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## Recent Developments: Gables Construction, Inc. v. Red Coats, Inc.

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## RECENT DEVELOPMENT

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### ***GABLES CONSTR., INC. V. RED COATS, INC.: A THIRD-PARTY WHICH HAS SIGNED A WAIVER OF SUBROGATION WITH THE INJURED PARTY CANNOT BE CONSIDERED A JOINT TORTFEASOR UNDER THE UCATA AND IS THEREFORE NOT LIABLE FOR CONTRIBUTION.***

**By: Alexa Mellis**

The Court of Appeals of Maryland held that a third-party who is not liable in tort to an injured party as a result of a contractual waiver cannot be held liable for contribution pursuant to the Maryland Uniform Contribution Among Joint Tort-Feasors Act (“UCATA”). *Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 671, 228 A.3d 736,759 (2020). A waiver of subrogation in a contract prevents the third-party from being liable in tort to the injured party and as a result the injured party may not bring a claim against it. *Id.* at 657, 228 A.3d at 750-51. Accordingly, a third-party who is not liable in tort to the injured party cannot be held liable for contribution because the UCATA requires that the joint tortfeasor be liable to the injured party. *Id.* at 645, 228 A.3d at 743.

On August 2, 2012, Upper Rock II, LLC (“Upper Rock”) entered into a contract (“the Prime Contract”) with Gables Construction, Inc. (“GCI”) under which GCI would serve as the general contractor for the construction of an apartment building. Both Upper Rock and GCI waived the right to subrogation on the condition that Upper Rock purchased property insurance for the construction project. Consequentially, GCI could not be held liable by Upper Rock for any fire damage. In January 2014, GCI’s parent company hired Red Coats, Inc. (“Red Coats”) to provide security and fire watch services for the apartment project. Red Coats was to provide security at night after GCI personnel walked through the jobsite ensuring no hazards were present upon completion of each workday. On March 31, 2014, both GCI personnel and the Red Coats security officer failed to perform a sweep of the building. That night, a fire ignited and destroyed the building, causing \$17.6 million in damages.

In November 2014, Upper Rock filed an action in the Circuit Court for Montgomery County against Red Coats. Upper Rock alleged that the failure to perform an adequate fire watch arguing it was the proximate cause of the March 31st fire. Upper Rock was granted a partial summary judgment motion on the issues of duty and breach. Thereafter, Red Coats and Upper Rock entered into a settlement agreement where Red Coats would pay \$14 million to Upper Rock. In August 2015, Red Coats filed a third-party complaint for contribution against GCI. The jury ultimately determined that the contractual waiver did not shield GCI from liability for contribution to Red Coats. GCI

subsequently appealed the circuit court's judgment. The Court of Special Appeals of Maryland affirmed the lower court's ruling, finding GCI to be a joint tortfeasor pursuant to the UCATA because the waiver of subrogation had no bearing on the relationship between the parties. The Court of Appeals of Maryland granted GCI's petition for certiorari.

The question before the court, an issue of first impression, was whether a defendant could be liable for contribution under the UCATA despite the defendant not being liable to the injured party by virtue of a contractual waiver. *Gables Constr., Inc.*, 468 Md. at 644, 228 A.3d at 743.

The Court of Appeals of Maryland first addressed the issue of whether GCI was considered a joint tortfeasor under the UCATA. *Gables Constr., Inc.* 468 Md. at 665, 228 A.3d 755. The court noted that Red Coats claim against GCI could only succeed if GCI satisfies the definition of a joint tortfeasor. *Id.* at 651, 228 A.3d 747. The court relied on the statutory interpretation of "joint tort-feasor" under the UCATA. *Id.* at 657, 228 A.3d at 751. The UCATA defines a joint tort-feasor as "two or more persons jointly or severally liable in tort for the same injury to person or property." *Id.* at 651, 228 A.3d at 747 (quoting Md. Code Ann., Cts.& Jud. Proc. §3-1401 (West 2020)). The Court of Appeals of Maryland evaluated the meaning of "liable in tort" in several previous cases, ultimately concluding that direct liability of the third party to the injured party is required for the right of contribution to be available. *Gables Constr., Inc.* 468 Md. at 657-62, 228 A.3d at 751-53. In reviewing those holdings, the court found that the defenses which precluded the injured party from directly suing the third-party acted as a complete bar to recovery. *Id.* at 662, 228 A.3d at 754. Accordingly, to bring a claim for contribution against a third-party, there must be legal responsibility to the injured party, not mere culpability. *Id.* at 657, 228 A.3d at 751.

