[Cite as *Fed. Ins. Co. v. Fredericks*, 2015-Ohio-694.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

FEDERAL INSURANCE COMPANY, et al.

Plaintiffs-Appellants

v.

FREDERICKS, INC., et al.

Defendants-Appellees

Appellate Case No. 26230

Trial Court Case No. 2012-CV-5990

(Civil Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 27th day of February, 2015.

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WELBAUM, J.

{¶ 1} In this case, Plaintiff-Appellants, J.P. Holding Co., Inc., Carter Express, Inc., and Carter Logistics, LLL, appeal from a trial court judgment denying them any recovery on claims asserted against Defendant-Appellee, Skiles Construction, Inc. The trial court also found, after a bench trial, that Intervenor/Third Party Defendant-Appellee, Acuity, A Mutual Insurance Company, had no duty to defend or to indemnify Skiles under a general commercial liability policy issued to Skiles on July 15, 2011.[1]

{¶ 2} Appellants contend that the trial court erred in concluding that their claims against Skiles were barred by the economic loss doctrine, and that they were not third-party beneficiaries to a subcontract entered into by Skiles and Fredericks, Inc. ("Fredericks"). In addition, Appellants contend that the trial court erred in failing to address the "common ownership" among Appellants, and erred in finding that their damages did not arise from physical damage to their property. Finally, Appellants contend that the trial court erred by failing to address whether Acuity's policy precluded coverage for consequential and incidental damage caused by Skiles' work.

{¶ 3} We conclude that the trial court did not err in applying the economic loss doctrine, which prevents recovery in tort of damages for purely economic loss. As will be explained below, in the absence of privity or a substitute for privity, the economic loss doctrine prevents recovery in tort of damages for purely economic loss where the defendant breached a

[1] For purposes of convenience, we will refer to Plaintiffs-Appellants collectively as "Appellants," and individually as J.P. Holding, Express, and Logistics. We will also refer to the other parties collectively as "Appellees" and individually as "Skiles" and Acuity.

duty that even partially arose by contract. Appellants are not entitled to recover because they were not in privity with Skiles, nor were there facts establishing a substitute for privity between Appellants and Skiles.

{¶ 4} Another method of establishing privity is where a party is a third-party beneficiary to a contract. However, Appellants were not third-party beneficiaries to the subcontract entered into by Skiles and Fredericks, a general contractor. The subcontract identifies another entity as the owner, and extends indemnification for damages only to the owner.

{¶ 5} Indirect economic damages are allowed in tort where physical damage to property occurs. However this doctrine also does not apply, because there was no direct causal nexus between Appellants' losses and the tangible damage to the property, which was owned by another.

{¶ 6} Finally, we conclude that the trial court did not err by failing to consider whether Appellants' collateral and consequential damages should be covered under Acuity's policy of insurance. Acuity's duty to pay was conditioned upon its insured (Skiles) having been found legally liable to pay damages. However, Skiles was not liable for any economic damages of Appellants, and Acuity would have no duty to pay for those damages. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 7} This case arose from a windstorm that occurred on September 3, 2011, which damaged a construction project on property owned by Pasco Enterprises ("Pasco"). Pasco was

one of several companies, including Express and Logistics, that were 100% owned by J.P. Holding. Pasco owned real estate holdings, and Logistics and Express were the tenants in Pasco's buildings. Logistics held contracts with customers, billed customers, and contracted with carriers, including Express, to transport freight. About 85% of Logistics' freight was transported by Express, which is a licensed motor carrier. The companies owned by J.P. Holding were all separately formed or incorporated, but they shared the same officers and the same principal place of business and location in Anderson, Indiana.

{¶ 8} In 2009, Logistics obtained a contract from Toyota for the transportation of materials to five different Toyota assembly plants. As a result, Logistics leased a building in West Carrollton, Ohio, in October 2009, for a period of 18 months at a rental price of about $33,333.33 per month. This was the best facility available at the time. However, the most efficient location for what was called a "cross-dock facility" was near the intersection of Interstates 70 and 75. The intent, therefore, was that a new warehouse would eventually be built in Vandalia, Ohio, with Express and Logistics as tenants. Although Logistics was the lessee on the West Carrollton lease, the lease agreement provided that Logistics would have the right during the lease to assign the lease to any related entity of Logistics or of J.P. Holding, without having to obtain the lessor's consent. Plaintiff's Ex. 1, p. 5, ¶ 17(b). The lease also contained an option for two additional six-month terms, with a slight increase in rent.

{¶ 9} In January 2011, Pasco entered into a purchase agreement with the City of Vandalia for 26 acres of land at a discounted price, based on the expectation that the decrease in price (about $140,400) would be offset by payroll taxes generated by Express. Express also signed the purchase agreement, solely for the purpose of allowing Vandalia to review pertinent

income tax records. If Vandalia failed to net $140,400 in increased income tax during a three-year period, Pasco would have to pay the difference between the tax collected and $140,400. John Paugh, the President of Express, Logistics, Pasco, and J.P. Holding, signed the contract on behalf of Pasco and Express. The land was located at 1655 Capstone Way, in Vandalia, Ohio.

{¶ 10} Paugh had a long-standing relationship with William Fredericks, who was the president of Fredericks, a construction company. At Paugh's request, Fredericks prepared a budget and estimate for construction of a cross-deck facility at the Vandalia site. The estimate included a steel building pre-engineered by Varco Pruden, Inc. ("Varco"). After receiving the estimate and budget, which bore the designation, "Carter Express Cross Dock Facility," Paugh told Fredericks to proceed with construction. Because of their relationship, no written contact was prepared; Paugh and Fredericks proceeded on a "handshake" basis. The anticipated completion date of the facility was January 2012.

