Rel: June 25, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190545

Nucor Steel Tuscaloosa, Inc.

v.

Zurich American Insurance Company and Onin Staffing, LLC, a division of the Onin Group, Inc.

Appeal from Tuscaloosa Circuit Court
(CV-17-900377)

BOLIN, Justice.

Nucor Steel Tuscaloosa, Inc. ("Nucor"), appeals from the Tuscaloosa Circuit Court's summary judgment in favor of Zurich American Insurance

Company ("Zurich") and Onin Staffing, LLC, a division of the Onin Group, Inc. ("Onin"), on claims asserted by Nucor arising from an alleged breach of an indemnification agreement.

Nucor operates a steel-manufacturing facility in Tuscaloosa. Nucor had an internship program that offered part-time work to technical-school students, who, as part of the internship program, earned both academic credit and work experience relevant to their vocational training. On August 20, 2010, Nucor entered into a "Temporary Services Agency Agreement" ("the TSA Agreement") with Onin, a personnel-staffing agency, whereby Onin was to manage the employment of the technical-school students selected by Nucor for its internship program, including providing payroll services, drug testing, and basic orientation regarding Nucor's policies to the interns. The TSA Agreement provided, in relevant part:

> "1. Scope of Work. [Onin] shall hire, employ and provide to Nucor personnel to perform the labor for the work ....
>
> "....

> "7. Policies of the Facility. [Onin] shall be solely responsible for ensuring that [Onin's] Personnel are educated in the relevant policies of the Facility ....
>
> "....
>
> "10. Indemnification. To the fullest extent allowed by law, [Onin] shall defend (but only if so elected by Nucor in its sole discretion), indemnify and hold harmless Nucor ... from and against all proceedings, claims, damages, liabilities, losses, costs and expenses (including, but not limited to, attorneys' fees and expenses, including any attorneys' fees and expenses incurred by a Nucor indemnified party in enforcing [Onin's] indemnification obligations hereunder) (collectively, 'damages'), in any manner arising out of, related to, or resulting from the performance of the work hereunder, provided that any such damages are caused in whole or in part by any act or omission of [Onin], any [of Onin's] Personnel, any subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, including, but not limited to any negligent, grossly negligent or willful acts or omissions, and regardless of whether or not (A) any such damages are caused in part by the concurrent negligence of a Nucor Indemnified Party or any other acts or omissions (including, without limitation, any negligent acts or omissions) of a Nucor indemnified party or (B) a Nucor Indemnified Party would otherwise be liable for such damages under a statutory or common law strict liability standard."

A separate section of the TSA Agreement entitled "Temporary Services Agency Additional Terms and Conditions" provided, in relevant part:

> "Safety Policy

> "Safety on the job site is of paramount importance to Nucor. Accordingly, [Onin] agrees to use its best efforts to insure the safety of all [of Onin's] Personnel, all other persons who may be on the job site or affected by the work performed by [Onin], and any other property on or adjacent to the job site. [Onin] shall comply with, and give all notices required by, the applicable provisions of any federal, state, county, and municipal laws, ordinances, or regulations bearing on the safety of persons or property or their protection from damage, injury, or loss, including but not limited to the applicable requirements of [the Occupational Safety and Health Administration].."

Finally, pursuant to the "Additional Terms and Conditions" section of the TSA Agreement, Onin was required to provide comprehensive general-liability insurance coverage to Nucor in the amount of $2,000,000, with Nucor being named as an additional insured on the general-liability policy. Onin provided the general-liability policy as required by the TSA Agreement. The general-liability policy was issued by Zurich and contained an aggregate limit of $2,000,000 and a per-occurrence limit of $1,000,000. The general-liability policy provided, in part:

> "Name of Additional Insured Person(s) Or Organization(s):
>
> "Any person or organization who you are required to add as an additional insured on this policy under a contract or agreement shall be an insured, but only with respect to that person's or organization's liability arising out of your

> operations as a 'Staffing Service' or premises owned by or rented to you.
>
> "Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:
>
> "A. In the performance of your ongoing operations."

Nucor was named as an additional insured and as a certificate holder under the general-liability policy, as required by the TSA Agreement.

Korey Ryan was a student at Shelton State Community College in 2014. Ryan applied for Nucor's internship program through Shelton State. Ryan was interviewed by Nucor personnel and was accepted into the internship program. Ryan was then referred to Onin to complete the administrative requirements for participating in the internship program. Ryan began his internship with Nucor on August 18, 2014.

Ryan was assigned to the ESAB cutting table at the Nucor facility. The ESAB cutting table is used to cut large plates of steel with a plasma torch. The large steel plates are placed on the cutting table by a 30-ton gantry crane that travels back and forth along a linear floor-rail system

from the center of the Nucor warehouse to a position "straddling" and directly above the cutting table. The plasma torch is cooled by filtered water to prevent it from overheating. If the water filter clogs, the plasma torch will not operate properly. The water filter, with its fittings and pipes, was located on a wall in the Nucor warehouse. The gearbox of the gantry crane is located on the same side of the crane as the wall with the water filter. The gearbox extended 15 1/2 inches from the crane toward the wall with the water filter. The distance between the bottom of the gearbox and the concrete floor was 3 5/8 inches. The space between the gearbox and the wall in the area of the water filter was 27 inches. However, the space between the gearbox and the wall diminished as the crane traveled past the water filter because the filter and its fittings and piping protruded from the wall toward the crane. The gearbox was not visible from the crane operator's station because the gearbox was located on the opposite side of the crane. The crane was equipped with flashing lights and a buzzer that would operate when the crane moved.

Ryan was assigned to work with Ricky Edwards, a Nucor employee, when he began his internship. Edwards trained Ryan and directed his

work on the cutting table. Edwards would operate the gantry crane, moving the steel plates on to and off of the cutting table, while Ryan operated the cutting table.

On October 23, 2014, Ryan was killed while working in the course of his duties at the Nucor facility. On the date of Ryan's death, Ryan and Edwards were tasked with changing out the water filter for the cutting table because the cutting table was experiencing poor water quality. Edwards testified that he told Ryan that a sheet of steel needed to be placed on the cutting table before they changed the water filter. Edwards stated that he directed Ryan to stand in a certain area in front of the water filter so that he would be clear of the moving crane. Edwards testified that he mounted the crane operator's station and picked up the steel plate. Edwards stated that he then looked to his left before moving the crane in the opposite direction to make sure Ryan was standing where he had told him to stand. Edwards testified that he saw the "front of [Ryan's] hat" and "knew that he could move [the crane] because [Ryan] was standing where [they] had talked about." Edwards stated that Ryan was a "very good" employee and that "he did not have any reason not to

trust him to stand where we had talked about." Edwards stated that he then turned his attention back to the load and began moving the crane. Edwards testified that he then heard a yell and stopped the crane. According to Edwards, he left the crane operator's station to check on Ryan and found Ryan unconscious and lying on the concrete floor against a building support beam. The record reflects that Ryan's right work boot was struck by and became caught underneath the gearbox as the crane was moving and that Ryan was dragged by the crane along the concrete floor through the narrow passageway between the crane and the warehouse wall, where he was crushed to death against a building support beam.

Edwards testified that, for Ryan's boot to have become caught underneath the gearbox, Ryan had to have taken a "step out" of the safe area toward to crane because, Edwards said, the "crane is not going to curve over there and get him." However, when asked if the location where Ryan had been asked to stand "was not the best choice," Edwards responded by stating: "[I]t probably wasn't the best place, but it [was] a safe place." Further, Edwards admitted that he had never had a

conversation with Ryan about how the gearbox on the crane protrudes away from the crane and causes a pinch point with the curb.

It is disputed whether Ryan was actually in the process of changing the water filter rather than just standing and waiting on the crane to be moved. An investigative report completed by the Occupational Safety and Health Administration ("OSHA") following the accident indicated that Ryan was changing the water filter at the time of the accident. Additionally, Ryan's mother testified in her deposition taken during the course of a wrongful-death action against Nucor, which is discussed in more detail infra, that she was told by Nucor officials at the hospital following the accident that Ryan was changing the water filter when the accident occurred. An expert witness offered by Ryan's mother in the wrongful-death action testified in her deposition that she did not know whether Ryan had moved into the path of the crane and that she did not have an explanation for how Ryan came into contact with the crane if he had been standing where Edwards claimed Ryan had been standing:

> "Q. [Nucor's counsel] So you don't have any explanation for how it contacted him if he had stayed in that place, correct?

