CASE NO. 01-08-00295-CV

IN THE COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

TELLEPSEN BUILDERS, L.P.,
Appellant,

v.

KENDALL/HEATON ASSOCIATES, INC. AND CBM ENGINEERS, INC.,
Appellees.

On Appeal from the 269th Judicial District Court of Harris County, Texas
Cause No. 2006-44489-A

BRIEF OF APPELLEE KENDALL/HEATON ASSOCIATES, INC.

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ORAL ARGUMENT REQUESTED

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Trial Judge:

The Honorable John T. Wooldridge, 269th Judicial District Court of Harris County, Texas.

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TO THE HONORABLE COURT OF APPEALS:

Appellee Kendall/Heaton Associates, Inc. ("Appellee" or "Kendall/Heaton") submits this brief in response to the brief filed by Appellant Tellepsen Builders, L.P. ("Appellant" or "Tellepsen"), as follows:

STATEMENT OF THE CASE

Tellepsen's statement of the case is accurate.

RECORD CITATIONS

The clerk's record has four volumes. Kendall/Heaton will cite the applicable volume, followed by the page number. Thus, a citation to **1 CR 14** refers to volume 1 and to page 14 of the clerk's record.

ISSUE PRESENTED

Reply Point To Appellant's Issue 1:

The trial court correctly granted summary judgment for Kendall/Heaton based on the waiver of subrogation clause in its subcontract with Tellepsen for the following three reasons:

a. The term "property or equipment insurance" in the waiver of subrogation clause is unambiguous. That term has the following meaning: an insurance policy that provides coverage for property damage;

b. Kendall/Heaton established that the CGL policy that Tellepsen obtained from Zurich American Insurance Company ("Zurich") qualifies as "property or equipment insurance," thereby triggering the waiver of subrogation clause and disallowing Tellepsen's claims. Further, Zurich consented to Tellepsen's waiver of subrogation;

c. Kendall/Heaton's interpretation of the waiver of subrogation clause upholds the basic principles of the doctrine of subrogation.

STATEMENT OF FACTS

Tellepsen signed a Design-Build Agreement ("the general contract") with Protestant Episcopal Church Council of the Diocese of Texas ("Episcopal Church Council") on August 15, 1997 (2 CR 427-50). The subject of the general contract was the expansion of and the renovations to the Camp Allen Retreat and Conference Center ("the project") (2 CR 428), which Episcopal Church Council owns (1 CR 2, 5).[1] Tellepsen served as the general contractor on the project (1 CR 4, 5). Kendall/Heaton was the architect on the project; Defendant/Appellee CBM Engineers, Inc. ("CBM") was the structural engineer on the project (*Id.*).

[1] The general contract that Tellepsen and Episcopal Church Council signed is a form agreement that the Associated General Contractors of America ("AGCA") issues (2 CR 427-28).

On October 1, 1997, Tellepsen signed a subcontract with Kendall/Heaton (3 CR 728-37). Tellepsen also signed a subcontract with CBM (2 CR 418-26). Both subcontracts were AGCA forms "between contractor and architect/engineer for design-build projects" (2 CR 418; 3 CR 728).

Section 2.3 of Kendall/Heaton's subcontract with Tellepsen provides that Kendall/Heaton's subcontract with Tellepsen "represents the entire agreement between the Contractor and the Architect/Engineer and supersedes all prior negotiations, representations and agreements, either written or oral" (3 CR 730). Section 7.3 of Kendall/Heaton's subcontract with Tellepsen, in turn, addresses waivers of subrogation (3 CR 735). That section provides as follows:

> The Contractor and Architect/Engineer waive all rights against each other and the Owner, Subcontractors and Subsubcontractors for loss or damage to the extent covered by property or equipment insurance, except such rights as they may have to the proceeds of such insurance.

(*Id.*).[2] Kendall/Heaton's subcontract with Tellepsen does not define the term "property or equipment insurance" (3 CR 728-37). Texas law governs Kendall/Heaton's subcontract with Tellepsen (3 CR 736).

Tellepsen previously obtained a commercial general liability insurance policy ("the policy" or "the CGL policy") from Zurich American Insurance Company ("Zurich") (2 CR 327-402). The policy period was from March 31, 2004 to March 31, 2005 (2 CR 327). The CGL policy contains the following waiver of subrogation endorsement:

[2] CBM's subcontract with Tellepsen contains the same waiver of subrogation clause (2 CR 424).

