JCI delivered materials and equipment with a total price of $147,000, exclusive of sales tax, to the medical center and subsequently sent Hardy an invoice listing $147,000 as the balance owed, with the notation that it was billed to Roanoke c/o Hardy. Thereafter,

Roanoke exhausted its funding before the renovation was complete and suspended work on the renovation, without paying JCI. Batson-Cook then sent Hardy a change order removing all the materials and equipment supplied by JCI from the subcontract.

JCI then sued Liberty Mutual on the payment bond. Liberty Mutual asserted as its defense that the materials and equipment provided by JCI were outside the scope of the work specified in the contract between Batson-Cook and Roanoke, that JCI's materials and equipment had been provided directly to Roanoke at its request, and that, therefore, neither Batson-Cook nor Liberty Mutual were liable for JCI's materials and equipment. The Randolph Circuit Court entered a summary judgment in favor of Liberty Mutual, and JCI appealed to our supreme court.

Our supreme court rejected Liberty Mutual's argument that the materials and equipment provided by JCI were not within the scope of the work Batson-Cook had contracted to perform under the general contract, held that JCI was entitled to recover from Liberty Mutual under the payment bond, reversed the summary judgment in favor of Liberty Mutual, and remanded

the cause for the Randolph Circuit Court to enter a judgment in favor of JCI.

However, the Johnson Controls court distinguished that case from A.G. Gaston Construction Co. v. Hicks, 674 So. 2d 545 (Ala. Civ. App. 1995), stating:

> "In Hicks, the Court of Civil Appeals upheld a trial court's finding that a subcontractor who had agreed with the general contractor to be paid for 'satisfactory performance' could maintain an action against the bond surety only for work that met the condition precedent to its payment -- satisfactory performance. In the present case, it is undisputed that the equipment and materials furnished by JCI were satisfactory and that JCI is entitled to payment. Hicks, therefore, is ... inapposite."

160 So. 3d at 263 (emphasis added). In this case, as in Hicks, the subcontractor's right to payment under the subcontract is subject to a condition precedent that has not been satisfied, i.e., Pate's receipt of the $12,189.58 from the city. Therefore, this case, like Hicks, is distinguishable from Johnson Controls, and Hartford, like the surety in Hicks, is entitled to assert the nonoccurrence of the condition precedent to Pate's obligation to pay Keller Construction the $12,189.58 under the subcontract as a defense to Keller Construction's claim seeking to recover the $12,189.58 from Hartford under the bond. Had the Johnson Controls court

intended its holding to preclude a surety from asserting such a defense, it would have overruled Hicks rather than distinguishing it.

Keller Construction next argues that Pate was not a necessary or indispensable party to its action against Hartford. That is correct. However, as noted above, allowing Keller Construction to recover the $12,189.58 from Hartford under the bond when Keller Construction has no right to recover the $12,189.58 from Pate under the subcontract would violate the principle of surety law that a surety under a payment bond can be liable only to the extent that the principal is liable. Moreover, Keller Construction freely, knowingly, expressly, clearly, and unambiguously agreed that Hartford was a third-party beneficiary of Section 2.2 and that Hartford was entitled to assert as a defense to a claim made by Keller Construction under the bond any defense that Pate would have been entitled to assert to a claim by Keller Construction under the subcontract. Therefore, Keller Construction's suing Pate under either the subcontract or the bond is not a condition precedent to Hartford's right to assert as a defense to Keller Construction's claim for the

$12,189.58 that it does not owe Keller Construction the $12,189.58 under the bond because Keller Construction freely, knowingly, expressly, clearly, and unambiguously agreed that Pate's receipt of the $12,189.58 from the city was a condition precedent to Pate's obligation to pay Keller Construction the $12,189.58, that Keller Construction assumed the risk that the city would not pay Pate the $12,189.58, and that Hartford was entitled to assert as a defense to a claim by Keller Construction under the bond any defense that Pate would have been entitled to assert as a defense to a claim by Keller Construction under the subcontract.

Finally, Keller Construction argues that the trial court erred because it failed to follow federal caselaw that, according to Keller Construction, has held that, under the Miller Act, a surety cannot assert a conditional-payment clause in a subcontract to avoid liability under the Miller Act. However, our supreme court held in Lemoine that express, clear, and unambiguous provisions (1) making a general contractor's receipt of payment from the owner for a subcontractor's work a condition precedent to the general contractor's obligation to pay the subcontractor for that work

and (2) transferring the risk of nonpayment by the owner from the general contractor to the subcontractor are enforceable. Moreover, in Johnson Controls, our supreme court, by distinguishing Hicks rather than overruling it, recognized the continued validity of the principle that a subcontractor "could maintain an action against the bond surety [on a bond executed pursuant to § 39-1-1(a)] only for work that met the condition precedent to its payment [under the terms of the subcontract]." Johnson Controls, 160 So. 3d at 263 (emphasis added). This court is bound by the decisions of our supreme court. See § 12-3-16, Ala. Code 1975 ("The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals ....").

Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

Thompson, P.J., and Thomas, Moore, and Donaldson, JJ., concur.