{¶ 11} Over the years, Fredericks had worked with Skiles, which was a company in the business of constructing pre-engineered metal buildings. Both Skiles and Fredericks were Indiana corporations. In April 2011, Fredericks and Skiles entered into a written subcontract.

{¶ 12} The subcontract indicated that Fredericks was the contractor, Skiles was the subcontractor, and Pasco was the owner, with whom Fredericks had made a contract for construction of the Carter Cross Dock Facility. Joint Ex. B., p. 1. In addition, the subcontract provided that a copy of the contract between Fredericks and Pasco had been made available to Skiles. When Skiles entered into the subcontract, he thought Express was the owner of the property and he intended Express to benefit from his construction work. Skiles had previously

worked on other buildings for Paugh, and knew that the building in Vandalia would be used by Express for its operations. During his testimony at trial, Skiles stated that after he had an opportunity to review the contract, he realized that Pasco was the owner of the building, and the owner was the party he intended to benefit.

{¶ 13} Article 1 of the subcontract provided that it included both the contract and the prime contract, or agreement between the owner and contractor, and other contract documents, including drawings, specifications, and addenda issued prior to the execution of the prime contract. Joint Ex. B., p. 2, Section 1.1.

{¶ 14} Fredericks contracted with Varco to engineer and design the steel building, and paid for the steel framework to be delivered to the Vandalia job site. The pre-engineered materials were delivered, along with a "Basic Erection Guide," which Skiles was required to follow when erecting the framework. In particular, Skiles was required to design and provide a temporary bracing plan before the steel framework was erected.

{¶ 15} In August 2014, Skiles began to erect the framework. Although Skiles put some temporary bracing in place, it was inadequate and did not meet a reasonable standard of workmanship. Joint Ex. I, p. 5, ¶ 23-25 (Stipulations). After Skiles' workers left the construction site on September 3, 2011, a wind and rain storm passed through the area, with wind gusts up to 47 miles per hour. *Id.* at ¶ 26. The following day, a substantial part of the steel framework was found collapsed on the ground at the site. "Skiles' negligence and failure to perform in a workmanlike manner under its contract was a legal and proximate cause of the collapse." *Id.* at ¶ 28.

{¶ 16} At the time of the collapse, Skiles was insured by Acuity under Commercial

General Liability and Excess Liability Policy No. K950060. Appellants, as well as Pasco, were insured by Federal Insurance Company ("Federal"), which paid Pasco for the costs, expenses, and other damages proximately caused by the collapse. Federal then filed a subrogation suit against Fredericks and Skiles in August 2012, seeking recovery of the amounts it had paid. Subsequently, Acuity received permission to intervene in the case. The complaint was also later amended to add Pasco, J.P. Holding, Express, Logistics, and another J.P. Holding company (Astro) as plaintiffs, for the purpose of asserting claims for uninsured losses not paid by Federal.

{¶ 17} In February 2014, the court held a bench trial, during which it considered various stipulated facts, the testimony of a few witnesses, and some exhibits. After hearing the evidence, the trial court filed a decision, concluding that: (1) Ohio law would apply to the contract issues; (2) damages for economic loss were available only to Pasco, on the basis that Pasco was a third-party beneficiary of the subcontract between Fredericks and Skiles; (3) Logistics, Express, and J.P. Holding could not recover against Skiles because they had no ownership interest in the property at the time of the collapse; and (4) Acuity had no duty to either defend or indemnify Skiles.

{¶ 18} Appellants then filed motions for judgment notwithstanding the verdict and for a new trial. The court overruled both motions, but granted a motion to amend its decision that had been contained within Appellants' motion for new trial. The court noted that it had failed to enter judgment as to Pasco's claims against Skiles and the amount owed to Federal. The court, therefore, modified its prior decision pursuant to Civ.R. 59(A), and entered judgment in favor of Pasco against Skiles. The court also ordered that Federal, as subrogee, was entitled to recover $664,852.50, plus interest and costs, from Skiles. Appellants timely appealed from the trial

court's judgment. Skiles did not appeal.

II. The Economic Loss Doctrine

{¶ 19} Appellants' First Assignment of Error states that:

> The Trial Court Erred in Concluding that the "Sufficient Nexus" Test Is Limited to Claims Against Design Professionals and in Concluding that the Claims Asserted by J.P. Holding, Carter Express and Carter Logistics Against Skiles Were Barred by the Economic Loss Doctrine When the Evidence Established a Sufficient Nexus Between Skiles and J.P. Holding, Carter Express and Carter Logistics.

{¶ 20} Under this assignment of error, Appellants contend that the trial court erred in concluding that an exception to the economic loss doctrine, the "sufficient nexus" test, is limited to claims against design professionals. Appellants also contend that they presented evidence of a sufficient nexus between themselves and Skiles.

{¶ 21} Before we address these points, we note that when we review "a trial court's judgment following a bench trial, [we are] 'guided by the presumption that the trial court's findings are correct.' " *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218, ¶ 81 (10th Dist.), quoting *Broadstone v. Quillen*, 162 Ohio App.3d 632, 637, 2005-Ohio-4278, 834 N.E.2d 424 (10th Dist.). (Other citations omitted.) "Thus, [we] may not substitute [our] judgment for that of the trial court and must affirm the judgment if it is supported by some competent, credible evidence going to the essential elements of the case." *Id.*, citing *Reilley v. Richards*, 69 Ohio St.3d 352, 632 N.E.2d 507 (1994). (Other citation omitted.)