> If you are required by a written contract or agreement, which is executed before a loss, to waive your rights of recovery from others, we agree to waive our rights of recovery.

(2 CR 345).

Work on the project began in 1998 (1 CR 5). After construction began, the project "began evidencing significant structural damage and water damage" (*Id.*). Episcopal Church Council notified Tellepsen of alleged problems concerning the design and the construction of the project (3 CR 893). Tellepsen then made various repairs to the Camp Allen Retreat and Conference Center (3 CR 324). The total cost of those repairs is $841,042.00 (1 CR 281). Zurich reimbursed Tellepsen for its repairs under the CGL policy (2 CR 323-24).

Acting as Zurich's subrogor, Tellepsen sued Kendall/Heaton and CBM, among others (1 CR 2-8; 2 CR 324). Tellepsen contends that Kendall/Heaton and CBM are liable for the design defects and for the construction defects on the project (2 CR 323-34). Tellepsen seeks to recover the cost of its repairs "from the parties with whom Tellepsen contracted and who performed the defective work" (2 CR 324).

CBM subsequently filed a traditional motion for summary judgment (1 CR 174-294). CBM contended that the waiver of subrogation clause in its subcontract precluded Tellepsen's claims (1 CR 174). Kendall/Heaton filed a traditional motion for summary judgment on the same grounds (3 CR 694-853).[3] Tellepsen responded to both summary judgment motions (2 CR 295 – 3 CR 694; 3 CR 854-68; 3 CR 888-918). Tellepsen

[3] Kendall/Heaton adopted and incorporated by reference the evidence and arguments in CBM's motion for summary judgment (3 CR 699).

argued that the waiver of subrogation clauses in the subcontracts applied to "first-party" property damage insurance[4]—not to CGL policies (2 CR 300-317; 4 CR 894-914).

The trial court eventually granted Kendall/Heaton's and CBM's motions for summary judgment (4 CR 937, 940). The trial court's order granting CBM's motion for summary judgment awarded CBM attorneys' fees totaling $58,976.31, as well as attorneys' fees on appeal (4 CR 940-41). The trial court's two summary judgment orders do not specify the reasons why the trial court granted summary judgment for Kendall/Heaton and CBM (4 CR 937, 940).

Kendall/Heaton and CBM filed a joint motion to sever Tellepsen's claims against Kendall/Heaton and CBM (4 CR 947-55). The trial court granted that motion and severed Tellepsen's claims against Kendall/Heaton and CBM into a new docket number: No. 2006-44489-A (4 CR 956). This appeal followed (4 CR 962-64).

SUMMARY OF THE ARGUMENT

Kendall/Heaton previously signed a subcontract with Tellepsen (3 CR 728-37). The waiver of subrogation clause in that subcontract explicitly states that Tellepsen waives "all rights" against Kendall/Heaton "for loss or damage to the extent covered by property or equipment insurance" (3 CR 735). Following Kendall/Heaton's execution of its subcontract with Tellepsen, a myriad of problems arose with the project and Tellepsen

[4] Property insurance is a good example of first-party insurance. A first-party claim is one that an insured makes in order to seek recovery for the insured's own loss. *See, e.g., Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 17 (Tex. 2007). A CGL policy, by contrast, is "third-party" insurance because the insured seeks coverage for injuries and damages it allegedly caused a third party to suffer. *Id.* at 17-18.

filed this subrogation lawsuit on Zurich's behalf (1 CR 2-8). Relying on the waiver of subrogation clause, Kendall/Heaton obtained summary judgment on Tellepsen's claims. Tellepsen contends that the trial court erred in disallowing its claims. The Court should disregard this assertion for three reasons.

First, the term "property or equipment insurance" in Kendall/Heaton's subcontract with Tellepsen is unambiguous. That term has the following meaning: an insurance policy providing coverage for property damage. Second, Kendall/Heaton established that the CGL policy provides coverage for property damage. Indeed, Zurich reimbursed Tellepsen for its repairs and consented to Tellepsen's waiver of subrogation. Thus, the waiver of subrogation clause precludes Tellepsen's claims.