The Court of Appeals of Maryland also addressed whether the waiver of subrogation in the Prime Contract prevented Upper Rock from bringing a claim against GCI. *Gables Constr., Inc.*, 468 Md. at 655, 228 A.3d at 749. In reviewing the Prime Contract, the court reaffirmed that a contractual waiver of subrogation is sufficient to waive a right to a claim of subrogation. *Id.* at 654, 228 A.3d at 749 (citing *John L. Mattingly Constr. Co. v. Harford Underwriters Ins. Co.*, 415 Md. 313, 999 A.2d 1066 (2010)). The waiver in the Prime Contract indicated that Upper Rock and GCI mutually agreed to not hold the other party liable should any damages result from a fire, so long as Upper Rock purchased property insurance for the value of the project. *Gables Constr., Inc.* at 657, 228 A.3d at 750. This agreement shifted the risk of loss to the insurance company, a common practice within the construction industry. *Id.* at 653, 228 A.3d at 749. The court ultimately found that Upper Rock and its insurer were precluded from bringing a claim against GCI for the damage sustained in the fire. *Id.* at 653, 228 A.3d at 749.

After establishing that GCI was not liable in tort to Upper Rock, the Court

of Appeals of Maryland then evaluated whether the contractual waiver acted as a complete bar to recovery by Red Coats for contribution. *Gables Constr., Inc.*, 468 Md. at 663, 228 A.3d at 754. Red Coats took the position that the contractual waiver did not preclude its claim for contribution, relying on *Parler & Wobber v. Miles & Stockbridge, P.C.* *Id.* at 665, 228 A.3d at 755. In *Parler*, the court balanced the right to contribution and public policy considerations originating from the attorney-client privilege. *Id.* (citing *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 681, 756 A.2d 526, 531 (2000)). However, the *Parler* court declined to find a compelling reason to recognize the defense of attorney-client privilege as an exception to the right to contribution pursuant to the UCATA. *Id.* at 666, 228 A.3d at 756. The Court of Appeals of Maryland in the instant case found *Parler* to be inapposite, holding that the defense of attorney-client privilege was not a defense to a direct suit by an injured party. *Id.* at 665, 228 A.3d at 756 (citing *Parler*, 359 Md. 671, 756 A.2d 526).

In the present case, the Prime Contract waiver of subrogation was sufficient for Upper Rock to waive liability against GCI creating a defense to the direct suit. *Gables Constr., Inc.* 468 Md. at 655, 228 A.3d at 749 (citing *Mattingly Constr. Co.*, 415 Md. 313, 999 A.2d 1066 (2010)). Liability for contribution is predicated on the liability to the injured party, not a common relationship between the injured party and the joint tortfeasors. *Gables Constr., Inc.*, 468 Md. at 669, 228 A.3d at 758.

The decision in *Gables Constr., Inc.* reinforces the role of subrogation waivers in construction contracts in the financial risks that accompany construction work. To find that the waiver is an insufficient defense to a claim for contribution would be to needlessly increase costs and litigation expenses for the parties and insurance companies alike. Despite this compelling justification, the court limited the analysis to American Institute of Architects (“AIA”) standard form contracts, which are the most commonly used forms throughout the construction industry. The court’s analysis did not venture into the implications of this ruling on other types of construction contracts that may be less commonly used. Accordingly, Maryland practitioners should be cautious in applying this decision to other standard construction contracts where a joint tortfeasor may have contractually waived a right to subrogation, as this holding was limited to AIA contracts only.