"A. That's correct.

"Q. So would you then conclude that he moved into the path of the crane?

"A. I don't know that. I don't know. I was not there. I don't know that.

"Q. Well, you're an engineer. Do you really think that there's any other explanation than for whatever reason, if he was standing where its shown in Defendant's 12 and given the dimensions shown in your drawing, Defendant's 10, how he could have been contacted if he didn't move into the path of the crane?

"A. I'm not sure that he knew exactly where to stand. I know where they said he was standing to begin with. I'm not sure if he had had enough training to understand that. I'm not sure if he moved or didn't move. So if he didn't truly understand where he was supposed to stand to be out of the way, then the answer to that is I don't know.

"Q. Okay. Wouldn't you conclude from a standpoint of physics as an engineer that if he was standing where he had been told and was stationary and he ended up getting contacted by the crane, he would have to have moved?

"A. There's too many -- there's conflicting information about where he was, what he was doing, and, you know, when you start comparing Ricky Edwards's deposition and you start comparing, you know, the actual OSHA citation, you know, you're looking at situations where they don't mesh what was occurring at the time of the incident."

As noted earlier, OSHA conducted an investigation of the accident. Following the investigation, OSHA cited Nucor for a "serious" safety violation and fined it $7,000. The OSHA investigation found that, in the area where Ryan allegedly was told to stand by Edwards, "the employer did not have adequate passageways or walkways for employees exposed to moving cranes." Onin was not cited by OSHA following the investigation. However, Onin was notified by OSHA of the following:

> "While the extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are jointly responsible for maintaining a safe working environment for temporary workers -- including, for example, ensuring that OSHA's training, hazard communication, and record keeping requirements are fulfilled.
>
> "OSHA could hold both host and temporary employers responsible for the violative condition(s). Temporary staffing agencies and host employers share control over the worker, and are therefore jointly responsible for temporary workers' safety and heath.
>
> "....
>
> "In this case, citations have been issued to Nucor Steel Tuscaloosa, Inc. To ensure that you are fully aware of the hazards to which your employees may be exposed, we are forwarding a copy of the citations to your attention. Please

> review these citations and ensure that steps are taken to protect your employees at the job site."

On March 26, 2015, Ryan's mother, Donna Cam Ryan, commenced a wrongful-death action against Nucor. On April 7, 2015, Nucor notified Onin by letter of the pending litigation and, pursuant to the terms of the TSA Agreement, requested that Onin "indemnify and hold harmless [Nucor] from and all claims asserted against it in the wrongful death complaint."

On June 4, 2015, Zurich issued a letter to Nucor and Onin in which it questioned whether the general-liability policy afforded coverage for the claims asserted in the wrongful-death action. Zurich noted that neither the indemnification provision in the TSA Agreement nor the additional-insured endorsement contained in the policy applied to in instances when the alleged "bodily injury" and/or "property damage" was caused by Nucor's sole wrongful conduct. Zurich noted that the wrongful-death complaint did not contain any allegations of wrongdoing by Onin. However, Zurich noted that, in the April 7, 2015, letter to Onin, Nucor had stated that "Mr. Ryan caused or contributed to the accident at issue" but

had not provided any facts to support that assertion. Zurich stated that, if it was determined that the accident giving rise to the wrongful-death claim had not been caused, in whole or in part, by Onin or Ryan, no coverage would be afforded under the policy. Because Zurich's investigation regarding whether coverage for the wrongful-death claim was afforded under the policy was at a preliminary stage and ongoing, Zurich informed Nucor and Onin that it would provide a defense to Nucor, subject to a full and complete reservation of its rights to deny coverage and to withdraw its defense.

On June 15, 2015, Nucor informed Onin by letter that it disputed Zurich's position that the general-liability policy would afford no coverage if Nucor was liable for Ryan's death, and Nucor reiterated its demand that Onin honor its duty to indemnify Nucor under the terms of the TSA Agreement, regardless of whether Zurich interpreted the policy to afford coverage to Nucor. Nucor also informed Onin that, pursuant to the "Additional Terms and Conditions" section of the TSA Agreement, Onin had been required to have Nucor named as an additional insured with coverage limits of at least $2 million per occurrence and that Zurich had

indicated that the policy Onin had secured naming Nucor as an additional insured had a policy limit of only $1 million per occurrence. Apparently Onin did not respond to the letter.

On September 9, 2016, Zurich formally denied coverage to Nucor, informing Nucor and Onin that the general-liability policy did not afford coverage to Nucor for the claims presented in the wrongful-death action. Zurich offered the following analysis for denying coverage:

> "[N]either Insured Contract nor Additional Insured indemnity is available to Nucor where the alleged 'bodily injury' was caused by Nucor's sole negligent conduct or its wanton conduct. Rather, these coverages apply only in instances where Nucor is legally responsible for damages caused, in whole or in part, by Onin, and then only to the extent of liability arising out of Onin's staffing services.
>
> "The [wrongful-death] Complaint does not allege any wrongdoing by Onin. In her Opposition to Nucor's Motion for Summary Judgment, [Ryan's mother] alleges:
>
> > "1) Nucor and Ricky Edwards are directly responsible for [Ryan's] death;
> >
> > "2) [Ryan] was assigned to Ricky Edwards in the ESAB/gantry crane area;
> >
> > "3) During the second month of [Ryan's] internship, Ricky Edwards told [Ryan] to change the water

filter while Ricky moved a piece of steel to the ESAB table with the crane;

"4) Numerous comments in the OSHA report referred to statements by Nucor individuals that [Ryan] was changing the water filter when the accident occurred;

"5) OSHA cited Nucor for a 'Serious' violation of OSHA regulations because its investigation found that Nucor 'did not have adequate passageways or walkways for employees exposed to moving cranes' in the ESAB area;

"6) Nucor failed to provide proper safeguards and training to [Ryan] in the crane area, especially regarding the pinch points on the gantry crane where the incident occurred;

"7) Nucor failed to correct the design of the gantry crane, which has a seat for the driver of the crane in a place where the driver cannot see what is west of it. Nucor kept this faulty design rather than reverting back to the original pendant controls or designing some other method of allowing the driver to see to the west, such as installing mirrors or cameras in appropriate places;

"8) Nucor conducted no safety analysis of the gantry crane area;

"9) Nucor kept Ricky Edwards on the job despite his blatant, well-documented disregard of safety procedures in the plant; and

> "10) Since [Ryan's] death, Nucor has established a lock out/tag out procedure for the water filter area, fenced and locked the water filter area to minimize traffic there and changed the gantry crane so it can only be operated by a driver walking alongside the crane.

"While Nucor states in its April 7, 2015 letter that 'Mr. Ryan caused or contributed to the accident at issue,' this allegation appears to be based on speculation. One witness testified that he believed Ryan may have lost his balance. In any event, Mr. Ryan's contributory negligence would be a complete bar to liability for the ... negligence claims [asserted in the wrongful-death action]. Thus, to the extent Nucor is found negligent, the jury also would necessarily have found that Mr. Ryan was not contributorily negligent.

"Moreover, under Alabama law, the only damages a jury might award against Nucor are punitive damages to punish it for its own actions, not the actions of Onin. Thus, if the jury renders a verdict against Nucor in the [wrongful-death action], it would be based entirely on Nucor's own negligence or wantonness. The amount of any jury award also would be based solely on the nature and extent of Nucor's negligent and/or wanton misconduct. The jury would be instructed on damages as follows:

> " 'The damages in this case are punitive and not compensatory. Punitive damages are awarded to preserve human life, to punish Nucor for its wrongful conduct, and to deter or discourage it and others from doing the same or similar wrongs in the future.

> " 'The amount of damages must be directly related to Nucor's culpability and by that I mean how bad [its] wrongful conduct was. You do not consider the monetary value of Mr. Ryan's life because the damages are not to compensate [Ryan's] family from a monetary standpoint because of his death.'
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> "(Adapted from Alabama Pattern Jury Instruction - Civil 3rd Edition APJI 11.28.)