Third, Kendall/Heaton's interpretation of the waiver of subrogation clause upholds the basic principles of the doctrine of subrogation: benefiting the property owner and avoiding litigation. By contrast, Tellepsen's constrained interpretation of the waiver of subrogation clause contravenes established rules of contract interpretation and violates the parol evidence rule. Moreover, adopting Tellepsen's construction of the waiver of subrogation clause will result in protracted litigation—even though Tellepsen previously made repairs on the project. The Court should affirm the trial court's entry of summary judgment for Kendall/Heaton.

ARGUMENT

Reply Point to Appellants' Issue 1

The trial court correctly granted summary judgment for Kendall/Heaton based on the waiver of subrogation clause in its subcontract with Tellepsen.

A. The appropriate standard of review for a traditional summary judgment is *de novo*.

A party who seeks summary judgment must show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The Court must take all evidence favorable to the non-movant as true and indulge every reasonable inference in the non-movant's favor. *Id.* Summary judgment for a defendant is proper when the proof shows that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's causes of action. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990). In other words, a defendant must disprove—as a matter of law—at least one of the essential elements of a plaintiff's cause of action. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). Once the movant establishes a right to summary judgment, the non-movant must expressly present any reasons seeking to avoid the movant's entitlement and must support the reasons with summary judgment proof to establish a fact issue. *Cummings v. HCA Servs. of Tex.*, 799 S.W.2d 403, 405 (Tex. App.—Houston [14th Dist.] 1990, no writ).

Where, as here, the trial court's order granting summary judgment does not specify the grounds on which the trial court granted summary judgment, the Court of Appeals should affirm the summary judgment if any theory advanced in the motion supports the granting of summary judgment. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995).

B. The Waiver of Subrogation Clause Bars Tellepsen's Claims.

1. The Term "Property Or Equipment Insurance" In The Waiver Of Subrogation Clause Is Unambiguous.

After tendering payment for a loss under a policy, an insurer is subrogated to any claims the insured may have against any third party whose actions or omissions caused the loss. *Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. John Zink Co.*, 972 S.W.2d 839, 843 (Tex. App.—Corpus Christi 1998, pet. denied). The insurer derives its subrogation rights from the insured's rights. *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142, 145 (Tex. App.—Houston [1st Dist.] 1991, writ denied). To put it another way, the insurer stands in the insured's shoes. *John Zink Co.*, 972 S.W.2d at 843. "[T]here can be no subrogation where the insured has no cause of action against the defendant." *Id.* at 843-44 (citations omitted).

One may waive or release subrogation rights by signing a contract. *E.g.*, *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 127 (Tex. App.—San Antonio 1995, no writ). Indeed, "[t]he general rule is that a release between the insured and the offending party prior to the loss destroys the insurance company's rights by way of subrogation." *Trinity Univ. Ins. Co. v. Bill Cox Constr., Inc.*, 75 S.W.3d 6, 10 (Tex. App.—San Antonio 2001, no pet.) (citations omitted). A waiver of subrogation clause serves two purposes: (1) avoiding litigation between the parties who work on the project; and (2) benefiting the property owner if property damage occurs. *Walker Eng'g, Inc. v. Bracebridge Corp.*, 102 S.W.3d 837, 841 (Tex. App.—Dallas 2003, pet. denied).

The language in a waiver of subrogation clause can vary considerably. Thus, Texas courts have carefully examined the particular terms of waiver of subrogation

clauses.[5] The construction of a particular waiver of subrogation clause depends greatly on the text of that clause. *Id*. at 840-41.

a. The Starting Point For Contract Interpretation Under Texas Law Is The Text Of The Contract.

"[T]he construction of a contract is for the court . . . ." *City of Houston v. Wise*, 323 S.W.2d 134, 140 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). The starting point for contract interpretation is the text of the contract, which constitutes "the written expression of the parties' intent." *Provident Life & Accident Ins. Co. v. Knott*, 128 SW.3d 211, 219 (Tex. 2003). Each sentence, each clause, and each word in a contract must be given meaning. *Temple Eastex, Inc.*, 848 S.W.2d at 738. The first legal question for the Court to answer is whether the contract is ambiguous. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000).

