

2000

Mountain States Steel, Inc. v. Voest-Alpine Services and Technologies Corporation : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Donald L. Dalton; Dalton, Kelley; Attorneys for Appellant.

Terry M. Plant, H. Justin Hitt; Plant, Wallace, Christensen, Kanell; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Mountain States Steel v. Voest-Alpine Services*, No. 20000608.00 (Utah Supreme Court, 2000).
https://digitalcommons.law.byu.edu/byu_sc2/534

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

MOUNTAIN STATES STEEL, INC., : Case No. 20000608-SC

Third-Party Plaintiff, : Priority No. 15

vs. :

VOEST-ALPINE SERVICES & :
TECHNOLOGIES CORPORATION, :

Third-Party Defendant. :
:

**BRIEF OF APPELLEE/CROSS-APPELLANT
VOEST-ALPINE SERVICES & TECHNOLOGIES CORPORATION**

On Appeal from Judgment
of the Fourth Judicial District Court,
Utah County, State of Utah
Honorable James Taylor, Presiding

Donald L. Dalton (4305)
DALTON & KELLEY
Post Office Box 58084
Salt Lake City, Utah 84158
Telephone: (801) 583-2510

Attorneys for Appellant Mountain
States Steel, Inc.

Terry M. Plant (2610)
H. Justin Hitt (8762)
PLANT, WALLACE,
CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Telephone (801) 363-7611

Attorneys for
Voest-Alpine Services &
Technologies Corporation,
Appellee/Cross-Appellant

FILED

MAY 23 2001

**CLERK SUPREME COURT
UTAH**

IN THE UTAH SUPREME COURT

MOUNTAIN STATES STEEL, INC., : Case No. 20000608-SC

Third-Party Plaintiff, : Priority No. 15

vs. :

VOEST-ALPINE SERVICES & :
TECHNOLOGIES CORPORATION, :

Third-Party Defendant. :
 :

**BRIEF OF APPELLEE/CROSS-APPELLANT
VOEST-ALPINE SERVICES & TECHNOLOGIES CORPORATION**

On Appeal from Judgment
of the Fourth Judicial District Court,
Utah County, State of Utah
Honorable James Taylor, Presiding

Donald L. Dalton (4305)
DALTON & KELLEY
Post Office Box 58084
Salt Lake City, Utah 84158
Telephone: (801) 583-2510

Attorneys for Appellant Mountain
States Steel, Inc.

Terry M. Plant (2610)
H. Justin Hitt (8762)
PLANT, WALLACE,
CHRISTENSEN & KANELL
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Telephone (801) 363-7611

Attorneys for
Voest-Alpine Services &
Technologies Corporation,
Appellee/Cross-Appellant

TABLE OF CONTENTS

JURISDICTION	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW	1
STATEMENT OF CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	13
POINT I	13
POINT II	14
POINT III	15
ARGUMENT	16
I. BECAUSE THE LEASE HAD NOT COMMENCED AT THE TIME OF THE BAKOWSKI/RAMIREZ ACCIDENT, VOEST-ALPINE WAS NOT OBLIGATED TO INDEMNIFY MOUNTAIN STATES FOR THE ACCIDENT.	16
II. BECAUSE THE BAKOWSKI/RAMIREZ ACCIDENT WAS COVERED BY MOUNTAIN STATES' INSURANCE, THE TRIAL COURT PROPERLY ENFORCED THE LEASE'S WAIVER OF SUBROGATION PROVISION AND DISMISSED MOUNTAIN STATES' INSURERS' CLAIMS AGAINST VOEST-ALPINE	22
A. <u>The Waiver of Subrogation Provision Applies to Any Insurance, Not Just the Insurance Required by the Lease.</u>	23