"Because any Jury award would necessarily be based solely on Nucor's wrongful conduct, Nucor's liability would not be caused, in whole or in part, by an act or omission of Onin and/or arise out of its staffing operations.

"If Nucor had wanted Onin's duty to indemnify to be triggered by 'death', Nucor could have included language to that effect in the Indemnity Provision. However, it did not do so. Instead, it limited Onin's indemnity obligation to instances where the damages are 'caused in whole or in part by any act or omission of [Onin].'

"[Further], the indemnity owed under the Indemnity Provision is limited to the 'fullest extent allowed by law.' In construing indemnity provisions, the Alabama Supreme Court [in City of Montgomery v. JYD International, Inc., 534 So. 2d 592, 595 (Ala. 1988),] has stated:

> " '[T]he degree of control retained by the indemnitee over the activity or property giving rise to liability is a relevant consideration. This is true because the smaller the degree of control retained by the indemnitee, the more reasonable it is for the indemnitor, who has control, to bear the full

> burden of responsibility for injuries that occur in that area.'
>
> "The evidence to date demonstrates that Nucor exercised exclusive control over the activity or area where the accident occurred. As such, under the circumstances of this case, the Indemnity Provision is against Alabama public policy and unenforceable.
>
> "Finally, Alabama law does not permit indemnity for wanton conduct or punitive damages."

On September 27, 2016, Nucor's defense counsel updated Zurich on the ongoing litigation in the wrongful-death action, including settlement negotiations, and requested additional settlement authority. On that same day, Zurich responded by stating that on September 9, 2016, it had denied any duty to defend or to provide coverage for Nucor in the wrongful-death action and that, therefore, it would not fund any settlement offers.

By letter to Onin and Zurich on October 10, 2016, Nucor again disputed the grounds on which Zurich had denied coverage and requested that Onin honor the indemnification provision contained in the TSA Agreement. Onin did not respond to that request.

On November 30, 2016, Nucor informed Onin by letter and by e-mail that mediation of the wrongful-death action had been scheduled and requested that Onin appear and participate in the mediation. On December 12, 2016, the day before the scheduled mediation was to take place, Onin responded to Nucor's request for indemnification by adopting Zurich's analysis as to why the duty to indemnify Nucor under the indemnification provision of the TSA Agreement was not triggered and stating that it would not attend the scheduled mediation. On December 15, 2016, Nucor responded to Onin's letter of December 12, disputing Onin's basis for refusing to indemnify it but also offering to accept Onin's participation in ongoing negotiations and mediation of the wrongful-death action. Onin did not respond to that communication.

On December 27, 2016, Nucor settled the wrongful-death action for a confidential amount during mediation. Onin did not participate in the mediation process.

On March 27, 2017, Nucor sued Onin and Zurich based on their refusal to indemnify Nucor for the settlement of the wrongful-death action, asserting claims of breach of contract, bad-faith failure to pay an

insurance claim, negligence and wantonness, tortious interference with a contractual relationship, and unjust enrichment. On May 24 and August 16, 2018, Nucor moved the trial court for a partial summary judgment as to the breach-of-contract claims asserted against Onin and Zurich. Also on August 16, 2018, Onin and Zurich moved the trial court for a summary judgment as to all the claims asserted against them by Nucor. Following a hearing, the trial court, on March 1, 2020, entered a summary judgment in favor of Onin and Zurich as to all the claims asserted against them by Nucor and denied Nucor's partial-summary-judgment motion as to its breach-of-contract claims against Onin and Zurich. This appeal followed.

Standard of Review

This Court's standard of review relative to a summary judgment is as follows:

> "'"'This Court's review of a summary judgment [or the denial of a summary-judgment motion] is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no

> genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989).' "

" 'Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004)).'

"Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

> " ' "In order to overcome a defendant's properly supported summary-judgment motion, the

> plaintiff bears the burden of presenting substantial evidence as to each disputed element of [its] claim." Ex parte Harold L. Martin Distrib. Co., 769 So. 2d 313, 314 (Ala. 2000).'
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> "White Sands Grp., L.L.C. v. PRS II, LLC, 32 So. 3d 5, 11 (Ala. 2009)."

Laurel v. Prince, 154 So. 3d 95, 97-98 (Ala. 2014).

Discussion

I. Breach-of-Contract Claims

A. Indemnification Provision

Nucor argues that Onin breached its contractual obligation under the terms of the TSA Agreement to indemnify it for the settlement of the wrongful-death action. Specifically, Nucor argues that the indemnification provision of the TSA Agreement was triggered because Ryan was Onin's employee, Ryan's work at the Nucor facility was performed pursuant to the terms of the TSA Agreement, and Ryan's movement into the path of the crane was an act that caused or contributed to the accident regardless of any negligent act on part of Nucor or its employee, Edwards.

This Court has stated:

" 'The Alabama Supreme Court has decided that indemnity agreements between private parties are valid where "the parties knowingly, evenhandedly, and for valid consideration, intelligently enter into an agreement whereby one party agrees to indemnify the other, including indemnity against the indemnitee's own wrongs, if expressed in clear and unequivocal language." Industrial Tile, Inc. v. Stewart, 388 So. 2d 171, 176 (Ala.1980). Nevertheless, the Alabama Supreme Court subsequently clarified how strictly the " 'clear and unequivocal language' " of the indemnity agreement is to be construed. Brown Mech. Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932, 945 (Ala.1983) (quoting Industrial Tile, 388 So. 2d at 176). "Agreements by which one party agrees to indemnify another for the consequences of the other's acts or omissions are carefully scrutinized," and such an agreement "is enforceable only if the indemnity provisions are unambiguous and unequivocal." City of Montgomery v. JYD Int'l, Inc., 534 So. 2d 592, 594 (Ala.1988).

" 'In Brown, the Alabama Supreme Court instructed that three factors are to be considered by a court interpreting an indemnity agreement: (1) "contractual language," (2) "identity of the draftsman of the language," and (3) "the indemnitee's retention of control." Brown, 431 So. 2d at 946. While particular language in the indemnity agreement is not required, the requisite intent of the parties must be clear. See id. at 945. Ambiguous language in an indemnity agreement is construed against the drafter. See id. at 946. Finally, we must consider "the degree of control retained by the indemnitee over the activity or property giving rise to liability." Brown, 431 So. 2d at 946; see City of Montgomery, 534 So. 2d at 595 ("The more control the indemnitee retains over the area, the less reasonable it is for the indemnitor to bear the responsibility for injuries that occur in that area.").' "

Royal Ins. Co. of America v. Whitaker Contracting Corp., 824 So. 2d 747, 750-51 (Ala. 2002) (quoting Royal Ins. Co. of America v. Whitaker Contracting Corp., 242 F.3d 1035, 1041-42 (11th Cir. 2001)). An important factor in determining the enforceability of an indemnification provision is the "degree of control retained by the indemnitee over the activity or property giving rise to liability." Brown Mech. Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932, 946 (Ala. 1983). See also Georgia, Florida, Alabama Transp. Co. v. Deaton, Inc., 293 Ala. 371, 304 So. 2d 168 (1974) (determining that the lessee of a cargo trailer would be required to defend and indemnify the owner and lessor of the trailer against a personal-injury action when the lessee of the trailer had "full and complete control" of the trailer and, under the lease agreement, the lessor had no right to control the work of any employee of the lessee handling the trailer).

In City of Montgomery v. JYD International, Inc., 534 So. 2d 592, 594 (Ala.1988), the plaintiff was employed by JYD International, Inc., a tenant of the Montgomery Civic Center, as a temporary cash-register operator. JYD, a merchandiser of oriental rugs, was occupying certain

space in the civic center under a lease that contained an indemnity clause. JYD had leased the "River Room," and the plaintiff was to perform her duties there. On the day of the accident giving rise to the action, the plaintiff entered the civic center from the service entrance at the rear of the civic center rather than from one of the two primary entrances. The plaintiff took a "short-cut" through the grand ballroom and, while crossing the ballroom, slipped on an oily substance that was on the floor. The plaintiff fell and fractured her arm.