A term or a clause in a contract is unambiguous if one can give that term or clause "a certain or definite legal meaning or interpretation." *Id*. (citations omitted). To put it another way, if a term is "not reasonably susceptible to more than one meaning," that term is unambiguous. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). Ambiguity does not exist simply because the parties present conflicting contractual interpretations. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996).

[5] *See TX. C.C., Inc. v. Wilson/Barnes Gen. Contractors, Inc.*, 233 S.W.3d 562, 574 (Tex. App.—Dallas 2007, pet. denied); *Bracebridge Corp.*, 102 S.W.3d at 840-41; *Bill Cox Constr., Inc.*, 75 S.W.3d at 8-10; *Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 731 (Tex. App.—Dallas 1992, writ denied).

If the contract is unambiguous, the Court's work is done and the Court will enforce the contract as written. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). If the Court finds that the contract is ambiguous, however, the Court may consider extrinsic evidence to determine the contract's true meaning. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam). At all times, the Court must effectuate the parties' intentions "as expressed in the document." *Lopez*, 22 S.W.3d at 861 (citation omitted).

b. The Meaning Of The Term "Property Or Equipment Insurance" In The Waiver Of Subrogation Clause Is As Follows: An Insurance Policy That Provides Coverage For Property Damage.

Texas courts have not yet interpreted the phrase "property or equipment insurance" in a waiver of subrogation clause. *Cf. Temple Eastex, Inc.*, 848 S.W.2d at 830 ("We have found no Texas case interpreting the effect of the AIA contract under consideration."). The logical interpretation of the meaning of the term "property or equipment insurance," however, is as follows: an insurance policy that provides coverage for property damage. This interpretation is fully consistent with the text of and the grammar contained in the waiver of subrogation clause.[6] *Cf., e.g., Dorsett v. Cross*, 106 S.W.3d 213, 219-20 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

[6] *Cf. TX. C.C., Inc.*, 233 S.W.3d at 574 ("TX. CC., and accordingly Safeco, waived its rights against Wilson/Barnes and Colorado Stone for damages to the restaurant arising from fire that were covered *by any property insurance* . . . . (emphasis added)); *Bill Cox Constr., Inc.*, 75 S.W.3d at 14 ("As long as *a policy of insurance* 'applicable to the Work' paid for Dog Team's damages, the waiver applies." (emphasis added)).

c. The Court Should Refuse To Adopt Tellepsen's Constricted Interpretation Of The Waiver Of Subrogation Clause For Several Reasons.

i. Tellepsen's Interpretation Of The Waiver Of Subrogation Clause Finds Little Support In The Text Of Kendall/Heaton's Subcontract With Tellepsen.

Tellepsen argues that the term "property or equipment insurance" only means property insurance that the project owner obtains. Tellepsen's Brief at 9-11. But Tellepsen reads the waiver of subrogation clause far too narrowly. That clause is not confined to "first-party" property insurance (3 CR 735). Nor does that clause utilize the term "property insurance obtained by the owner" (*Id.*). And in the absence of any such language, this Court cannot rewrite the waiver of subrogation clause at Tellepsen's request. *See Lopez*, 22 S.W.3d at 861. Further, the Court must construe the subcontract against Tellepsen, the party that obtained it. *Cf. Hill Constructors, Inc. v. Ins. Co. of N. Am.*, 833 S.W.2d 742, 746 (Tex. App.—Houston [1st Dist.] 1992, writ denied).[7]

ii. Tellepsen Chose Not To Limit The Waiver Of Subrogation Clause To Property Insurance Obtained By Episcopal Church Council.

Before Kendall/Heaton and Tellepsen signed the subcontract, Tellepsen could have limited the waiver of subrogation clause to property insurance obtained by Episcopal Church Council. Tellepsen did not do so (3 CR 735). Indeed, Tellepsen volitionally chose to waive its subrogation rights. *See Valero Energy Corp. v. M.W.*

[7] Kendall/Heaton's subcontract with Tellepsen contains many handwritten changes and deletions (3 CR 732, 734-36). Tellepsen did not, however, alter the language contained in the waiver of subrogation clause (3 CR 735).

Kellogg Constr. Co., 866 S.W.2d 252, 257-58 (Tex. App.—Corpus Christi 1993, writ denied). The Court should hold Tellepsen to its contractual commitments.

iii. The Court Should Decline Tellepsen's Invitation To Consider Extrinsic Evidence.