{¶ 22} In the case before us, most of the facts were stipulated, and the issues are primarily legal issues, which we review de novo. *See, e.g., Artz v. Elizabeth Twp.*, 2d Dist. Miami No. 2013 CA 36, 2014-Ohio-854, ¶ 20, citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586. However, to the extent the trial court's decision involves resolution of facts, we will accord the trial court due deference. With these standards in mind, we will first consider the application of the "economic loss doctrine."

{¶ 23} "[E]conomic losses are intangible losses that do not arise from tangible physical harm to persons or property." *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, 8th Dist. Cuyahoga No. 87382, 2006-Ohio-5014, ¶ 20, citing *Columbia Gas of Ohio v. Crestline Paving & Excavating Co.*, 6th Dist. Lucas No. L-02-1093, 2003-Ohio-793, and *Floor Craft Floor Covering, Inc. v. Parma Comm. Gen. Hosp.*, 54 Ohio St.3d 1, 3, 560 N.E.2d 206 (1990). (Other citation omitted.) "Thus, where only economic losses are asserted, damages may be recovered only in contract; there can be no recovery in negligence due to the lack of physical harm to persons and tangible things." *RWP, Inc.* at ¶ 21, citing *Queen City Terminals v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609, 653 N.E.2d 661 (1995). (Other citations omitted.)

{¶ 24} In *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, the Supreme Court of Ohio noted that:

> The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. *See Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 45, 537 N.E.2d 624; *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.* (1990), 54 Ohio St.3d 1, 3, 560 N.E.2d 206. " '[T]he well-established general rule is that a plaintiff who has suffered only

> economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.' " *Chemtrol*, 42 Ohio St.3d at 44, 537 N.E.2d 624, quoting *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984), 345 N.W.2d 124, 126. *See, also, Floor Craft*, 54 Ohio St.3d at 3, 560 N.E.2d 206. This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that "parties to a commercial transaction should remain free to govern their own affairs." *Chemtrol*, 42 Ohio St.3d at 42, 537 N.E.2d 624. *See, also, Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner v. Rust, Orling & Neale Architects, Inc*. (1988), 236 Va. 419, 425, 374 S.E.2d 55. " 'Tort law is not designed * * * to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.' " *Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner*, 236 Va. at 425, 374 S.E.2d 55.

Corporex at ¶ 6.

{¶ 25} *Corporex* involved a lawsuit brought by a property owner against a subcontractor who had allegedly negligently performed. Based on the above discussion, the Supreme Court of Ohio rejected the possibility of a tort cause of action by the owner against the subcontractor, concluding that the owner should instead sue the contractor, who would have a

potential claim against the subcontractor. *Id.* at ¶ 11.

{¶ 26} The court went on to note that the property owner also could not sue the subcontractor directly in contract based on the economic loss rule, because the owner "had failed to allege any facts establishing privity or a sufficient substitute for privity as required by *Floor Craft.*" *Id.* at ¶ 12. In this regard, the court stressed that "mere knowledge by the subcontractor of the identity of the project owner, without more, does not create a nexus sufficient to establish privity or its substitute. Given the general availability of the identity of the project owner in all building projects, as attested to by both parties, we refuse to allow parties to abrogate the substance of *Floor Craft's* privity requirement by allowing such readily available information by itself to serve as a substitute for privity." *Id.*

{¶ 27} The Supreme Court of Ohio further observed in *Corporex* that even where a sufficient nexus or privity exists, "only those contractual duties and liability for breach of those duties agreed to by the parties to the contract may be imposed." *Id.* at paragraph one of the syllabus.

{¶ 28} "Privity, or its substitute, is not a tort; it serves only to identify an interest or establish a relationship necessary to allow for the bringing of a tort action for purely economic damages." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 365-66, 678 N.E.2d 519 (1997).

{¶ 29} After *Corporex*, courts have not discussed the privity requirement, or its substitute, at length.[2] Some courts have found that "excessive control may serve as a substitute

[2] Courts have noted that after *Corporex*, there is some confusion about the extent to which the economic loss doctrine applies outside "simple negligence actions," with the general approach being that the rule "does not apply – and the plaintiff who suffered only economic damages can proceed in tort – 'if the defendant breached a duty that did not arise solely from a contract.' " *Mulch Mfg., Inc. v. Advanced Polymer Solutions, LLC*, 947 F.Supp.2d

for privity under Ohio law." *J & H Reinforcing & Structural Erectors, Inc. v. Wellston City School Dist.*, 4th Dist. Jackson No.09CA8, 2010-Ohio-2312, ¶ 34. Prior to *Corporex*, courts also indicated, in the context of design professionals and a third party, that whether a sufficient nexus exists is based on "the degree of control the design professional exerted over the project and the amount of interaction between the design professional and the third party." (Citations omitted.) *Ohio Plaza Assoc., Inc. v. Hillsboro Assoc.*, 4th Dist. Highland No. 96CA898, 1998 WL 394370, *5 (June 29, 1998).

{¶ 30} Notably, the party being sued in *J&H* was not, strictly speaking, a "design professional" involved in drafting plans and specifications, as in *Floor Craft*. *See Floor Craft*, 54 Ohio St.3d at 1, 560 N.E.2d 206. Instead, the defendant in *J&H* had been hired by a school district to administer a building project and coordinate subcontractors' efforts. *J&H* at ¶ 5. Our own district has previously concluded that *Floor Craft* is "specifically limited to design professionals rather than subcontractors." *Brewer v. H & R Concrete, Inc.*, 2d Dist. Montgomery No. 17254, 1999 WL 49366, *4 (Feb. 5, 1999). However, *Brewer* was decided prior to *Corporex*, which does not restrict a party's ability to assert a "sufficient nexus" to situations involving design professionals.