The plaintiff sued both the City of Montgomery ("the City") and JYD, asserting claims of negligence and wantonness for failing to remedy a hazard on the floor of the civic center. The City cross-claimed against JYD, demanding indemnification pursuant to the indemnity clause contained in the lease agreement for any damages for which the City would be held responsible as a result of the plaintiff's injuries. The trial court entered a summary judgment in favor of JYD on the plaintiff's claim against it. The plaintiff's claim against the City was settled and dismissed. Following the settlement, both the City and JYD moved for a

summary judgment on the cross-claim. The trial court entered a summary judgment in favor of JYD, denying the City's indemnification claim.

In affirming the denial of the indemnification claim, this Court stated the following:

> "Assuming, without deciding, that the language employed unequivocally and unambiguously expressed the intent to indemnify [the City] against its own negligence, we are still confronted with the question of whether as a matter of public policy such a contract can be enforced with respect to injuries that occur outside of the immediate area of the leased premises.
>
> "In Brown Mechanical Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932 (Ala. 1983), we noted that the degree of control retained by the indemnitee over the activity or property giving rise to liability is a relevant consideration. This is true because the smaller the degree of control retained by the indemnitee, the more reasonable it is for the indemnitor, who has control, to bear the full burden of responsibility for injuries that occur in that area. However, the opposite is also true: The more control the indemnitee retains over the area, the less reasonable it is for the indemnitor to bear the responsibility for injuries that occur in that area. In this case, the mishap took place in an area not within the actual leased area and, for all that appears from the record, an area in which the lessee (the indemnitor) had no right of control. To allow the indemnitee to transfer financial responsibility to the indemnitor under such circumstances would be totally at odds with the tort system's incentives to encourage safety measures. See Industrial Tile, Inc. [v. Stewart, 388 So. 2d 171, 176 (Ala.1980)] (Jones, J., dissenting).

> Any argument that the agreement simply shifts the burden to the indemnitor to take such measures is untenable if the indemnitor has no right to exercise control over the potentially hazardous area or activity."

JYD Int'l, 534 So. 2d at 595.

Relying upon the decision in JYD International, both Onin and Zurich argued to the trial court in support of their motions for a summary judgment that, because Nucor had exercised exclusive control over all aspects of Ryan's work at its facility, the indemnification provision contained in the TSA Agreement that Nucor seeks to enforce is void as a matter of public policy. The trial court relied upon the decision in JYD International in entering a summary judgment in favor of Onin and Zurich on the breach-of-contract claims.

In support of their motions for a summary judgment on the breach-of-contract claims, Onin and Zurich submitted Nucor's own statement of undisputed facts presented in its motion for a summary judgment in the wrongful-death action, as well as the deposition and affidavit testimony adduced in the wrongful-death action upon which that statement of undisputed facts was based. That evidence establishes that Onin provided

strictly administrative services to Nucor and that Nucor exercised complete operational control over its facility and the work performed by Ryan. The evidence can be summarized as follows: Ryan was interviewed and selected by Nucor; following Ryan's interview, he was drug tested by Nucor; when Ryan passed the drug test, he was hired by Nucor, who then referred Ryan to Onin; Ryan was paid by Onin, which also withheld taxes and provided workers' compensation insurance; Nucor provided Ryan with a "new hire" orientation, all safety and employee training, and personal protection equipment; Ryan signed an agreement to follow Nucor's code of professional conduct; Ryan was also provided a Nucor "Team Member Handbook" that he signed, acknowledging that he was a "Nucor Team Member"; Nucor performed all new-employee screening, such as providing hearing and medical exams; Nucor conducted all performance evaluations for the interns; and, finally, Nucor possessed the authority to determine whether to terminate an internship.

Onin did not have any supervisory employees on site at the Nucor facility, and no Onin employees supervised Ryan's work while he was at the Nucor facility. Janet Hernandez, Onin's branch manager in

Tuscaloosa, was completely unaware of Ryan's duties. Hernandez stated to the OSHA investigators during its investigation that she had been to the Nucor facility "but not in the plant work areas. I thought interns did mostly administrative [work] than actual work in the plant." Onin did not have any control over the work performed by Ryan or the way in which Ryan performed the work at the Nucor facility. Ryan's training and work was supervised and controlled exclusively by other "Nucor Team Members." Finally, the record is devoid of any evidence whatsoever indicating that Onin had any control over any portion of the Nucor facility itself, specifically the area of the facility in which Ryan worked and was killed.

As Justice Shaw notes in his special writing, Nucor contends that Onin shared control over certain aspects of its employees' safety and training under the TSA Agreement. The TSA Agreement required Onin to be "solely" responsible for ensuring that its personnel were educated in Nucor's policies. The TSA Agreement also provided that Onin agreed "to use its best efforts to insure the safety of all [of Onin's] Personnel, all other persons who may be on the job site or affected by the work

performed by Onin, and any other property on or adjacent to the job site." Further, Nucor references the letter from OSHA to Onin regarding its investigation of the accident, which states that staffing agencies are jointly responsible for maintaining a safe working environment for temporary employees. Nucor additionally points to evidence in the record indicating that Onin failed to exercise its right of control, particularly the fact that Onin's Tuscaloosa branch manager never visited the work areas of Nucor's facility because the manager believed that the interns performed mostly administrative work. Based on these arguments, Justice Shaw concludes that, under the TSA Agreement, Nucor did not "retain" exclusive "control" over Ryan's safety or training; rather, he concludes, the TSA Agreement explicitly reserved for Onin authority over Ryan's training and safety that it failed and/or did not attempt to exercise, which left Nucor as the only party actually exercising control over Ryan's work safety and training.

Although the TSA Agreement provided that Onin would be "solely" responsible for ensuring that its personnel were educated in Nucor's policies and also obligated Onin "to use its best efforts to insure the safety

of all [of Onin's] Personnel," the actual course of dealing between Onin and Nucor under the TSA Agreement was much different. This Court has held that

> " 'course of dealing' is defined as 'a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.' Ala. Code 1975, § 7-1-205(1). A course of dealing is 'relevant not only to the interpretation of express contract terms, but may [itself] constitute contract terms.' James J. White & Robert S. Summers, Handbook of the Law Under the Uniform Commercial Code § 3-3, at 98 (2d ed.1980). Indeed, it 'may not only supplement or qualify express terms, but in appropriate circumstances, may even override express terms.' Id."

Marshall Durbin Farms, Inc. v. Fuller, 794 So. 2d 320, 325 (Ala. 2000). The evidence clearly establishes that, despite the fact that the TSA Agreement obligated Onin to ensure that its personnel were educated on Nucor's policies and "to use its best efforts to insure the safety of all [of Onin's] Personnel," the parties acquiesced to an actual course of dealing that left Onin performing strictly administrative duties, such as payroll services, and left Nucor performing all employee supervision and training, including safety training. As stated above, Ryan was interviewed and

hired by Nucor. Nucor conducted Ryan's new-employee orientation and provided all employee training, including safety training. Nucor provided Ryan with its "Team Member Handbook," which he signed.

In addition, Nucor also controlled every aspect of the work performed by Ryan. Both Ryan's training and the work he performed was supervised and controlled exclusively by Nucor. Onin did not have any supervisory employees at the Nucor facility, and no Onin employees supervised Ryan's work while he was at the Nucor facility. Onin's Tuscaloosa branch manager was unaware of Ryan's work duties. Although the branch manager had been to the Nucor facility, she had not been in the plant work areas. Nucor had total and exclusive control of its facility, including the area of the facility in which Ryan was killed.

Nothing in the record before this Court indicates that Nucor precluded or prevented Onin from exercising its obligations under the TSA Agreement regarding the training of its personnel on Nucor policies and its duty to ensure the safety of its personnel. There is nothing in the record that indicates that Onin raised an objection to its allegedly being prevented or precluded from performing its obligations under the TSA

Agreement. However, there is also nothing in the record indicating that Nucor objected to Onin's failure to perform its obligations under the TSA Agreement, its failure to maintain a supervisory presence at the Nucor facility, and its failure to exercise any supervisory role in Ryan's employment. The failure of either party to object to the other's conduct, or lack thereof, gives rise to the inference that both parties acquiesced to their course of dealing under the TSA Agreement, whereby Onin performed strictly administrative functions and Nucor performed all supervisory functions, including training Ryan, providing Ryan's safety training, and exclusively controlling Ryan's work. It would be patently unfair to require Onin and Zurich to bear the burden under the indemnification provision contained in the TSA Agreement when the parties' course of dealing under the agreement did not allow for Onin to exercise any right of control over the hazardous activity that led to Ryan's death. See JYD Int'l, 534 So. 2d at 595.