B.	<u>The Waiver of Subrogation Provision Is Not Contingent Upon Notice to the Insurers and Receipt of Endorsements</u>	28
C.	<u>Equity Favors Voest-Alpine’s Position</u>	33
III.	THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING VOEST-ALPINE ONLY \$30,206.45 IN ATTORNEY FEES, WHERE THE EVIDENCE ESTABLISHES THAT VOEST-ALPINE INCURRED \$38,380.00 IN ATTORNEY FEES	34
	CONCLUSION	38

TABLE OF AUTHORITIES

CASES	PAGE(S)
<u>Allstate v. Ivie</u> , 606 P.2d 1197 (Utah 1980)	33
<u>Continental Ins. Co. v. Boraie</u> , 672 A.2d 274 (N.J. Super. Ct. Law Div. 1995)	31
<u>Dixie State Bank v. Bracken</u> , 764 P.2d 985 (Utah 1988)	2, 36, 37
<u>Dixon v. Pro Image, Inc.</u> , 987 P.2d 48 (Utah 1999)	19
<u>Fashion Place Inv. v. Salt Lake County</u> , 776 P.2d 941 (Ut. App. 1989)	24
<u>Harlington Realty Corp. v. S.L.G. Discount Corp.</u> , 556 N.Y.S.2d 308 (N.Y.A.D. 1 Dept. 1990)	29
<u>Hoth v. White</u> , 799 P.2d 213 (Ut. App. 1990)	37
<u>Lloyd's Underwriters v. Craig & Rush, Inc.</u> , 32 Cal. Rptr. 2d 144 (Cal. Ct. App. 1994)	25
<u>Millican of Wash. v. Wienker Carpet Serv.</u> , 722 P.2d 861 (Wash. App. 1986)	31
<u>Peirce v. Peirce</u> , 994 P.2d 193 (Utah 2000)	20
<u>Plain City Irr. Co. v. Hooper Irr. Co.</u> , 356 P.2d 625 (Utah 1960)	20

<u>ProMax Development Corp. v. Raile,</u> 998 P.2d 254 (Utah 2000)	11
<u>Richmond Steel, Inc. v. Legal & General Assurance Soc., Ltd.,</u> 821 F.Supp. 793 (D. Puerto Rico 1993)	31
<u>Rio Algom Corp. v. Jimco Ltd.,</u> 618 P.2d 497 (Utah 1980)	30
<u>Touchet Valley Grain v. Opp & Seibold,</u> 831 P.2d 724 (Wash. 1992)	26, 27, 28
<u>Town of Silverton v. Phoenix Heat Source,</u> 948 P.2d 9 (Colo. App. 1997)	24, 25, 28
<u>Zions First Nat'l Bank v. National Am. Title Ins. Co.,</u> 749 P.2d 651 (Utah 1988)	1, 2
 TREATISE	
16 Couch on Insurance 2d (Rev. ed. 1983) § 61:194	31
 JOURNAL	
2 Conn. Ins. L. J. 1 (1996)	32
 STATUTE	
Utah Code Ann. §78-2-2(3)(j)	1

JURISDICTION

The Court has jurisdiction over this appeal and cross-appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES

1. Did the trial court err in holding that the lease agreement executed between Voest-Alpine Services & Technologies Corporation (“Voest-Alpine”), as lessee, and Mountain States Steel, Inc. (“Mountain States”), as lessor, commenced on March 1, 1994, despite the fact that Mountain States had not completed improvements to the leased premises which were a contractual prerequisite to Voest-Alpine taking possession of the leased premises, and despite the fact that Mountain States failed to deliver possession of the building by March 1, 1994. This issue was raised in Voest-Alpine’s motion for summary judgment. (R. 156-155) On this issue, the trial court denied Voest-Alpine’s motion for summary judgment and granted Mountain States’ insurers’ cross-motion for summary judgment . (R. 458) Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions this Court reviews the trial court’s interpretation for correctness. See Zions First Nat’l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 653 (Utah 1988).