{¶ 31} In *Corporex*, the Supreme Court of Ohio first concluded that the property owner had failed to identify any existing duty in tort of the subcontractor. *Corporex*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, at ¶ 11. In particular, the court rejected the application of the duty in tort for professional liability that had previously been applied in *Haddon View*

841, 856 (S.D.Ohio 2013), quoting *Campbell v. Krupp*, 195 Ohio App.3d 573, 580, 2011-Ohio-2694, 961 N.E.2d 205, ¶ 16 (6th Dist.). This exception would not apply in the case before us, however, as there is no indication that Skiles breached duties other than those arising from its contract with Fredericks.

Invest. Co. v. Coopers & Lybrand, 70 Ohio St.2d 154, 436 N.E.2d 212 (1982). In *Haddon View*, the Supreme Court of Ohio had found that "an accountant may be liable for purely economic damages based upon negligent misrepresentation to third parties 'when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen.' " *Corporex* at ¶ 7, quoting *Haddon View,* at the syllabus. The court rejected application of this theory because it could circumvent contractual limitations on recovery by allowing recovery in tort. *Id.* at ¶ 8.

{¶ 32} The court then went on to consider whether the property owner in *Corporex* could sue the subcontractor directly in contract for economic loss. In this regard, the Supreme Court of Ohio stated that:

> DSI [the property owner] may not sue Shook [the subcontractor] directly in contract based upon the economic-loss rule. Even construing the facts of this case in a light most favorable to DSI, DSI has failed to allege any facts establishing privity or a sufficient substitute for privity as required by *Floor Craft*. Contrary to DSI's assertion, mere knowledge by the subcontractor of the identity of the project owner, without more, does not create a nexus sufficient to establish privity or its substitute. Given the general availability of the identity of the project owner in all building projects, as attested to by both parties, we refuse to allow parties to abrogate the substance of *Floor Craft's* privity requirement by allowing such readily available information by itself to serve as a substitute for privity.

Corporex at ¶ 12.

{¶ 33} The implication is that a party may sue directly in contract, even if the opposing party is not a design professional, where the facts establish privity or a substitute for privity. The trial court, therefore, did err in rejecting this potential for liability because it found that Skiles was not a "design professional." Bench Trial Decision and Verdict Entry, Doc. #122, pp. 9-10. Nonetheless, there was no indication of a relationship that would establish a substitute for privity, i.e., "excessive control," in the case before us.

{¶ 34} Specifically, the facts in this case do not indicate that Skiles " 'had the power to stop the work and give orders about the project.' " *J&H* at ¶ 35, quoting *Nicholson v. Turner/Cargile*, 107 Ohio App.3d 797, 806, 669 N.E.2d 529 (10th Dist. 1995). Furthermore, there is also no evidence of any interaction between Skiles and the Appellants, other than Skiles's mere knowledge of the identity of the owner. As an additional matter, even if Skiles "thought" at the time of contracting that the building was being constructed for Carter Express, that is an insufficient basis for finding a sufficient nexus between Skiles and the Carter entities or J.P. Holding.[3] Skiles did not have direct contact with any of the J.P. Holding companies with respect to this contract. This is consistent with the holding in *Corporex* that knowledge of the identity of the project owner does not establish a sufficient nexus. Accordingly, even though the trial court's reasoning was not entirely correct, the evidence does not support the existence of privity or a substitute for privity.

{¶ 35} Appellants argue that sufficient nexus is shown because Mr. Skiles had worked

[3] In this regard, Joe Skiles, who signed the subcontract for Skiles, testified that when he entered into the contract, he thought Carter Express was the owner of the property where he would be working. However, Skiles also stated that he did not read the contract, and only later realized that Pasco was the owner of the property. He stressed that his intent was to benefit the owner, not a particular entity.

on other projects for the president of J.P. Holding, and knew that the buildings in Vandalia would be used by "Carter" or Carter Express for its operations. However, the testimony is undisputed, with respect to this project, that no one from any of the J.P. Holding companies was involved in the negotiations between Skiles and Fredericks. Again, it is not sufficient that Skiles may have known the identity of the owner, or even the identity of possible future tenants.

{¶ 36} Accordingly, Appellants failed to establish privity or a substitute for privity for purposes of overcoming the application of the economic loss doctrine. The First Assignment of Error, therefore, is overruled.

III. Application of Third-Party Beneficiary Principles

{¶ 37} Appellants' Second Assignment of Error states that:

> The Trial Court Erred in Finding that J.P. Holding, Carter Express and Carter Logistics Were Not Third-Party Beneficiaries of the Subcontract Between Skiles and Fredericks Because the Subcontract Did Not Expressly Identify J.P. Holding, Carter Express and Carter Logistics.

{¶ 38} Under this assignment of error, Appellants contend that they were entitled to recover because they were third-party beneficiaries of the contract between Fredericks and Skiles. According to Appellants, the evidence demonstrated Skiles's intent to benefit J.P. Holding and its related companies.

{¶ 39} "[T]hird-party beneficiaries have the rights of parties in privity of contract and thus may bring suit for breach of contract or to enforce performance." *Waterfield Mortg. v. Buckeye State Mut. Ins. Co.*, 2d Dist. Miami No. 93-CA-53, 1994 WL 527594, *4 (Sept. 30,

1994), citing *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 566 N.E.2d 1220 (1991). (Other citation omitted.) The Supreme Court of Ohio has indicated that an " 'intent to benefit' " test is used to decide "whether a third party is an intended or incidental beneficiary." *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St.3d 36, 40, 521 N.E.2d 780 (1988), quoting *Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir.1980). "An intended beneficiary is one who has enforceable rights under the contract, in contrast to an incidental beneficiary, who has no rights of enforcement." *Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 303, 736 N.E.2d 517 (10th Dist.1999), citing *Hill* at 40.

