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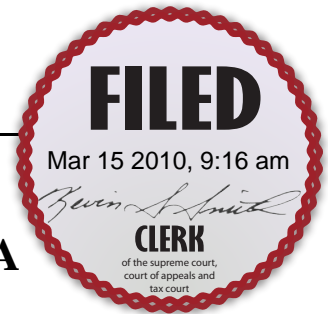
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**IN THE  
COURT OF APPEALS OF INDIANA**



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GREENE COUNTY, INDIANA, )  
By and Through Its Board of Commissioners, and )  
GREENE COUNTY BUILDING CORPORATION, )  
 )  
Appellants, )  
 )  
vs. )  
 )  
WEDDLE BROTHERS CONSTRUCTION CO., INC., )  
 )  
Appellee. )

No. 60A05-0907-CV-371

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APPEAL FROM THE OWEN CIRCUIT COURT  
The Honorable Frank M. Nardi, Judge  
Cause No. 60C01-0503-PL-97

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**March 15, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

In this interlocutory appeal, Greene County of Indiana by and through its Board of Commissioners and Greene County Building Corporation (“Greene County”) appeals the denial of its motion for partial summary judgment regarding the effect of lien waivers and releases signed by the subcontractors and suppliers of Weddle Brothers Construction Company (“Weddle”). We affirm.

### **Issue<sup>1</sup>**

Greene County raises five issues on appeal, which we consolidate and restate as whether the trial court erred in denying its motion for partial summary judgment.

### **Facts and Procedural History**

In 2002, Greene County undertook a project to renovate and construct an addition to the Greene County Courthouse (the “Project”). After a bidding process, Weddle signed an agreement to be the general contractor for the project (“General Contractor Contract”). In January of 2003 during the construction process, cracks were noticed in a stairwell of the existing Courthouse. In addition to the cracks, significant settling of the Courthouse occurred, delaying the renovation portion of the Project for one and a half years (“Phase I Delay”) due to needed redesign remedies. Pursuant to Greene County’s request, Weddle submitted information regarding the claims of Weddle and its subcontractors and suppliers for the Phase I Delay on October 7, 2004. Weddle sought \$1.4 million in delay costs.

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<sup>1</sup> Weddle filed a Motion to Strike Portions of Reply Brief of Appellants requesting this Court to strike the new arguments raised by Greene County in its reply brief. Indiana Appellate Rule 46(C) provides, “[n]o new issues shall be raised in the reply brief.” Inasmuch as two of the noted arguments were not raised in Greene County’s original brief, we grant the motion to strike sections II. B and D of the reply brief.

Weddle submitted additional information on the Phase I Delay Claim on March 9, June 6, and June 8, 2005. Work on the renovation work restarted in August 2004.

In the meantime, the construction of the addition portion of the Project was progressing until May 2005, when a structural design flaw was discovered. The problem required significant alteration of the original design, halting work on the addition portion of the Project until May 2006 (“Phase II Delay”).

By September 2005, tension between the parties rose as the Phase I Delay Claim had not been resolved, and Weddle threatened to suspend work until a resolution was determined. Both seeking to ultimately resume construction, Weddle and Greene County entered into a Provisional Agreement whereby Weddle was paid \$600,000 by Greene County under a reservation of rights to pursue its remedies regarding the Phase I Delay Claim. The Provisional Agreement also reserved Weddle’s rights and remedies to seek additional sums for the Phase I Delay and provided that the Provisional Agreement was not an admission of liability as to either party. The terms of the Provisional Agreement provided in part:

4. Weddle agrees that the Provisional Payment provides sufficient funds to permit Weddle and its subcontractors and suppliers to continue to work on the Project. Weddle further agrees that the Provisional Payment will be used in whole or in substantial part for the payment of subcontractors and suppliers, and that these funds shall only be used to satisfy those obligations that Weddle, in good faith, believes represents increased costs of construction caused by the Phase I Delay.

5. To the extent that all or a substantial portion of the Provisional Payment is paid by Weddle to its subcontractors and suppliers, Weddle will provide Greene County with waivers and releases from each of the subcontractors and suppliers receiving payment from the Provisional Payment, which waivers and releases shall specifically release any claim that they may have against Greene County and the Project in relation to the Phase I Delay.

Appellant's Appendix at 145-46. The Provisional Agreement determined that any amount awarded for the delays would be determined through litigation.