2. Did the trial court properly determine that the waiver of subrogation provision in Voest-Alpine’s and Mountain States’ lease agreement barred Mountain States’ insurers from bringing a subrogation action against Voest-Alpine. This issue was

raised in Voest-Alpine's second motion for summary judgment. (R. 491-490) The trial court granted Voest-Alpine's second motion for summary judgment and dismissed Mountain States' insurers' claims against Voest-Alpine in their entirety. (R. 955-949) Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions this Court reviews the trial court's interpretation for correctness. See Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 653 (Utah 1988).

3. Did the trial court err in awarding Voest-Alpine only \$30,206.45 in attorneys' fees where Voest-Alpine established, prior to the trial court's entry of judgment, that it actually incurred \$38,380 in attorneys' fees in defending against this action. This issue was raised in Voest-Alpine's Memorandum in Opposition to Mountain States Steel's Objections to Voest-Alpine's Amended Findings of Fact, Conclusions of Law Regarding Attorney's Fees and Costs. (R. 1074; 1063) This Court reviews a trial court's award of attorney fees for abuse of discretion. See Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988).

STATEMENT OF CASE

This is a subrogation action brought by third-party plaintiff Mountain States' insurers against third-party defendant Voest-Alpine. Mountain States' insurers asserted claims for breach of contract and indemnification against Voest-Alpine. Mountain States' insurers appeal the trial court's grant of summary judgment in favor of Voest-Alpine

which dismissed Mountain States' insurers' claims against Voest-Alpine in their entirety. Voest-Alpine cross-appeals the trial court's grant of partial summary judgment in favor of Mountain States' insurers, which preceded the grant of summary judgment in favor of Voest-Alpine. Voest Alpine also appeals the trial courts' award of only \$30,206.45 in attorneys' fees to Voest-Alpine, where Voest-Alpine established that it incurred \$38,380.00 in attorneys' fees.

STATEMENT OF FACTS

1. On January 19, 1994, Voest-Alpine and Mountain States executed a lease agreement (hereinafter "Lease") pursuant to which Voest-Alpine agreed to lease a commercial building located in Utah County and owned by Mountain States. (R. 319) The term of the lease was to commence on March 1, 1994. (R. 319) However, as a precondition to Voest-Alpine's taking possession of the building, Mountain States agreed to make various improvements to the building which were necessary for Voest-Alpine's occupancy. (R. 318) A list of these improvements and a completion schedule were incorporated by the lease and attached as exhibits thereto. (R. 299, 295)

2. By March 1, 1994, the date the lease was supposed to commence, Mountain States had completed only 7 of the 15 required improvements and Mountain States was unable to deliver possession of the building to Voest-Alpine. (R. 356 ¶ 10; 318 ¶ 2.3) Because Voest-Alpine could not take possession of the building, Voest-Alpine's obligation to pay rent was delayed. (R. 334 ¶ 16)

3. In order to accelerate Mountain States' improvements, Voest-Alpine directed two of its employees, Mark Bakowski and Alfonse Ramirez, to assist Mountain States with the improvement work. (R. 334 ¶ 14) On March 4, 1994, Mr. Bakowski and Mr. Ramirez worked on the completion of Mountain States' building's west wall, which was otherwise known as Lessor Improvement #3 in the lease. (R. 335 ¶ 9; 295) Mr. Bakowski and Mr. Ramirez were working in a "man-basket" suspended above the floor by a cable, when the cable snapped and the men dropped to the floor. (R. 338 ¶ 1) Both men sustained severe injuries. (R. 18 ¶ 9; R. 1114 ¶ 4)

4. Mountain States' insurers tendered the defense of any claims arising out of the Bakowski/Ramirez accident to Voest-Alpine. (R. 471-70) Voest-Alpine denied any liability for the accident, denied any obligation to indemnify Mountain States for the accident, and rejected the tender. (R. 468)

5. As support for the tender, Mountain States' insurers cited paragraph 6.1 of the lease and paragraph 5 of Exhibit C to the lease. (R. 471-70) Paragraph 6.1 of the lease states:

6.1. Liability Insurance. [Voest-Alpine] shall, at [Voest-Alpine's] expense, obtain and keep in force during the term of this lease a policy of combined single limit, bodily injury and property damage public liability insurance insuring [Mountain States] and [Voest-Alpine] against any liability arising out of the ownership, use, occupancy or maintenance of the premises and all areas appurtenant thereto. Such insurance shall be a combined single limit policy in an amount not less than Two Million Dollars (\$2,000,000.00). The policy shall contain cross liability endorsements. The limits of the insurance shall not, however, limit the liability of [Voest-Alpine] hereunder.