{¶ 40} In *Hill*, the court explained the "intent to benefit" test as follows:

> " * * * Under this analysis, if the promisee * * * intends that a third party should benefit from the contract, then that third party is an 'intended beneficiary' who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an 'incidental beneficiary,' who has no enforceable rights under the contract.
>
> " * * * [T]he mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary."

Hill at 40, quoting *Norfolk* at 1208.

{¶ 41} The trial court concluded that Pasco was a third-party beneficiary of the subcontract between Fredericks and Skiles, but that Appellants were not intended beneficiaries. For purposes of analyzing this issue, the trial court relied on *Huff v. FirstEnergy Corp.*, 130 Ohio

St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, for the proposition that the intent to benefit must be included within the terms of the agreement. Bench Trial Decision and Verdict Entry, Doc. #122, p. 11. Thus, although the trial court found evidence in Joe Skiles's testimony of an intent to benefit Carter Express, the court also held that under *Huff*, there was no clear intent in the language of the subcontract itself to benefit Carter Express or any of the other Appellants.

{¶ 42} Appellants contend that the trial court misinterpreted the holding in *Huff* and improperly disregarded Skiles's testimony. In addition, Appellants argue that the architectural plans, which are included by reference in the contract, specifically refer to Carter Express, thus evidencing an intent to benefit Carter Express.

{¶ 43} In *Huff*, the Supreme Court of Ohio considered "whether a person injured by a falling tree located near, but outside, the utility's easement is an intended third-party beneficiary of a contract between a utility and its service contractor." *Huff* at ¶ 1. The court concluded that, under the facts of the case, "a contract between a utility and a contractor that provides that '[t]he Contractor shall plan and conduct the work to adequately safeguard all persons and property from injury' does not create a duty on the part of the contractor, once the work has been completed, to protect a third party from injury." *Id.*

{¶ 44} The plaintiff in *Huff* was injured in 2004 during a walk, when a large limb from a sugar maple tree hit her after the tree split in half during a heavy thunderstorm. *Id.* at ¶ 2. The tree was located on private property about twenty feet from utility lines owned and maintained by Ohio Edison Company. *Id.* Although Ohio Edison maintained the easement, the tree was outside the easement. *Id.* at ¶ 3. Ohio Edison had contracted with Asplundh Tree Expert Company to inspect trees and vegetation along Ohio Edison's power lines, but Asplundh

had last been in the area of the injury in 2001. *Id.*

{¶ 45} The trial court concluded that the defendants did not have actual or constructive notice of the alleged decay of the tree, and that they did not owe any duty to the plaintiffs (the injured woman and her family) due to the tree's location, which leaned away from the power lines. *Huff*, 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, at ¶ 6. In addition, the trial court concluded that the plaintiffs were not third-party beneficiaries of the contract between the defendants. *Id.* The court of appeals disagreed, finding general issues of material fact on the issue of whether the plaintiffs had enforceable rights under the contract as a third party beneficiaries. *Id.* at ¶ 7. In particular, the court of appeals relied on the fact that the language in the contract could be read narrowly or broadly, creating an ambiguity. *Id*. On further appeal, the Supreme Court of Ohio reversed the court of appeals, finding that the contract was not ambiguous and did not create any duty to the plaintiffs. *Id*. at ¶ 9 and ¶ 19.

{¶ 46} After discussing general principles of the law relating to third-party beneficiaries, the Supreme Court of Ohio observed that:

> Courts generally presume that a contract's intent resides in the language the parties chose to use in the agreement. *Shifrin v. Forest City Ents., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499. "Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions." *Id.* at syllabus. Ohio law thus requires that for a third party to be an intended beneficiary under a contract, there must be evidence that the contract was

> intended to directly benefit that third party. Generally, the parties' intention to benefit a third party will be found in the language of the agreement.

Huff, 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, at ¶ 12.

{¶ 47} After examining the contract, the court concluded that it was not intended to benefit the general public walking on public roads; it was instead designed to support Ohio Edison's electrical service, i.e., to make sure the company's equipment was "kept free of interference from trees and vegetation." *Id.* at ¶ 14. In addition, the applicable part of the contract was directed towards ensuring public safety while the contractor performed its work, and was not intended to safeguard the public after work had been completed. *Id.* at ¶ 19.

{¶ 48} In the case before us, the subcontract between Fredericks and Skiles indicates that Fredericks had made a contract for construction with the owner, Pasco, for construction of the Carter Cross Dock Facility. Joint Ex. B, p. 1. The subcontract further states that the contract between Fredericks and Pasco would be referenced as "the prime contract," and that the contract had been made available to Skiles.[4] *Id.* at p. 2 (Article 1, Section 1). In addition, Article 1, Section 1.1 states that the subcontract documents include, among other things, the subcontract agreement and "the Prime Contract, consisting of the Agreement between the Owner and Contractor * * * including Drawings, Specifications [and] Addenda issued prior to the Agreements between the Owner and Contractor * * *." *Id.* Section 1.1 also states that "These [documents] form the Subcontract and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein." *Id.*

{¶ 49} Article 2 further provides that Fredericks and Skiles would be mutually bound

[4] There was apparently no "prime contract," as Pasco and Fredericks had a "handshake agreement." The

by the terms of the subcontract, and that Skiles would assume toward Fredericks "all obligations and responsibilities which [Fredericks] under the Prime Contract, assumes toward the Owner and the Architect." *Id.* (Article 2, Section 2.1).

