No. 27822-1-III

Kulik, C.J. (dissenting) — The right of contribution among sureties exists where the sureties have common liability for the same debt and one surety is required to pay the whole amount. Here, Dustcoating, Inc., and Larry and Kathleen Johnson (Dustcoating defendants) appeal a summary judgment against them, contending they are not cosureties with Remtech, Inc. (Remtech) and Keith and Julie Carpenter under an indemnity agreement with Hartford Fire Insurance Company (Hartford). Because the Dustcoating defendants and the Carpenters are liable under the indemnity agreement for the same continuing debt that is not limited on a project-specific basis, I conclude the Dustcoating defendants and the Carpenters are cosureties, and the Carpenters have a right of contribution against the Dustcoating defendants. Therefore, I would affirm the trial court's summary judgment in favor of the Carpenters. Accordingly, I respectfully dissent.

The June 8, 1999 general indemnity agreement (GIA) requires that Dustcoating, Remtech, the Carpenters, and the Johnsons

> will indemnify and hold the Surety harmless from all loss, liability, damages and expenses . . . which the Surety incurs or sustains (1) *because of having furnished any Bond*, or (2) because of the failure of any indemnitor to discharge any obligations under this Agreement, or (3) in enforcing any of the provisions of this Agreement.

Clerk's Papers (CP) at 62 (emphasis added).

This provision is central to the dispute here. The trial court agreed with the Carpenters that the June 8, 1999 GIA applies to all bonds. I agree with the majority that neither the May 20, 1999 nor the June 8, 1999 GIA refers to a specific bond or project. However, the majority then looks at the conduct of the parties and the context of the agreements and concludes the GIAs are project specific. But the GIAs do not say that, and Dustcoating did not agree to limit its obligation to any specific project. Dustcoating could have avoided liability on this project by including a limitation in the GIAs or by giving timely notice of termination to Hartford. It did neither.

Significantly, section XV of the June 8, 1999 GIA requires the indemnitor to notify Hartford of any desire to have no exposure as to bonds not yet written. The Dustcoating defendants did not ask Hartford to relieve them of their indemnity obligations until July 3, 2007, more than seven years after signing the agreement.

The majority and the Dustcoating defendants rely, in part, on the declaration of Rick Levesque to establish a project specific agreement. In his declaration, Mr. Levesque states that

> [i]t was Hartford's position that the 6/8/99 GIA signed by Dustcoating and the Johnsons was a "project-specific" general indemnification agreement for the Manchester Project, that neither the Johnsons nor Dustcoating intended to assume indemnification liability for the McCormick & Baxter Project through execution of the 6/8/99 GIA, and that Hartford did not intend to take the Johnsons' indemnity for the McCormick & Baxter Project

through the 6/8/99 GIA.

CP at 13-14. Mr. Levesque also stated that Hartford received indemnification only under the May 20, 1999 GIA. But Mr. Levesque did not work for Hartford prior to April 2004 and had no firsthand knowledge of the May 20 or June 8, 1999 negotiations. Mr. Levesque conceded that he had never spoken with the Hartford underwriter who handled the underwriting of Remtech in 1999 and that his understanding of Hartford's intent was based solely on a Hartford underwriter, Scott Alderman.

Contradicting Mr. Levesque, Steve Allsop, the actual underwriter for the Remtech account in 1999, stated that it was Hartford's "intent for the General Indemnity Agreement dated June 8, 1999 to govern all bonds issued by The Hartford [for Remtech] after June 8, 1999." CP at 182.

The Dustcoating defendants acknowledge that no specific indemnity agreement is referenced in the San Juan County lawsuit settlement agreement. To settle the San Juan County lawsuit, the Carpenters paid Hartford $287,360.22 under an agreement that read, in part:

> The Hartford hereby unconditionally releases Carpenters from *all liability* arising out of The Hartford's settlement and payment of the claims [asserted by Munitor and Global Diving].

CP at 279 (emphasis added).

"The right to contribution is distinct from the contract that expresses the relation between the sureties and the creditor of their principal." 74 Am. Jur. 2d *Suretyship* § 172 (2009). This right is not based upon the instrument binding the cosureties to the creditor. *Id.* Instead, the right of contribution among cosureties is based on equitable principles. More specifically, "[t]he right to contribution is not based upon the instrument on which the guarantors have become liable, but is based upon the idea that, when the guarantors signed such instrument, they impliedly agreed that, if there should be any liability, each will contribute his just portion." *Appleford v. Snake River Mining, Milling & Smelting Co.*, 122 Wash. 11, 15, 210 P. 26 (1922). Because the Carpenters are cosureties who paid the obligation, the doctrine of contribution allows them to collect from their cosureties any amount paid over their share. The San Juan County settlement does not change Dustcoating's liability under the GIAs.

The Dustcoating defendants and the Carpenters are cosureties, and the Carpenters have a right of contribution against the Dustcoating defendants. I would affirm the trial court's grant of summary judgment to the Carpenters.

Kulik, C.J.