While mentioning the Phase II Delay, the Provisional Agreement did not address the potential claims by Weddle for that delay. Weddle submitted its Phase II Delay Claim to Greene County on July 20, 2006. Both Phase I and Phase II Delay Claims included delay costs incurred by the suppliers and subcontractors hired by Weddle as well as increased costs related to labor and general conditions.

In April 2006, Greene County added Weddle as a defendant in a lawsuit that the county had previously filed in the Owen Circuit Court against the firms hired to perform the architectural and geotechnical work on the Project. Subsequently, Weddle filed its Answer as well as a Counterclaim, Cross-Claim and Third-Party Complaint. On August 18, 2008, Greene County filed a motion for partial summary judgment against Weddle, contending that Weddle is not entitled to money based on delay claims that it detailed in the Phase I and II Delay Claims for alleged delay damages suffered by its subcontractors and suppliers. Greene County argued that these amounts were waived when many of the subcontractors and suppliers signed general waiver forms, provided by Weddle, throughout the progression of the construction. If the motion was granted, Weddle's potential damages would be limited to its direct costs and damages resulting from "general conditions." App. at 116 n.6. Weddle contested summary judgment, asserting that such waivers were not intended to waive the claims for the Phase I and II Delays. On May 4, 2009, the trial court issued its order, denying the motion for partial summary judgment on the basis that "genuine issues of material fact

exist in regard to what work was covered by each release; whether any delay costs were included in the work covered by these releases; and whether Weddle used the Agreement consideration to pay delay costs, which were not specifically mentioned in the releases.” App. at 25. This interlocutory appeal ensued.

## **Discussion and Decision**

### **I. Standard of Review**

A party seeking summary judgment bears the burden of making a prima facie demonstration that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Warren v. IOOF Cemetery, 901 N.E.2d 615, 617 (Ind. Ct. App. 2009), trans. denied. Upon the satisfaction of this burden through evidence designated to the trial court pursuant to Indiana Trial Rule 56, the non-movant must designate specific facts demonstrating the existence of a genuine issue for trial. Id.

In reviewing the grant or denial of such motion, we apply the same standard as the trial court: whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. Ind. T.R. 56(C), (H). In our review, we only consider those portions of the pleadings, depositions and other matters specifically designated to the trial court for the purposes of the motion. Id. We accept as true those facts alleged by the non-moving party, which are supported by affidavit or other evidence, and resolve all doubts against the moving party. Cleary v. Manning, 884 N.E.2d 335, 337 (Ind. Ct. App. 2008). We will affirm summary judgment if it may be sustained on any legal theory or basis found in the record. Indianapolis Car Exch., Inc. v.

Alderson, 910 N.E.2d 802, 804 (Ind. Ct. App. 2009).

## II. Analysis

As the parties acknowledge, the outcome here depends on whether the written contracts are determined to be ambiguous or unambiguous. While the waivers or releases at issue are between Weddle and the subcontractors and suppliers, Greene County asserts that these documents bar any delay claims of the subcontractors and suppliers represented by Weddle.

While usually only parties to a contract and their privies have rights under a contract, a third party may enforce the contract if it clearly appears that it was the purpose or a purpose of the contract to impose an obligation on one of the contracting parties in favor of the third party. Evan v. Poe & Assocs., Inc., 873 N.E.2d 92, 98 (Ind. Ct. App. 2007) (quoting OEC-Diasonics, Inc. v. Major, 674 N.E.2d 1312, 1315 (Ind. 1996)). This intent to impose an obligation for the benefit of a third party must affirmatively appear from the language of the instrument when properly interpreted and construed. Id. “However, it is not necessary that the intent to benefit a third party be demonstrated any more clearly than the parties’ intent regarding any other terms of the contract.” Id.

Generally all of the contracts between the various parties working on the Project contemplate the linear employment chain of the involved parties: the owner, general contractor, subcontractors and material suppliers. This is particularly so in the Provisional Agreement as well as waivers Weddle required each of the subcontractors and suppliers to sign prior to receiving payment for a portion or all of the work performed. The Provisional

Agreement acknowledges that claims submitted by Weddle for the Phase I Delay represent the alleged costs associated with the delay for both Weddle and its subcontractors and that Weddle's assertion of its right to stop its work was based on the subcontractors "requiring Weddle to provide assurances that Weddle will pay additional costs incurred by the subcontractors as a result of the Phase I Delay before those subcontractors [would] return to complete the base contract work on the Project." App. at 73. Furthermore, the Provisional Agreement required Weddle to obtain waivers specifically releasing any claim against Greene County for the Phase I Delay if any portion of the Provisional Payment was used to pay the subcontractors and suppliers.