{¶ 50} With regard to indemnification, Section 4.6.1 provides, in pertinent part, that:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-contractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Joint Ex. B., p. 4. Essentially the same provisions are repeated in Section 8.12 of the subcontract. *Id.* at p. 6.

{¶ 51} Consistent with the Supreme Court's decision in *Huff*, we find no ambiguity in the subcontract, and no need to consider extrinsic evidence. The subcontract identifies Pasco as

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architect, however, had prepared drawings and specifications. *See* Defendant's Ex. I.

the owner, and extends indemnification for damages only to the owner and certain other parties, not Appellants. Furthermore, although the subcontract incorporates the architectural drawings, which include the name "Carter Express Incorporated," and refer to the "Carter Express Cross Dock Facility," the drawings do not identify Carter Express as the "owner" of the facility. We find these references insufficient to require consideration of extrinsic evidence.

{¶ 52} As a final matter, even if we considered extrinsic evidence, the testimony of Joe Skiles indicates that his intent was to benefit the *owner* of the facility, regardless of whom the owner might be. The owner was Pasco, not Express or any other Appellant. Accordingly, the trial court did not err in concluding that J.P. Holding, Express, and Logistics were not intended beneficiaries of the subcontract.

{¶ 53} The Second Assignment of Error, therefore, is overruled.

IV. Alleged Error as to Common Ownership and Physical Damage

{¶ 54} Appellants' Third Assignment of Error states as follows:

> The Trial Court Erred in Failing to Address the "Common Ownership" Between the J.P. Holding Companies and Erred in Finding that the J.P. Holding Companies' Damages Did Not Arise From Physical Damage to their Property.

{¶ 55} Another potential avenue for recovery of economic damages exists when a plaintiff can establish that indirect economic loss has arisen from tangible property damage. *Queen City*, 73 Ohio St.3d 609, 653 N.E.2d 661, at the syllabus. Under the Third Assignment of Error, Appellants rely on an unpublished opinion of the Sixth Circuit Court of Appeals, in which a non-profit organization was permitted to recover economic damages that were causally

connected to the collapse of a roof and damage to other tangible property. *See Marnatha Volunteers Intern., Inc. v. Golden Giant, Inc.*, 181 F.3d 102, 1999 WL 357786, *5 (6th Cir.1999). According to Appellants, the case before us and *Marantha* involve similar fact patterns, because, as in *Marantha*, there is a direct causal nexus between the collapse of the building and Appellants' economic damages.

{¶ 56} In this regard, Appellants focus on the fact that the purchase agreement between Pasco and the City of Vandalia identifies Express as the intended tenant of the building, and requires the "Carter Express entities to employ a minimum number of employees with a minimum annual payroll in order to guarantee the City with a certain amount of personal income taxes." Appellants' Brief, p. 15. Appellants also rely on the inter-related nature of the J.P. Holding Companies, and claim that any of the Appellants could have been substituted for any of the others regarding the construction of the steel building that collapsed and the lease of temporary facilities while the new facility was being constructed. They also argue that J.P. Holding is the party who ultimately suffered a loss because it is the 100% owner of all the entities.

{¶ 57} In *Queen City*, the Supreme Court of Ohio concluded that indirect economic damages like lost profits, additional expenses, and the diminished value of the plaintiff's terminal, could be recovered in a negligence action where the losses arose from property damage. The court indicated that "there must be a direct causal nexus between the tangible damage and the indirect economic losses in order for the economic losses to be recoverable." *Queen City*, 73 Ohio St.3d at 615, 653 N.E.2d 661.

{¶ 58} The Supreme Court of Ohio concluded that one party's (QCT's) economic

damages, which included useless terminal improvements stemming from the failure of a benzene project, could be recovered because QCT's property had been contaminated with benzene, causing the revocation of a benzene street permit. Revocation of the permit, in turn, rendered improvements to QCT's terminal useless. *Id.* at 616.

{¶ 59} Unlike Appellants, however, QCT was the owner of the property in question. Although Appellants and Pasco are all owned by J.P. Holding, Pasco was the owner of the property. " '[W]here the term "owner" is employed with reference to land or buildings, it is commonly understood to mean the person who holds the legal title.' " *Victoria Plaza Liab. Co. v. Cuyahoga Cty. Bd. of Revision*, 86 Ohio St.3d 181, 183, 712 N.E.2d 751 (1999), quoting *Bloom v. Wides*, 164 Ohio St. 138, 141, 128 N.E.2d 31 (1955).

{¶ 60} Furthermore, even though Express and Logistics were anticipated lessees of the cross-dock facility, they had not entered into leases and did not have any existing interest in that property when the damage occurred. Notably, even though a lessee holds "certain property interests, [courts] regard the legal title holder as the owner, from whom a lessee acquires an inferior interest." *Performing Arts School of Metro. Toledo, Inc. v. Wilkins*, 104 Ohio St.3d 284, 2004-Ohio-6389, 819 N.E.2d 649, ¶ 14. If a lessee holds only an inferior interest, a prospective tenant, who has not even entered into an agreement to lease the property, holds no interest at all, and would not be entitled to recover for damage to the property.

{¶ 61} As an additional matter, we are not persuaded by the argument that Express obtained a certain status based on the purchase agreement entered into by the City of Vandalia and Pasco. This agreement was entered into on January 13, 2011. The agreement identifies Pasco as the "purchaser", and Express is identified as a party signing the agreement "solely to

provide its consent for the City to review pertinent income tax records pursuant to section 7(d) below * * *." Plaintiff's Ex. 2, p. 1.