The insurance shall have a Lessor's Protective Liability endorsement attached thereto. If Lessee shall fail to procure and maintain the insurance, [Mountain States] may, but shall not be required to, procure and maintain the same, but at the expense of [Voest-Alpine], or [Mountain States] may declare a material breach of this Lease.

(R. 94) Additionally, paragraph 5 of Exhibit C to the lease states, in pertinent part:

5. Insurance. [Voest-Alpine] shall secure, pay for and maintain or cause [Voest-Alpine's] contractors to secure, pay for and maintain during the continuance of any of [Voest-Alpine's] improvements within the Premises, insurance in the following minimum coverages and limits of liability:

....

b. Comprehensive General Liability Insurance (including Contractors' Protective Liability).

....

All policies (except the worker's compensation policy) shall be endorsed to include as additional insured parties [Mountain States] and its employees and agents, [Mountain States'] contractors and such additional persons as [Mountain States] may designate. The endorsements shall also provide that Lessor shall be given thirty (30) days' [sic] prior written notice of any reduction, cancellation, or non-renewal of coverage and shall provide that the insurance coverage afforded to the additional insured parties thereunder shall be primary to any insurance carried independently by the additional insured parties. [Mountain States] shall furnish a list of names and addresses of parties to be named as additional insured.

(R. 78)

6. Voest-Alpine rejected Mountain States' insurers' tender for three reasons.

(R. 468-67) First, because Mountain States' liability for the Bakowski/Ramirez accident arose out of Mountain States' improvements rather than Voest-Alpine's "ownership, use, occupancy or maintenance" of the premises, Voest-Alpine had no obligation to insure Mountain States for the accident. (R. 468-67) Second, because Mountain States had not

delivered possession of the building to Voest-Alpine by March 1, 1994, the lease had not “commenced” and Voest-Alpine’s obligations under the lease had not been triggered. (R. 468-67) Third, although Voest-Alpine was required to maintain certain insurance coverages “during the continuance of any of [Voest-Alpine’s] Improvements within the Premises”, because the accident arose out of [Mountain States’] Improvements, Voest-Alpine was not obligated to indemnify Mountain States for the accident. (R. 468-67)

7. Subsequently, Mr. Ramirez asserted a claim against Mountain States, which was settled by Mountain States’ insurers for \$1,182,500. (R. 1114 ¶ 6)

8. Additionally, Mr. Bakowski filed suit naming Mountain States and others as defendants; Voest-Alpine, Mr. Bakowski’s employer, was not named. (R. 20)

9. Mountain States’ insurers assumed the defense of Mountain States in the Bakowski suit (R. 30), and filed a third-party complaint against Voest-Alpine alleging claims for breach of contract and indemnification. (R. 48)

10. Mountain States’ insurers subsequently settled Mr. Bakowski’s claim for \$503,714. (R. 357 ¶ 7) However, Mountain States’ insurers’ third-party claim against Voest-Alpine remained before the trial court. (R. 54-53)

11. Mountain States’ insurers also filed a separate action against Voest-Alpine to recover the costs incurred in settling the Ramirez claim. (R. 1115) This action was consolidated with Mountain States’ insurers’ third-party action in the Bakowski matter. (R. 1130)