The documents at the core of this interlocutory appeal are the general waivers Weddle required each of the subcontractors and suppliers to sign prior to receiving payment for a portion or all of the work performed:

The undersigned FOREVER RELEASES and DISCHARGES the Principal and Contractor and their agents . . . from any and all legal, equitable, or statutory claims, demands, actions or causes of action arising out of or in connection with any of the Services furnished by or for the undersigned in connection with the Work and Project[.]

"A release, as with any contract, should be interpreted according to the standard rules of contract law." Huffman v. Monroe County Cmty. Sch. Corp., 588 N.E.2d 1264, 1267 (Ind. 1992). "[R]elease documents shall be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document governing." OEC-Diasonics, 674 N.E.2d at 1314.

As noted by the trial court, the issue that must be addressed before deciphering the

effect of the waivers is whether the waivers alone constitute the four corners of the contract. We agree with the trial court “that any contract interpretation of these releases must be made in light of the . . . [Greene County]-Weddle Provisional Agreement Re Phase I and Phase II Delays.” App. at 24. “The terms of this contract should be considered as part of the contract formed by each release because this Agreement was the basis for Weddle and its subcontractors’ decisions to not abandon [Greene County’s] project and stands as [Greene County’s] assurance that any delay damages would be litigated.” Id. Thus, the four corners of each contract include the Provisional Agreement and each waiver.

#### Construction of the Contracts

Construction of the terms of a contract is a question of law, which we review *de novo*. Collins v. McKinney, 871 N.E.2d 363, 372 (Ind. Ct. App. 2007). If the contract language is unambiguous and the intent of the parties is discernible from the written contract, the court gives effect to the terms of the contract. Fackler v. Powell, 891 N .E.2d 1091, 1096 (Ind. Ct. App. 2008), trans. denied. When a contract is unambiguous, the terms as expressed within the four corners of the contract are conclusive, and we do not construe the contract or look to extrinsic evidence. Id. Rather, we merely apply the contractual provisions. Id.

A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation. Id. However, the terms are not ambiguous merely because the parties disagree as to the interpretation. Id. We determine the meaning of a contract by examining all of its provisions, without giving special emphasis to any word, phrase or paragraph. Hepburn v. Tri-County Bank, 842 N.E.2d 378, 384 (Ind. Ct. App. 2006), trans.



denied. The contract is read as a whole, and we avoid interpreting individual sections in a manner that would cause them to conflict. Id.

The Provisional Agreement requires, “to the extent that all or a substantial portion of the Provisional Payment is paid by Weddle to its subcontractors and suppliers, Weddle will provide Greene County with waivers and releases from each of the subcontractors and suppliers receiving payment from the Provisional Payment, which waivers and releases shall specifically release any claim that they may have against Greene County and the Project in relation to the Phase I Delay.” App. at 75 (emphasis added). “Shall specifically release” mandates that any release or waiver must clearly indicate that it relates to a Phase I Delay claim. Furthermore, this language requires a waiver only when Weddle uses a portion of the Provisional Payment to pay a subcontractor or supplier.

Each of the general releases or waivers is signed in consideration of a sum paid to the subcontractor or supplier that signed the waiver. However, the language of the waivers does not specify whether the payment was from the Provisional Payment. The waiver language is very general and does not mention the particular subcontractor or supplier’s claim that it submitted through Weddle for the Phase I or II Delays. Furthermore, the Provisional Agreement was signed on September 22, 2005, yet the waivers have dates ranging from February 2005 to August 2007. Thus, it is unclear whether it was the intention of Weddle and the subcontractors and suppliers that these waivers apply to the specific claims submitted for the Phase Delays of the Project. We therefore agree with the trial court that the contracts are ambiguous as to the parties’ intention regarding the scope of the waivers.

The ambiguity of the contracts raises a genuine issue of material fact and prohibits the entry of summary judgment. Due to this ambiguity, extrinsic evidence is permitted to determine the meaning and scope of the contracts. See Niezer v. Todd Realty, Inc., 913 N.E.2d 211, 215 (Ind. Ct. App. 2009), trans. denied.

Affirmed.

BAKER, C.J., and ROBB, J., concur.