Nucor also points to the letter from OSHA to Onin regarding the accident investigation to support its contention that Onin shared in the responsibility of maintaining a safe working environment for Ryan at the

Nucor facility. As noted earlier, the letter from OSHA to Onin states, in part:

> "While the extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are jointly responsible for maintaining a safe working environment for temporary workers -- including, for example, ensuring that OSHA's training, hazard communication, and record keeping requirements are fulfilled.
>
> "OSHA could hold both host and temporary employers responsible for the violative condition(s). Temporary staffing agencies and host employers share control over the worker, and are therefore jointly responsible for temporary workers' safety and health.
>
> "....
>
> "In this case, citations have been issued to Nucor Steel Tuscaloosa, Inc. To ensure that you are fully aware of the hazards to which your employees may be exposed, we are forwarding a copy of the citations to your attention. Please review these citations and ensure that steps are taken to protect your employees at that job site."

We note initially that Onin was neither cited nor fined by OSHA in regard to the accident in which Ryan was killed. Further, although the letter states that staffing agencies and host employers are jointly responsible for maintaining a safe working environment for temporary

workers, the letter qualifies the extent of that responsibility by expressly stating that it is "dependent on the specific facts of each case." As explained in detail above, the facts of this case show that Onin's role in Ryan's employment was strictly administrative and that Onin exercised no actual control over Ryan's training or the work he performed, and, importantly, Onin exercised no control over the area of the Nucor facility where the accident that resulted in Ryan's death occurred. Rather, the exact opposite is true -- Nucor exercised exclusive supervisory control over every aspect of Ryan's employment -- from his training to the work he performed and the manner in which he performed the work. Nucor retained exclusive control over its facility, including the area where Ryan's accident occurred. Additionally, this Court questions the reasonableness of imposing upon Onin, a staffing agency not in the business of producing steel, the responsibilities of ensuring Ryan's safety by requiring its representatives to train Ryan on the safety standards and procedures common to the steel industry; of entering a steel-producing mill and inspecting the facility for safety hazards; or of exercising some control over the employee's work, the manner in which the work is performed, or the

area in which the work is performed. It would appear from the record before us that Onin would be wholly unqualified to perform such complicated tasks to a level of acceptable standards common to the steel industry.

In this case, the indemnification provision required Onin to indemnify Nucor from losses resulting from work performed under the TSA Agreement, provided any loss was "caused in whole or in part by any act or omission of Onin." (Emphasis added.) The undisputed facts establish that Onin's role in Ryan's employment was strictly administrative and that Nucor exercised exclusive control over Ryan's employment and its facility, including the area where the accident occurred. Accordingly, because Onin's role in Ryan's employment was strictly administrative in nature while Nucor exercised complete control over all aspects of Ryan's work, including his training and the area in which he performed his work, we find that the indemnification provision contained in the TSA Agreement is inapplicable in this case, and is unenforceable against Onin. Brown Mech. Contractors, 431 So. 2d at 946.

B. Additional-Insured Endorsement

Nucor argues that it qualifies as an "additional insured" under the general-liability policy and that the trial court erred in entering a summary judgment in favor of Zurich on Nucor's claim alleging breach of the additional-insured endorsement. Because we have determined that Onin is not required to indemnify Nucor pursuant to the indemnification provision in the TSA Agreement because that provision violates public policy and is, therefore, void, we need not determine whether Nucor is entitled to coverage under the additional-insured endorsement of the policy. See Pacific Life Ins. Co. v. Liberty Mut. Ins. Co., (No. Civ. A. 203 CV838-A, July 28, 2005) (M.D. Ala. 2005) (not reported in Federal Supplement) (quoting Chubb Ins. Co. of Canada v. Mid-Continent Cas. Co., 982 F. Supp. 435, 438 (S.D. Miss. 1997) (determining that indemnity agreement controls regardless of clauses in an insurance policy because "[a] contrary conclusion 'would render the indemnity contract between the insureds completely ineffectual and would obviously not be a correct result, for it is the parties' rights and liabilities to each other which determine the insurance coverage; the insurance coverage does not define

the parties' rights and liabilities one to the other' "). Accordingly, we affirm the summary judgment entered in favor of Zurich on Nucor's breach-of-contract claim relating to the additional-insured endorsement.

II. Bad-Faith Claim

Nucor asserted a bad-faith claim against Zurich arising out of Zurich's denial of coverage for the claim asserted in the wrongful-death action. Nucor argues that the trial court erred in entering a summary judgment in favor of Zurich on its bad-faith claim. In order to prevail on a bad-fath claim, the following elements must be established:

> " '(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> " '(b) an intentional refusal to pay the insured's claim;
>
> " '(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> " '(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> " '(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.' "

Crook v. Allstate Indem. Co., [Ms. 1180996, June 26, 2020] __ So. 3d __, __ (Ala. 2020) (quoting National Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982)). Additionally,

> "the tort of bad faith requires proof of the third element, absence of legitimate reason for denial: 'Of course, if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith.'[Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916, 924 (Ala. 1981) (emphasis added). As we held in Weaver [v. Allstate Insurance Co., 574 So. 2d 771 (Ala. 1990)], where the '[insurer's] investigation established a legitimate or arguable reason for refusing to pay [the insured]'s claim, [that] is all that is required.' 574 So. 2d at 774. See also Bowers v. State Farm Mut. Auto. Ins. Co., 460 So. 2d 1288, 1290 (Ala. 1984) ('[W]here a legitimate dispute exists as to liability, ... a tort action for bad faith refusal to pay a contractual claim will not lie.')."

State Farm Fire & Cas. Co. v. Brechbill, 144 So. 3d 248, 258 (Ala. 2013).

Zurich provided Nucor with a defense and monitored the wrongful-death action as it was being litigated. On September 9, 2016, Zurich formally notified Nucor that it was denying coverage for the wrongful-death claim, basing its denial on several stated reasons, including that the indemnification provision violated public policy and was, therefore, void because the evidence demonstrated that Nucor had exercised exclusive

control over the activity being performed by Ryan and the area where the accident occurred. As discussed above, this Court agrees that the indemnification provision contained in the TSA Agreement violates public policy and is, therefore, void because the evidence established that Nucor had exercised exclusive control over Ryan's work activity and the area of the Nucor facility where the accident occurred. Thus, Zurich in fact had a legitimate reason for denying Nucor coverage. Accordingly, the trial court did not err in entering a summary judgment in favor of Zurich on Nucor's bad-faith claim.

III. Negligence and Wantonness Claims

Nucor argues that the trial court erred in entering a summary judgment on its negligence and wantonness claims asserted against Onin and Zurich. Nucor alleged in its complaint that Onin negligently, recklessly, and/or wantonly performed its work under the TSA Agreement; failed to indemnify it under the terms of the TSA Agreement; and failed to procure liability insurance as required under the TSA Agreement. Nucor alleged that Zurich negligently, recklessly, and/or wantonly failed to provide it insurance coverage.

The "mere failure to perform a contractual obligation is not a tort, and it furnishes no foundation for an action on the case." C & C Prods., Inc. v. Premier Indus. Corp., 290 Ala. 179, 186, 275 So. 2d 124, 130 (1974). See also Gustin v. Vulcan Termite & Pest Control, Inc., [Ms. 1190255, Oct. 30, 2020] ___ So. 3d ___, ___ (Ala. 2020). "Failed expectations as to performance of a contract usually result only in a remedy for breach of contract." Exxon Mobil Corp. v. Alabama Dep't of Conservation & Nat. Res., 986 So. 2d 1093, 1130 (Ala. 2007)(Lyons, J., concurring in part and concurring in the result).

