

IN THE SUPREME COURT
OF THE STATE OF OREGON

WALSH CONSTRUCTION CO.,

Appellant,

v.

MUTUAL OF ENUMCLAW,

Appellee.

SC No. S51104

CA No. A117368

TC No. 0104-03398

**MEMORANDUM OF ADDITIONAL AUTHORITIES OF AMICUS CURIAE
AMERICAN SUBCONTRACTORS ASSOCIATION**

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Company, and Senator Frank Morse

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Pursuant to ORAP 8.15(7) and ORAP 5.85, Amicus Curiae American Subcontractors Association (“ASA”) submits as additional authorities in this matter *MW Builders v. Safeco Insurance Company, et al.*, Civ. No. 02-1478-AS (U.S. District Court for the District of Oregon, September 14, 2004) and the October 15, 2004 New York Times article entitled “Amtrak Pays Millions for Others’ Fatal Errors” (“Amtrak Article”) as additional authorities in this matter.

MW Builders supports the observation at pp 2-4 of ASA’s Amicus Curiae Brief that the Court of Appeals correctly concluded that ORS 30.140(2) did not apply to this case. In *MW Builders*, magistrate Ashmanskas correctly interprets the Court of Appeals decision in Walsh Construction. The Court rules that the general contractor on a completed hotel project is entitled to coverage, as an additional insured on its EIFS subcontractor's general liability insurance policy, against construction defect claims brought by the hotel owner for substantial water intrusion and damage to the completed hotel. Slip opinion at p 23. Specifically, Judge Ashmanskas ruled that the general contractor “is not precluded, under Oregon law, from arguing that it was entitled to coverage, as an additional insured, under [the EIFS subcontractor]’s policy for covered damages arising from the fault or negligence of [the EIFS subcontractor].” Slip opinion at p 23. He further rules as follows: “Conversely, of course, [the general contractor] may not recover under the [the EIFS subcontractor's] CGL policies for any damages that resulted from its own fault or negligence.” *Id.*

Similarly, here, ORS 30.140(2) is simply not implicated. Any contention that the trial court failed to permit Walsh Construction to litigate the extent of the negligence of Ron Rust

Drywall is unavailing because Walsh Construction did not pursue and/or preserve that argument on appeal.

The Amtrak Article supports the arguments set forth at pages 11-14 of ASA's Amicus Curiae Brief that hold harmless and additional insured endorsement requirements like the one sought to be enforced in this matter by Walsh Construction create a "moral hazard" by eliminating incentives to prevent accidents and construction defects. In the Amtrak Article, the author observes that Amtrak must indemnify railroads as a condition of Amtrak using a railroad's tracks. As a consequence, multiple instances exist in which substantial and punitive damage awards against railroads for a railroad's own negligent actions or gross misconduct are actually paid by Amtrak:

"For three decades, Amtrak has been paying these liability claims, regardless of fault, as a condition for using the freight lines' tracks. Not only do these payments shift the burden of paying for negligence from profitable corporations to taxpayers, they remove an incentive for railroads to keep their tracks safe."

Amtrak Article p 1.

Similarly, here, the existence of hold harmless and additional insured obligations circumvents the moral hazard public policy embodied in ORS 30.140. When upstream contractors may contractually foist liability for their mistakes off on subcontractors, there exists no legal incentive to prevent accidents or eliminate construction defects.

DATED: October 28, 2004.

Respectfully submitted, AMERICAN
SUBCONTRACTORS ASSOCIATION, INC., by
and through its counsel,

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