12. Thereafter, Voest-Alpine filed a motion for summary judgment. (R. 156) Voest-Alpine argued that because Mountain States failed to complete the necessary improvements and tender possession of the building by March 1, 1994, the lease did not commence and thus Voest-Alpine's obligations under the lease, including the obligation to provide insurance covering Mountain States, had not been triggered. (R. 333) Further, Voest-Alpine reasoned that because the Bakowski/Ramirez accident happened before the lease commenced, Voest-Alpine had no obligation to indemnify Mountain States for the accident. (R. 332-331)

13. In response, Mountain States' insurers filed a cross-motion for summary judgment. (R. 348) Mountain States' insurers acknowledged that although Mountain States failed to complete the required improvements to the building and Mountain States failed to deliver possession of the building to Voest-Alpine by March 1, 1994, the lease nevertheless commenced on March 1, 1994. (R. 354-53) Mountain States' insurers contended that only Voest-Alpine's obligation to pay rent was delayed by Mountain States' failure to complete the necessary building improvements and failure to deliver possession by March 1, 1994. (R. 354). Further, Mountain States' insurers argued that Voest-Alpine had failed to procure the insurance required under the lease agreement and had therefore breached the agreement. (R. 351-50)

14. Judge Maetani of the Fourth District Court heard oral argument on both summary judgment motions. (R. 458) Judge Maetani denied Voest-Alpine's motion for

summary judgment and granted Mountain States' partial motion for summary judgment.

(R. 452) Judge Maetani concluded that the lease was clear and unambiguous. (R. 454)

Judge Maetani held that although at the time of the Bakowski/Ramirez accident Mountain States had not completed the required improvements and had not delivered possession of the building, the lease term had nevertheless commenced and Voest-Alpine, while not obligated to pay rent, "was obligated to have a liability insurance policy in force on March 1, 1994." (R. 458-52)

15. Judge Maetani also concluded that Voest-Alpine did not procure insurance as required by paragraph 6 of the lease and stated that "Inasmuch as the Bakowski/Ramirez accident arose out of the ownership, use and occupancy of the premises, the required insurance would have provided coverage for the Bakowski/Ramirez accident." (R. 455 ¶ 18)

16. Judge Maetani did not reach the issue of damages. (R. 452)

17. Thereafter, Mountain States' insurers filed a second motion for summary judgment on the issue of damages. (R. 461) Mountain States' insurers sought an award of all sums paid to settle the Bakowski and Ramirez claims. (R. 461-60)

18. Voest-Alpine filed a cross-motion for summary judgment. (R. 491) Voest-Alpine sought a determination that it had not breached the lease agreement because it had, in fact, procured insurance as required by the lease, and moreover, that Mountain States' insurers subrogation' action was barred by the lease's waiver of subrogation provision.

(R. 491-90)

19. Paragraph 6.4 of the lease states:

6.4. Waiver of Subrogation. [Voest-Alpine] and [Mountain States] waive any and all rights of recovery against the other, or against the officers, employees, agents and representatives of the other, for loss of or damage to such waiving party or its property or the property of others under its control where such loss or damage is insured against under any insurance policy in force at the time of such loss or damage. [Voest-Alpine] and Mountain States shall, upon obtaining the policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this lease, and shall obtain endorsements to the respecting policies recognizing the waiver.

(R. 94)

20. Judge James Taylor of the Fourth District Court heard oral argument on both motions. Judge Taylor recognized that the lease required Voest-Alpine to procure liability insurance and Mountain States to procure property insurance. (R. 952 ¶ 14, 15) Judge Taylor expressed no opinion as to whether the parties' insurance complied with the lease requirements. (R. 952 ¶ 16) Judge Taylor considered the lease's "Waiver of Subrogation" provision, concluded it was clear and unambiguous, and held that "applying the plain and unambiguous terms of the lease agreement to this case, since the loss which Mountain States suffered was covered by an insurance policy, the waiver of subrogation bars Mountain States' insurers from bringing this action to recover the sums it played [sic] to the injured persons." (R. 952-51 ¶ 17, 18)