Tellepsen contends that the term "property insurance" "is distinct from 'liability insurance'" in the insurance industry. Tellepsen's Brief at 4. But this Court need not examine trends in the insurance industry. Rather, the Court's initial task is to determine the meaning of the term "property or equipment insurance." And because the meaning of this term is apparent, the Court should not consider extrinsic evidence regarding the insurance industry. *See NationsBank*, 939 S.W.2d at 121.

Tellepsen asks the Court to consider parol evidence. The parol evidence rule provides that where, as here, the parties have integrated their agreement "into a single written memorial, all prior negotiations and agreements with regard to the same subject matter are excluded from consideration . . . ." *Smith v. Smith*, 794 S.W.2d 823, 827 (Tex. App.—Dallas 1990, no writ). The parol evidence rule particularly applies if the contract contains a recital that it constitutes the entire agreement between the parties. *E.g.*, *Baroid Equip., Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Courts consider parol evidence only in limited situations, such as contractual ambiguity or fraud. *Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 178 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Section 2.3 of Kendall/Heaton's subcontract with Tellepsen states that Kendall/Heaton's subcontract with Tellepsen "represents the entire agreement between

the Contractor and the Architect/Engineer and supersedes all prior negotiations, representations and agreements, either written or oral" (3 CR 730). The presence of this merger clause prohibits the consideration of parol evidence. *See Edascio, L.L.C. v. Nextiraone, L.L.C.*, No. 01-07-00362-CV, 2008 Tex. App. LEXIS 3855, at *37 (Tex. App.—Houston [1st Dist.] May 22, 2008, no pet. h.). Further, because the term "property or equipment insurance" is unambiguous, the Court should not consider parol evidence. *Ledig*, 193 S.W.3d at 178.[8]

iv. The Cases On Which Tellepsen Relies Do Not Directly Apply To The Waiver Of Subrogation Clause.

Tellepsen eloquently and forcefully argues that Texas courts construe the term "property or equipment insurance" to mean "first-party" property insurance that the project owner obtains—not CGL policies. Tellepsen's Brief at 9-11. Admittedly, Texas courts have previously found that waiver of subrogation clauses applied because the project owner obtained property insurance.[9] The cases on which Tellepsen relies, however, did not involve the term "property or equipment insurance."[10] Thus, these cases do not directly answer the question pending before the Court.

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[8] Tellepsen contends that Kendall/Heaton attempts to selectively assert the parol evidence rule because Kendall/Heaton wants the Court to consider the CGL policy. Tellepsen's Brief at 15. Kendall/Heaton, however, cites the CGL policy simply to show that the property damage claimed by Episcopal Church Council is covered by "property or equipment insurance." The term "property or equipment insurance" is unambiguous; the CGL policy has no bearing on that issue.

[9] *See TX. C.C., Inc.*, 233 S.W.3d at 567; *Bracebridge Corp.*, 102 S.W.3d at 841; *Bill Cox Constr., Inc.*, 75 S.W.3d at 13; *Temple Eastex, Inc.*, 848 S.W.2d at 731.

[10] *See TX. C.C., Inc.*, 233 S.W.3d at 567; *Bracebridge Corp.*, 102 S.W.3d at 841; *Bill Cox Constr., Inc.*, 75 S.W.3d at 13; *Temple Eastex, Inc.*, 848 S.W.2d at 731. Nor do any of these cases support the proposition that professionals in the insurance industry construe the term "property or equipment insurance" to mean property insurance that the project owner obtains.

This case is one of first impression. The Court should therefore focus on the precise meaning of the term "property or equipment insurance." As previously illustrated, the meaning of this term is as follows: an insurance policy that provides coverage for property damage. Because the CGL policy fits within this definition, the waiver of subrogation clause prohibits Tellepsen's claims (3 CR 788, 791).

2. Kendall/Heaton Established That The Waiver Of Subrogation Clause Applies.

a. The CGL Policy That Tellepsen Obtained From Zurich Provides Coverage For Property Damage.

The record demonstrates that the CGL policy provided coverage for the property damage to the Camp Allen project (2 CR 323-24; 3 CR 750). The CGL policy states that Zurich will "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applied" (3 CR 788). "Property damage" includes damage to property on which Tellepsen and its subcontractors "are performing operations, if the 'property damage' arises out of those operations . . . ." (3 CR 791).