{¶ 62} Section 7 of the agreement discusses the fact that the City was selling the property to Pasco at a discounted price, based on Pasco's representation that Express would have a certain cumulative three-year payroll which would net the City $140,400 by the end of the three-year payroll period. *Id.* at p. 2. If the payroll did not meet anticipated amounts, Pasco agreed to pay the City the difference between the scheduled net tax of $140,400 and the actual net tax that the City retained. *Id.* at pp. 2-3. Under the agreement, Express agreed to provide Pasco with copies of its income tax returns and related documents, and gave the City Manager or his designee the right to review the tax returns to verify that Express's obligations had been met, or to compute the unpaid tax amount. *Id.* at p. 3. Finally, the agreement provided for a final audit of the net income tax collected by April 30, 2018, because over-the-road truckers employed by Express could file for a refund of tax paid for up to three years. *Id.*

{¶ 63} Notably, the agreement between the City and Pasco did not provide a specific date upon which the cumulative three-year payroll calculation would begin; it only provided a date – April 30, 2018 – upon which a final audit would be competed. This was more than seven years after the contract was signed, and about six years after the cross-dock facility was completed in May 2012. The agreement also did not obligate Express to pay anything or to do anything other than furnish its tax returns. Instead, Pasco was the party obligated under the agreement to make up the difference in taxes.

{¶ 64} As a result, we attach no significance to the fact that Express was named in the agreement between Pasco and the City of Vandalia. We also note that Logistics, not Express,

made the extra payments to the West Carrollton facility that had been temporarily rented during construction.

{¶ 65} As was noted, Appellants also contend that the trial court erred by ignoring the "fiduciary relationship" between the various companies and by failing to recognize that J.P. Holding was the entity that ultimately suffered the loss. In this regard, Appellants note that they share the same board members, the same chief executive officer, and the same chief financial officer. In addition, J.P. Holding files a consolidated tax return for all the entities.

{¶ 66} In general, the law protects the separate identity of corporations and their subsidiaries. For example, "[t]he separate corporate entities of a parent and subsidiary corporation will not be disregarded and the parent corporation will not be held liable for the acts and obligations of its subsidiary corporation, notwithstanding the facts that the latter was controlled by the parent through its stock ownership, and that the officers and directors of the parent corporation were likewise officers and directors of the subsidiary, in the absence of proof that the subsidiary was formed for the purpose of perpetrating a fraud, and that domination by the parent corporation over its subsidiary was exercised in such manner as to defraud complainant." *North v. Higbee Co.*, 131 Ohio St. 507, 3 N.E.2d 391 (1936), syllabus.[5]

{¶ 67} The Supreme Court of Ohio has stressed that disregard of the corporate form is

[5] The Supreme Court of Ohio subsequently modified the *Higbee* standard, concluding that "the requirement that a corporation be *formed* in order to perpetrate a fraud is simply too strict." (Emphasis sic.) *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 287-88, 617 N.E.2d 1075 (1993). The court now uses the following test for disregarding the corporate form: "(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Id.* at 275, paragraph three of the syllabus. These distinctions are irrelevant for purposes of the case before us, as we have only cited *Higbee* for the idea that the corporate form has been generally protected and is not lightly disregarded.

a " 'rare exception' to be applied only 'in the case of fraud or certain other exceptional circumstances.' " *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 510, 2008-Ohio-4827, 895 N.E.2d 538, ¶ 17, quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003).

{¶ 68} No such circumstances exist in the case before us. No fraud is involved; Appellants simply want to disregard the separate existence of corporations they created, presumably to insulate themselves with respect to the different types of activities performed by each corporation.

{¶ 69} Furthermore, Pasco potentially could have recovered indirect economic damages as the third-party beneficiary of the subcontract between Fredericks and Skiles. Pasco sustained physical damage to its property and would have lost profit, for example, through its inability to collect rent from prospective tenants during the five-month delay that was caused by the collapse. This is similar to the economic loss in *Queen City*, where a benzene spill caused damage to the owner's property, and the city, thereafter, revoked the owner's permit to transport benzene. *Queen City*, 73 Ohio St.3d at 616, 653 N.E.2d 661. This, in turn, rendered useless the improvements the owner had made to its facility. *Id.* However, Pasco did not appeal from the trial court's decision, and that issue is not before us.

{¶ 70} Accordingly, the Third Assignment of Error is overruled.

V. Error Relating to Acuity's Insurance Policy

{¶ 71} Appellants' Fourth Assignment of Error states that:

> The Trial Court Erred in Failing to Address Whether the Acuity

Commercial General Liability Company Insurance Policy Precluded Coverage for Plaintiffs' Consequential and Collateral Damage Caused by Skiles' Work.

{¶ 72} Under this assignment of error, Appellants contend that the trial court erred by failing to consider whether their collateral and consequential damages should be covered under Acuity's policy. According to Appellants, damage to other property arising out of the insured's work is not barred by the policy exclusion for "damage to work" performed by the insured.

{¶ 73} Acuity issued a commercial general liability (CGL) policy to Skiles, with an effective date of June 3, 2011. Regarding coverages, the policy stated that:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury* or *property damage* to which this insurance applies. We will have the right and duty to defend the insured against any *suit* seeking those damages. However, we will have no duty to defend the insured against any *suit* seeking damages for *bodily injury* or *property damage* to which this insurance does not apply. * * *
>
> * * *
>
> b. This insurance applies to *bodily injury* and *property damage* only if:
>
> (1) the bodily injury or property damage is caused by an *occurrence* that takes place in the *coverage territory*.