> "There is, in Alabama, no tort liability for nonfeasance for failing to do what one has promised to do in the absence of a duty to act apart from the promise made. On the other hand, misfeasance, or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things. See C & C Products, Inc. v. Premier Industrial Corp., 290 Ala. 179, 186, 275 So. 2d 124 (1972); and Garig v. East End Memorial Hospital, 279 Ala. 118, 182 So. 2d 852 (1966)."

Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107, 114 (Ala. 1985).

Nucor argues on appeal that the admission by Hernandez, Onin's Tuscaloosa branch manager that she had never visited the area of the

facility where Ryan was engaged in work constitutes exactly the type of negligent performance of Onin's contractual duties that would give rise to tort liability. Nucor contends that Hernandez failed to perform an alleged duty under the TSA Agreement -- namely, to inspect Ryan's work and the area of the Nucor facility where Ryan performed his work. The alleged failure to perform a duty to inspect does not amount to "affirmative conduct in the performance of a promise" under a contract. Morgan, 466 So. 2d at 114 (emphasis added). Misfeasance giving rise to tort liability under a contract requires the negligent doing of some act. Id. The alleged failure to perform an inspection is merely an omission or a failure to perform a promise under the TSA Agreement and does not give rise to extracontractual liability on the part of Onin.

Nucor next argues that, in addition to its contractual obligations, Onin owed it a duty of good faith and fair dealing that it breached by refusing to respond to Nucor's repeated requests for indemnification once the wrongful-death action was commenced. Nucor contends that the record establishes a "total abdication" on the part of Onin of its duty to indemnify that rises to the level of negligence or worse. Again, like the

alleged duty to inspect, the failure to indemnify Nucor does not constitute "affirmative conduct in the performance of a promise" under the TSA Agreement. The failure to indemnify is not an affirmative act but is merely an omission or a failure to perform some act under the TSA Agreement and does not give rise to extracontractual liability on the part of Onin. Further, with respect to Nucor's contention that Onin's refusal to indemnify it was negligent or a breach of the duty of good faith and fair dealing, such refusal does not give rise to extracontractual liability on the part of Onin because this Court, as discussed above, has determined that the indemnification provision contained in the TSA Agreement violates public policy and is, therefore, void. In the absence of a valid duty to provide indemnification in accordance with the TSA Agreement, Onin's refusal to do so cannot be negligent or wanton.

Nucor next argues that an insurer owes a duty to act honestly and in good faith in dealing with its insured and that that duty includes the a duty to use ordinary care and prudence when evaluating and acting upon settlement opportunities. See Carrier Express, Inc. v. Home Indem. Co., 860 F. Supp. 1465, 1478-79 (N.D. Ala. 1994). Nucor contends that

Zurich negligently and/or wantonly breached this duty of good faith in dealing with it when it rescinded its authority to settle the wrongful-death action and based on the alleged "dishonesty of its evaluation of [Nucor's] defenses in the [underlying wrongful-death] [l]itigation]." This claim rests solely on Zurich's alleged failure to provide insurance coverage to pay for the settlement of the wrongful-death action and is merely a restatement of Nucor's breach-of-contract claim against Zurich, which we have previously determined fails.

Based on the foregoing, we conclude that the trial court properly entered a summary judgment in favor of Onin and Zurich on Nucor's negligence and wantonness claims.

IV. Tortious-Interference-with-a-Contractual-Relationship Claims

Nucor argues that the trial court erred in entering a summary judgment in favor of Onin and Zurich on its tortious-interference claims. Nucor alleged in its complaint that both Onin and Zurich had intentionally acted in a way with each other that caused a breach of each other's contractual duties. In order to prevail on a claim of tortious interference, a plaintiff must establish: "(1) the existence of a protectible

business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage." White Sands Grp., L.L.C. v. PRS II, LLC, 32 So. 3d 5, 14 (Ala. 2009). " 'After proving the existence of a contract, it is essential to a claim of tortious interference with contractual relations that the plaintiff establish that the defendant is a "third party," i.e., a "stranger" to the contract with which the defendant allegedly interfered.' " BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So. 2d 203, 212 (Ala. 2001) (quoting Atlanta Mkt. Ctr. Mgmt. Co. v. McLane, 269 Ga. 604, 608, 503 S.E.2d 278, 282 (1998)). "This is so, because 'a party to a contract cannot, as a matter of law, be liable for tortious interference with the contract.' " BellSouth, 814 So. 2d at 212 (quoting Lolley v. Howell, 504 So. 2d 253, 255 (Ala.1987)). In Waddell & Reed, Inc. v. United Investors Life Insurance Co., 875 So. 2d 1143, 1157 (Ala. 2003), this Court stated:

> "One cannot be guilty of interference with a contract even if one is not a party to the contract so long as one is a participant in a business relationship arising from interwoven contractual arrangements that include the contract. In such an instance, the participant is not a stranger to the business relationship and the interwoven contractual arrangements define the participant's rights and duties with respect to the other

> individuals or entities in the relationship. If a participant has a legitimate economic interest in and a legitimate relationship to the contract, then the participant enjoys a privilege of becoming involved without being accused of interfering with the contract."

Here, Onin and Nucor entered into the TSA Agreement that contained the indemnification provision requiring Onin to indemnify Nucor under certain circumstances. The "Additional Terms and Conditions" section of the TSA Agreement also required Onin to provide comprehensive general-liability insurance coverage to Nucor and to name Nucor as an additional insured on the general-liability policy. To satisfy its obligation under the TSA Agreement to provide general-liability insurance, Onin procured a general-liability policy issued by Zurich, which named Nucor as an additional insured. Without the existence of the TSA Agreement between Nucor and Onin, Nucor would have no potential claim upon the general-liability policy between Onin and Zurich. Because any contractual obligations between Nucor, Onin, and Zurich all arise from these interwoven contractual arrangements, neither Onin nor Zurich can be described as a stranger to the contractual or business relationship the other shares with Nucor. Accordingly, we conclude that the trial court

properly entered a summary judgment in favor of Onin and Zurich on the tortious-interference claims.

V. Unjust-Enrichment Claims

Last, Nucor argues that the trial court erred in entering a summary judgment in favor of Onin and Zurich on its claims asserting unjust enrichment. Specifically, Nucor contends that it paid in good faith sums of money for indemnification and insurance coverage that it was denied and did not receive. To prevail on a claim of unjust enrichment, the plaintiff must show that the " 'defendant holds money which, in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid to defendant because of mistake or fraud.' " Dickinson v. Cosmos Broad. Co., 782 So. 2d 260, 266 (Ala. 2000) (quoting Hancock-Hazlett Gen. Constr. Co. v. Trane Co., 499 So. 2d 1385, 1387 (Ala.1986)). "The doctrine of unjust enrichment is an old equitable remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another." Battles v. Atchison, 545 So. 2d 814, 815 (Ala. Civ. App. 1989).

We note that Zurich did initially provide Nucor with a defense to the wrongful-death action pursuant to the terms of the additional-insured endorsement to the general-liability policy. Further, Nucor's argument for equitable relief erroneously equates its requests for indemnification and the payment of an insurance benefit with an entitlement to indemnification and payment of an insurance benefit. Again, as discussed above, the particular facts and circumstances underlying the wrongful-death action did not trigger the indemnification provision and the payment of an insurance benefit; rather, the facts and circumstances voided the indemnification provision altogether. The failure of the particular facts and circumstances to trigger the indemnification provision and the payment of the insurance benefit does not render inequitable Onin's or Zurich's receipt of money under the TSA Agreement or the general-liability policy. " 'In the absence of mistake or misreliance by the donor, or wrongful conduct by the recipient, the recipient may have been enriched, but he is not deemed to have been unjustly enriched. See Restatement of Restitution: Quasi Contracts and Constructive Trusts § 2 at 16 [(1937)]. See generally F. Woodward, The Law of Quasi Contracts

(1913).' " Carroll v. LJC Defense Contracting, Inc., 24 So. 3d 448, 459 (Ala. Civ. App. 2009) (quoting Jordan v. Mitchell, 705 So. 2d 453, 458 (Ala. Civ. App. 1997)).

Because we have determined that Onin and Zurich were not unjustly enriched, the trial court was correct in entering a summary judgment on Nucor's claims seeking equitable relief based on a theory of unjust enrichment.