In September 2004, Episcopal Church Council notified Tellepsen of problems with the design and with the construction of the project (3 CR 893). Shortly thereafter, Tellepsen made numerous repairs (3 CR 750-56). Tellepsen sought reimbursement from Zurich under the CGL policy (3 CR 750, 893). Zurich then reimbursed Tellepsen under the CGL policy (2 CR 323-24; 3 CR 750). The total amount of repairs for which Tellepsen received reimbursement is $841,042 (1 CR 281; 3 CR 750).

The CGL policy provided coverage for "loss or damage" to the project (2 CR 323-24; 3 CR 750). Thus, the waiver of subrogation clause applies and Tellepsen waived its claims against Kendall/Heaton. Because Zurich's insured waived its claims, Zurich has no subrogation rights. *John Zink Co.*, 972 S.W.2d at 843-44. The Court's entry of summary judgment for Kendall/Heaton was appropriate.

b. Zurich Consented To Tellepsen's Waiver Of Subrogation.

The CGL policy contains a blanket waiver of subrogation endorsement (3 CR 786). This endorsement modifies the insurance provided by the policy (*Id.*). This endorsement also nullifies Zurich's rights as a subrogee.

The blanket waiver of subrogation endorsement in the CGL policy states that if Tellepsen is "required by a written contract or agreement, which is executed before a loss, to waive your rights of recovery from others, we agree to waive our rights of recovery" (3 CR 786). Kendall/Heaton signed its subcontract with Tellepsen on October 1, 1997 (3 CR 728). Construction on the project began in 1998 (1 CR 5). Because the alleged property damage occurred after Tellepsen and Kendall/Heaton signed the subcontract (1 CR 5; 3 CR 893), Zurich consented to Tellepsen's waiver of subrogation.

3. Kendall/Heaton's Interpretation Of The Waiver Of Subrogation Clause Upholds The Basic Principles Of The Doctrine Of Subrogation.

a. Benefiting The Project Owner.

Kendall/Heaton's interpretation of the phrase "property or equipment insurance" fully embodies one of the basic purposes of subrogation—to benefit the project owner. *Bracebridge Corp.*, 102 S.W.3d at 841. There is no dispute that Episcopal Church

Council received benefits after the alleged property damage occurred (3 CR 750-56). Indeed, Tellepsen made substantial repairs and Zurich reimbursed Tellepsen for doing so (3 CR 750). Accordingly, interpreting the term "property or equipment insurance" to encompass the CGL policy produces a fair result in this case.[11]

b. Avoiding Protracted Litigation.

Moreover, Kendall/Heaton's interpretation of the waiver of subrogation clause upholds a key policy underlying those clauses—to avoid litigation. *Bracebridge Corp.*, 102 S.W.3d at 841. Waiver of subrogation clauses "serve to ensure construction stays on schedule without falling victim to lawsuits . . . ." *TX. C.C., Inc.*, 233 S.W.3d at 571. Adopting Tellepsen's interpretation of the waiver of subrogation clause, however, will prolong litigation regarding the project—even though Episcopal Church Council has received the benefit of Tellepsen's repairs. Accordingly, the Court should refuse to adopt Tellepsen's interpretation of the waiver of subrogation clause.

PRAYER

For these reasons, Appellee Kendall/Heaton Associates, Inc. respectfully prays that the trial court's summary judgments be in all things affirmed, with costs taxed against Appellant Tellepsen Builders, L.P.

[11] Tellepsen argues that if CGL policies triggered waiver of subrogation clauses, "the subcontract provisions requiring professional liability insurance would be rendered meaningless." Tellepsen's Brief at 5. This argument fails for two reasons. First, the project owner can sue a subcontractor directly. Second, subcontractors must obtain professional liability insurance regardless of whether a subrogation claim is pending.

Respectfully submitted,

HAYS, McCONN, RICE & PICKERING

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CERTIFICATE OF SERVICE

As required by Texas Rules of Appellate Procedure 6.3 and 9.5(b), (d), (e), I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded by certified mail, return receipt requested on this the eleventh day of September, 2008, to all counsel of record, as follows:

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