Joint Ex. A, Acuity CGL policy, p. 1.

{¶ 74} The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." *Id.* at p. 14.

{¶ 75} In *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476,

2012-Ohio-4712, 979 N.E.2d 269, the Supreme Court of Ohio considered an insurance policy that contained the same terms as those outlined above. *Id.* at ¶ 9. In particular, the court evaluated whether a subcontractor's defective construction of and workmanship on a steel grain bin constituted "property damage caused by an 'occurrence.' " *Id*. at ¶ 11.

{¶ 76} During its discussion, the court gave the word "accident" its " 'natural and commonly accepted meaning' " because the term was not defined in the policy. *Id.* at ¶ 12, quoting *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347 (1982). The court stressed that the idea of "fortuity" is inherent in the plain meaning of accident. *Id.* (Citation omitted.) The court then went on to quote extensively from an opinion of the Eleventh District Court of Appeals, which had stated that:

> " 'Insurance coverage is bottomed on the concept of fortuity. Applying this rule in the construction context, truly accidental property damage generally is covered because such claims and risks fit within the statistical abstract. Conversely, faulty workmanship claims generally are not covered, except for their consequential damages, because they are not fortuitous. In short, contractors' "business risks" are not covered by insurance, but derivative damages are. *The key issues are whether the contractor controlled the process leading to the damages and whether the damages were anticipated.*
>
> " 'Coverage analysis largely turns on the damages sought. If the damages are for the insured's own work, there is generally no coverage. If the damages are consequential and derive from the work the insured performed, coverage generally will lie. The underwriting intent is to exclude coverage for the contractor's

> business risks, but provide coverage for unanticipated consequential damages.' " (Emphasis added.) [*Indiana Ins. Co. v. Alloyd Insulation Co.*, 2d Dist. No. 18979, 2002-Ohio-3916, 2002 WL 1770491], quoting Franco, *Insurance Coverage for Faulty Workmanship Claims Under Commercial General Liability Policies* (1994), 30 Tort and Ins. L.J. 785, 785-787.

(Quotation marks repeated as in original.) *Westfield*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, at ¶ 13, quoting *JTO, Inc. v. State Auto. Mut. Ins. Co.*, 194 Ohio App.3d 319, 2011-Ohio-1452, 956 N.E.2d 328, ¶ 32-33 (11th Dist.).

{¶ 77} Appellants argue that under *Westfield* and other authorities, coverage under Acuity's policy would lie for consequential damages, even if it is not available for Skiles's defective work. However, even if this were true, the insurer's duty to pay is conditioned upon its insured (Skiles) having been found legally liable to pay the damages. Because Skiles is not legally liable for any consequential damages of Appellants, Acuity would have no duty to pay for those damages.

{¶ 78} In their reply brief, Appellants make two remaining points. First, they contend that we may accept their statement of facts and issues, and reverse the judgment of the trial court on that basis, since Skiles failed to file a brief.

{¶ 79} In situations where an appellee fails to file a brief, App.R. 18(C) does permit us to "accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." However, this rule is permissive, and does not require reversal, where an appellant's brief does not reasonably support reversal. *See, e.g., State v. Frye*, 2d Dist. Clark No. 96-CA-118, 1997 WL 762828, *2 (Dec. 12, 1997). In

this case, Appellants' brief does not reasonably support reversal. We also note that most of the facts in the trial court were stipulated.

{¶ 80} Appellants' second argument is that Acuity lacks standing to contest any substantive issues in this appeal because it was allowed to intervene in the trial court for purposes of challenging coverage. Appellants also contend that Acuity has a conflict of interest with Skiles, who would be inclined to argue in favor of insurance coverage on the issue of economic loss.

{¶ 81} "One who was not a party to an action generally has no right of direct appeal." *In re Fusik*, 4th Dist. Athens No. 02CA16, 2002-Ohio-4410, ¶ 20, citing Whiteside, *Ohio Appellate Practice*, Section 1.27, at 31 (2001), and *State ex rel. Lipson v. Hunter*, 2 Ohio St.2d 225, 208 N.E.2d 133 (1965). "However, a well-settled exception to this rule is that one who has attempted to intervene as a party does have the requisite standing." *Id.*, citing *Hunter* and *Januzzi v. Hickman*, 61 Ohio St.3d 40, 45, 572 N.E.2d 642 (1991).

{¶ 82} The ability to appeal would also include the ability to cross-appeal and raise arguments to both defend a trial court judgment and seek to change or modify the judgment. App.R. 3(C)(1). Furthermore, even where a party does not file a cross-appeal, he or she may advance arguments to prevent reversal of a trial court judgment. *See, e.g., Gessner v. Union*, 159 Ohio App.3d 43, 2004-Ohio-5770, 823 N.E.2d 1, ¶ 23-26 (2d Dist.), and App.R. 3(C)(2).

{¶ 83} In the case before us, Acuity's arguments against the economic loss doctrine are consistent with its defense of the lack of coverage under its insurance policy. If Appellants had been able to recover consequential damages from Skiles, Acuity may have been required to pay those damages. Acuity was, therefore, entitled to raise any argument that would justify

affirming the trial court judgment. We express no opinion on the ultimate resolution of the coverage issue, since Acuity's insured, Skiles, was not legally obligated to pay damages to Appellants, and certain exclusions from coverage may have applied.

{¶ 84} Based on the preceding discussion, the Fourth Assignment of Error is overruled.

VI. Conclusion

{¶ 85} All of Appellants' assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J. and DONOVAN, J., concur.

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