Conclusion

We conclude that the trial court properly entered a summary judgment on each claim asserted by Nucor and that the summary judgment is due to be affirmed.

AFFIRMED.

Wise, Sellers, and Stewart, JJ., concur.

Mendheim, J., concurs in the result.

Parker, C.J., concurs in part, concurs in the result in part, and dissents in part.

Shaw and Bryan, JJ., concur in the result in part and dissent in part.

Mitchell, J., recuses himself.

PARKER, Chief Justice (concurring in part, concurring in the result in part, and dissenting in part).

I dissent from the main opinion's "Discussion" section Parts I and V (breach-of-contract and unjust-enrichment claims) because I agree with Justice Shaw's analysis regarding why the indemnification provision in the "Temporary Services Agency Agreement" ("the TSA Agreement") did not violate public policy. Further, like Justice Shaw, I question the correctness of City of Montgomery v. JYD International, Inc., 534 So. 2d 592 (Ala. 1988), although for a different reason. I am not persuaded that JYD is wrong merely because an indemnification provision does not affect an indemnitee's safety incentives as to activities that are not within the scope of the provision. JYD's rationale necessarily focused on how an indemnification provision may affect the indemnitee's incentives as to activities that are within the scope of the provision. And the fact that a particular indemnitee might not have consciously based its safety decisions on its indemnity rights does not undermine the rationale of JYD, which was based on systemic economic incentives that do not depend on any individual's consciousness of indemnity.

I believe that there is a more fundamental reason to question JYD: by holding that these indemnification provisions violate public policy, JYD substitutes judges' allocation of economic risks and resulting safety incentives (via tort law) for the parties' own allocation (via contract law). In essence, JYD says, "We judges like the way tort law allocates incentives, and we're not going to let parties, even in arm's-length and nonadhesion contracts, opt out by reallocating those incentives among themselves." In my view, that perspective fails to give sufficient weight to principles of freedom of contract. These principles generally allow parties to shift tort-based risk by mutual consent. So we ought to rethink JYD, given an appropriate case and appropriate argument.

In addition, I disagree with the main opinion's rationale that the indemnification provision was unenforceable under JYD because the duty of Onin Staffing, LLC ("Onin"), to control Korey Ryan was eliminated or waived by the parties' "course of dealing." [1] As Justice Shaw alludes to,

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[1]By "course of dealing," the main opinion seems to mean the parties' conduct under the contract at issue (the TSA Agreement). But the commonly accepted term for that concept is "course of performance." See Black's Law Dictionary 444 (11th ed. 2019) (defining "course of

summary-judgment movants Onin and Zurich American Insurance Company have not argued, below or here, that the parties' course of conduct eliminated or waived Onin's contractual duty to control Ryan. Thus, by affirming on the basis of this rationale, the main opinion disregards the due-process rights of Nucor Steel Tuscaloosa, Inc. See Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003).

Further, the main opinion's "question[ing]" of the "reasonableness" of the TSA Agreement's requirement that Onin, as a staffing agency,

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performance" as "[a] sequence of previous performance by either party after an agreement has been entered into, when a contract involves repeated occasions for performance and both parties know the nature of the performance and have an opportunity to object to it" (emphasis added)); see, e.g., Progressive Emu, Inc. v. Nutrition & Fitness, Inc. (No. 2:12-CV-01079-WMA June 7, 2013) (N.D. Ala. 2013) (not reported in Federal Supplement) (" 'course of performance,' that is, the parties' conduct pertinent to the contract term in question"). "Course of dealing," on the other hand, generally refers to the parties' conduct in other transactions before or besides the contract at issue. See Black's Law Dictionary 444 (defining "course of dealing" as "[a]n established pattern of conduct between parties in a series of transactions (e.g., multiple sales of goods over a period of years)" (emphasis added)); Ex parte Coussement, 412 So. 2d 783, 786 (Ala. 1982) ("A course of dealing is shown through prior transactions of the parties.").

exercise control over Ryan's safety, ___ So. 3d at ___, is beside the point. Parties are free to contractually assume responsibilities that they cannot adequately perform; it is not the role of courts to rescue parties from bad bargains. Regardless of what we may think of the "reasonableness" of the duty that Onin took upon itself, judges in contract cases are not free to act as roving fairness police.

I concur in the result as to the main opinion's "Discussion" section Part II (bad-faith claim) because the insurance company's public-policy argument, while incorrect in my view, did not equate to bad faith. I concur in the result as to Part III (negligence and wantonness claims) because, as the main opinion states, failure to perform a contractual duty is not a tort. And I concur in Part IV (tortious-interference claims).

SHAW, Justice (concurring in the result in part and dissenting in part).

I disagree that the indemnification provision at issue in this case is unenforceable because it violates public policy; therefore, to the extent that the main opinion holds otherwise, I respectfully dissent.

In a contract called the "TSA Agreement," Onin Staffing, LLC ("Onin"), agreed, among other things, to provide interns to work in a facility operated by Nucor Steel Tuscaloosa, Inc. ("Nucor"). The TSA Agreement contained an indemnification provision. Boiled down to its essence, it stated that Onin would defend Nucor from and indemnify Nucor for all "damages" related to the work performed under the TSA Agreement, provided that those damages were caused in whole or in part by any act of Onin or Onin's personnel and regardless of whether any such damages were also caused in part by Nucor. In this context, "damages" under the indemnification provision would include damages arising from a lawsuit against Nucor. Zurich American Insurance Company ("Zurich") issued an insurance policy to Onin naming Nucor as an additional insured.

Korey Ryan, who was employed by Onin, worked as an intern at Nucor's facility. He was killed in an accident while working at Nucor's facility. A wrongful-death action was commenced against Nucor by the representative of Ryan's estate. Nucor demanded that Onin defend Nucor in the suit, and indemnify Nucor for any resulting damages, and that Zurich provide insurance coverage. Ultimately, Onin and Zurich both refused. The wrongful-death action was settled, and Nucor commenced a separate lawsuit against Onin and Zurich. The trial court entered a summary judgment in favor of Onin and Zurich, and Nucor appeals.

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence

> is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Nucor presented substantial evidence that, when viewed in the light most favorable to Nucor, tended to show that Ryan contributed to the injuries that caused his death; specifically, testimony by Ryan's coworker indicated that Ryan had been told to stand in a particular area where, if he had remained there, he would not have been injured in the accident. For the accident to have occurred, Ryan would have had to have violated that instruction. Nucor alleges that because Ryan's actions, as an employee of Onin, purportedly caused the resulting "damages," at least in part,[2] the indemnification provision was triggered. Nucor, as the indemnitee, thus contends that Onin, as the indemnitor, was required

[2]Whether Ryan actually contributed to his injuries is disputed, but, at this point, Nucor was required only to produce substantial evidence on this issue to create a genuine issue of material fact. Dow, supra.

under the indemnification provision to defend and indemnify Nucor in the wrongful-death action.

Onin, on the other hand, challenges whether the indemnification provision violated public policy. Generally, "if the parties knowingly, evenhandedly, and for valid consideration, intelligently enter into an agreement whereby one party agrees to indemnify the other, including indemnity against the indemnitee's own wrongs, if expressed in clear and unequivocal language, then such agreements will be upheld." Industrial Tile, Inc. v. Stewart, 388 So. 2d 171, 176 (Ala. 1980).[3] In certain circumstances, however, an "agreement by which the indemnitee attempts to obtain indemnity for its own negligence ... is void as against public policy." City of Montgomery v. JYD Int'l, Inc., 534 So. 2d 592, 595 (Ala. 1988). One circumstance considered in determining whether an indemnification provision is void as against public policy, which is argued in this case, is the degree of control retained by an indemnitee:

[3]I see no merit in any argument that the indemnification provision in this case did not comply with these requirements.