21. Judge Taylor therefore granted Voest-Alpine's second motion for summary

judgment, denied Mountain States' insurers' second motion for summary judgment, and dismissed Mountain States' insurers' claims against Voest-Alpine with prejudice and on the merits. (R. 950 ¶ A, B, C) Judge Taylor entered the judgment on June 5, 2000. (R. 950)

22. On June 19, 2000, Voest-Alpine motioned for an award of attorneys' fees as provided for in the lease. (R. 959) Voest-Alpine sought an award of \$30,206.45 for fees paid to Plant, Wallace, Christensen & Kanell in Salt Lake City, Utah, and an award of \$23,637.50 for fees paid to Kirkpatrick & Lockhart in Pittsburgh, Pennsylvania. (R. 1014-1013)

23. On July 6, 2000, Mountain States' insurers filed a notice of appeal, specifically appealing "from the Findings of Fact, Conclusions of Law and Order Granting Defendant Voest-Alpine Service's [sic] Motion for Summary Judgment, entered by the Fourth Judicial District Court, Utah County on June 6, 2000 to the Utah Supreme Court." (R. 1022-1021)

24. On July 10, 2000, Mountain States' insurers filed a memorandum in opposition to Voest-Alpine's motion for attorneys' fees. (R. 1027) Mountain States' insurers argued that Voest-Alpine did not qualify for fees under the lease and, further, that the fees sought were unreasonable because Voest-Alpine's employment of two law firms was unnecessary. (R. 1027-1024)

25. On July 11, 2000, Voest-Alpine filed a cross-notice of appeal, specifically

appealing “from the entry of partial summary judgment on May 6, 1998, by the Honorable Howard H. Maetani.” (R. 1030-1029)

26. In a memorandum decision dated September 11, 2000, the trial court stated: “At the risk of treading upon the jurisdiction of the Supreme Court, this Court notes that the motion for attorney fees was pending before the notice of appeal was filed.” (R. 1051) The Court then cited to ProMax Development Corp. v. Raile, 998 P.2d 254 ¶ 14, 15 (Utah 2000), and stated:

Recognizing that this Court runs the risk of assuming jurisdiction that it does not have by making a decision relative to the motion for attorney’s fees after dismissing the Plaintiff’s complaint on the merits and after both parties have filed notices of appeal and cross appeal with the Supreme Court which has assigned a docket number and created a deadline for filing of docketing statements, this Court will undertake, in the interest of judicial economy to make ruling on the motion for attorney fees as requested.

(R. 1051-1050)

27. The trial court granted Voest-Alpine’s motion for attorneys’ fees in part and awarded the fees paid to Plant, Wallace, Christensen & Kanell; however, the court could not conclude the fees paid to Kirkpatrick & Lockhart were reasonable or necessary. (R. 1052) The court awarded \$30,206.45 to Plant, Wallace, Christensen & Kanell and directed Voest-Alpine’s counsel to prepare the judgment. (R. 1052-1049)

28. In preparing the judgment, Voest-Alpine’s counsel discovered that Voest-Alpine had actually paid \$38,380 in attorneys’ fees to Plant, Wallace, Christensen & Kanell and \$4,870.33 in costs. (R. 1063) Voest-Alpine’s counsel prepared Findings of

Fact and Conclusions of Law on Voest-Alpine's Motion for Attorneys' Fees, as well as a judgment. (R. 1141; 1138) Both documents listed the amount of fees awarded to Voest-Alpine as \$43,250.33. (R. 1141; 1138) This figure included the omitted attorney fees and costs.