> "In Brown Mechanical Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932 (Ala. 1983), we noted that the degree of control retained by the indemnitee over the activity or property giving rise to liability is a relevant consideration. This is true because the smaller the degree of control retained by the indemnitee, the more reasonable it is for the indemnitor, who has control, to bear the full burden of responsibility for injuries that occur in that area. However, the opposite is also true: The more control the indemnitee retains over the area, the less reasonable it is for the indemnitor to bear the responsibility for injuries that occur in that area. In this case, the mishap took place in an area not within the actual leased area and, for all that appears from the record, an area in which the lessee (the indemnitor) had no right of control. To allow the indemnitee to transfer financial responsibility to the indemnitor under such circumstances would be totally at odds with the tort system's incentives to encourage safety measures. See Industrial Tile [, Inc. v. Stewart, 388 So. 2d 171, 176 (Ala. 1980)] (Jones, J., dissenting). Any argument that the agreement simply shifts the burden to the indemnitor to take such measures is untenable if the indemnitor has no right to exercise control over the potentially hazardous area or activity."

JYD Int'l, 534 So. 2d at 595. Onin argues that Nucor had control to such an extent that it would violate public policy for Onin to bear the responsibility for Ryan's injuries, thus rendering the indemnification provision void and unenforceable.[4] I disagree.

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[4]Although the Court in Brown Mechanical Contractors, Inc. v. Centennial Insurance Co., 431 So. 2d 932 (Ala. 1983), characterized such

Nucor contends that, under the terms of the TSA Agreement, Onin shared responsibility, i.e., control, over aspects of its employees' safety while they worked at Nucor's facility. Specifically, the TSA Agreement required Onin to be "solely" responsible for ensuring that its personnel were educated in Nucor's policies, which presumably include safety policies. Specifically as to safety, the TSA Agreement also provided that Onin agreed "to use its best efforts to insure the safety of all [of Onin's] Personnel, all other persons who may be on the job site or affected by the work performed by [Onin], and any other property on or adjacent to the job site." Additionally, Nucor points to a letter from the Occupational Safety and Health Administration to Onin regarding the accident that states that staffing agencies are jointly responsible for maintaining a safe working environment for temporary employees. Thus, the TSA Agreement itself did not "retain" for Nucor exclusive "control" over personnel safety, and Onin cannot say it had "no right to exercise control

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indemnity provisions as "unenforceable," JYD Int'l, applying Brown, labeled them as void as against public policy. I see no material distinction between these designations.

over the potentially hazardous area or activity." JYD Int'l, 534 So. 2d at 595. Further, Nucor points to evidence in the record indicating that Onin failed to exercise that right to control. Onin's Tuscaloosa branch manager never visited the work areas of Nucor's facility because the manager erroneously believed that the interns performed mostly administrative work. The manager apparently did not know the work the interns performed or where they worked in the facility, and thus no material action to ensure the interns' safety in those areas was taken.

Although the evidence in the record indicates that Nucor provided all of Ryan's job and safety training and supervised him and his work, under the TSA Agreement it did not "retain" exclusive control over Ryan's safety or training. Instead, Onin agreed to educate Ryan as to Nucor's policies and to use "its best efforts" to ensure Ryan's safety. As best as I can tell, the record before us indicates that Onin made no efforts to do this or even to understand what Ryan did at Nucor's facility or where he worked in it. Onin contends in its brief "that Nucor precluded Onin from exercising any management or control over Ryan's work at Nucor's facility"; however, no evidence of Nucor's preventing or precluding Onin

from ensuring the safety of its personnel is cited. Instead, Onin simply details the supervision and training that Nucor undertook. Viewing the evidence in the light most favorable to Nucor, as the nonmovant, Dow, supra, none of this demonstrated that Onin was precluded from training Ryan or ensuring his safety, which, the evidence suggests, Onin did not attempt.

The TSA Agreement did not "retain" for Nucor exclusive control over safety and training -- it explicitly provided authority to Onin. Onin did not actually undertake to exercise any such control, which left Nucor as the only party actually exercising control. There is a difference between an indemnitee's retaining control and an indemnitee's exerting control because the indemnitor did not actually exercise the joint control it was authorized to assert.

As noted above, the proposition underlying the rationale disallowing an indemnitee from transferring financial responsibility to the indemnitor (in certain circumstances) is that it "would be totally at odds with the tort system's incentives to encourage safety measures." JYD Int'l, 534 So. 2d at 595. Holding that the indemnification provision in this case is against

public policy because it reduced Nucor's financial liability and thus any motive to provide for safety, at least where Onin's personnel or work are concerned, would not serve that public policy. Onin had joint duties to provide for safety, which, for all that appears, it completely failed to exercise. The result of invalidating the indemnification provision is to ratify Onin's failure to perform its own safety duties and to remove Onin's own "incentives to encourage safety measures." It encourages indemnitors to disregard their own duties to provide safety measures because, if they do so, they might make themselves subject to an indemnification provision. This does not provide "incentives to encourage safety measures"; instead, it actually removes such incentives from one party who has contractually agreed to undertake safety measures.

Additionally, I have serious concerns as to the correctness of the holding of JYD Int'l, supra. In the words of Industrial Tile, if the parties to a contract have "knowingly, evenhandedly, and for valid consideration, intelligently" entered into an indemnification agreement that is "clear and unequivocal," then it should be enforced. 388 So. 2d at 176. Even with an indemnification agreement, an indemnitee still has "incentives to

encourage safety measures" for parties not related to the agreement. For example, in the instant case, indemnification is triggered only when damages are related to the work performed under the TSA Agreement and are caused in whole or in part by any act of Onin. The incentives for Nucor to encourage safety at its facility generally, for its own employees, and for activities unrelated to the TSA Agreement or Onin, were not removed by the indemnification provision. Further, nothing suggests at this point in the case that any purported failure by Nucor to provide for Ryan's safety is traced to any protection from financial liability found in the indemnification provision; that is, there is no allegation or evidence of a safety failure at the location of the accident or related to the work that Ryan was performing that existed because Onin personnel were involved and Nucor knew it would not be liable for such failure. Nevertheless, as noted above, I do not believe that the policy preferences expressed in this Court's prior decisions that would require voiding an indemnification provision and holding it unenforceable have yet been shown to apply in this case.

I also disagree that the evidence in this case clearly establishes that the parties acquiesced to a course of dealing or performance that altered the contractual terms and relieved Onin of its duty to ensure Ryan's safety. Another way to view the evidence is that Onin simply disregarded its obligations, but that Nucor fulfilled its own. The standard of review on a motion for a summary judgment requires this Court to view the evidence in the light most favorable to Nucor, as the nonmovant. Dow, supra.

Assuming that Ala. Code 1975, § 7-1-303 (formerly Ala. Code 1975, § 7-1-205), a provision of Alabama's version of the Uniform Commercial Code ("the UCC") addressing "course of performance" and "course of dealings," applies in this case,[5] such theory did not form a basis for Onin's motion for a summary judgment. Onin did not address its own obligations to provide for Ryan's safety or argue that the contractual terms were changed to remove those obligations. On appeal, Onin instead claimed that it was precluded from exercising its obligations; as noted above, it provided no evidence, when viewed in the light most favorable to Nucor,

[5]It is not clear to me that the TSA Agreement is one of the types of contracts regulated under the UCC, Title 7, Ala. Code 1975.

to support that assertion. The burden thus did not shift to Nucor to present substantial evidence disproving that the parties' course of performance or dealing had altered the parties' contractual obligations. This is why nothing in the record indicates that Nucor objected to Onin's failure to perform its obligations; if such evidence exists, Nucor was never required to produce it or otherwise to address such an argument. In light of the arguments and as the record stands, I do not believe that this Court may affirm the trial court's judgment under a course-of-performance or -dealing theory.[6]

Given the above, I respectfully dissent as to Part I of the "Discussion" section of the main opinion affirming the trial court's summary judgment on Nucor's breach-of-contract claims against Onin and Zurich. Those claims must await further litigation or determination by a

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[6]This Court will affirm a trial court on any valid legal ground found in the record. Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003). However, an exception to this rule provides that "this Court may not affirm a summary judgment on a ground the movant did not argue before the trial court because the nonmovant was not given an opportunity to present substantial evidence creating a genuine issue of material fact as to that ground." Ex parte Canada, 890 So. 2d 968, 971 (Ala. 2004).

trier of fact. As to Nucor's remaining claims discussed in Parts II through V, I believe that the trial court's summary judgment on those claims should be affirmed independent of whether the indemnification provision violates public policy and is unenforceable, and I therefore concur in the result as to the holdings on those issues.

Bryan, J., concurs.