29. Mountain States' insurers filed objections to Voest-Alpine's Findings of Fact and Conclusions of Law and to the Judgment. (R. 1057) Mountain States' insurers sought to evaluate Voest-Alpine's request for the additional \$8,173.55 in attorneys' fees. (R. 1057) Further, Mountain States' argued that an award of "costs" was not provided for in the lease and objected to Voest-Alpine's request for \$4,870.33 in costs. (R. 1057)

30. Voest-Alpine filed an opposing memorandum to Mountain States' insurers' objections, and a second affidavit of Voest-Alpine's counsel stating the basis for the requested award of \$43,250.33. (R. 1074; 1063) Voest-Alpine argued that due to an arithmetic error and a new hourly billing computer program, Voest-Alpine's counsel compiled an incomplete figure (\$30,206.45) when it originally filed its motion for attorneys' fees and neglected to include the amount of costs paid to its counsel. (R. 1074; 1063) Voest-Alpine argued that the trial court had already determined that Voest-Alpine's attorneys' fees were reasonable and therefore the omitted portion of fees should be included in the award. (R. 1074) Additionally, Voest-Alpine argued that "costs" were awardable under the lease's Attorney Fees provision. (R. 1074).

31. Paragraph 15.13 of the lease provides:

Attorney Fees. If either party brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party shall be entitled to its reasonable attorney fees.

(R. 86)

32. On November 13, 2000, Judge Taylor signed Voest-Alpine's proposed Findings of Fact and Conclusions of Law Regarding Attorney's Fees, and also signed Voest-Alpine's proposed Judgment for Third-Party Defendant Voest-Alpine's Attorney's Fees. (R. 1143; 1139) However, Judge Taylor crossed out the listed amount of \$43,250.33 on both documents and handwrote in \$30,206.45. (R. 1141; 1138)

SUMMARY OF ARGUMENTS

POINT I: Voest-Alpine was not obligated to indemnify Mountain States for the Bakowski/Ramirez accident because at the time of the accident, the lease had not commenced and Voest-Alpine was not obligated to provide insurance covering Mountain States. Voest-Alpine's obligation to procure insurance was not triggered until Voest-Alpine a month after the accident when Mountain States finally delivered possession of the building. Although the lease was to commence on March 1, 1994, Mountain States had not completed the requisite improvements and could not deliver possession of the building by that date. Accordingly, commencement of the lease was delayed and Voest-Alpine's obligations under the lease were likewise delayed. Therefore, because the March 4, 1994 accident occurred before the lease commenced, Voest-Alpine was not obligated to provide insurance coverage for Mountain States.

POINT II: The mutual “Waiver of Subrogation” provision in the lease is valid and enforceable against both Mountain States and Mountain States’ insurers. Voest-Alpine and Mountain States mutually waived any and all rights of recovery against one another for losses or damage covered by any insurance. The waiver is not limited to insurance required under the lease. By its clear terms, this waiver equally applies to Voest-Alpine and Mountain States, as well as their insurers. Consequently, because the Bakowski/Ramirez loss was covered by Mountain States’ insurance, Mountain States’ insurers’ are barred from maintaining this subrogation action against Voest-Alpine.

Additionally, regardless of whether or not Mountain States’ insurers had notice of the waiver provision, Mountain States’ insurers are barred from maintaining this subrogation action against Voest-Alpine. The waiver provision does not require that the parties obtain an endorsement of the waiver provision from the their insurers as a precondition to the provision’s enforceability. So, although Mountain States apparently failed to inform its insurers of the waiver provision and similarly failed to obtain an endorsement recognizing the waiver, Mountain States’ failure does not invalidate the provision and give Mountain States’ insurers a right of action against Voest-Alpine. To the contrary, if Mountain States prejudiced its insurers’ rights, the dispute concerns only Mountain States and its insurers; Voest-Alpine has no interest in it. The fact of the matter is Mountain States’ insurers paid a loss that they were contractually obligated to pay, and they have no right to reimbursement from Voest-Alpine.

Moreover, equity favors Voest-Alpine's position. Subrogation is an equitable doctrine designed to ensure that a debt is paid by the party who in fairness and good conscience ought to pay it. Here, Mountain States' is the proper party to bear responsibility for the Bakowski/Ramirez accident. It is undisputed that, at the time of the accident: Mountain States retained control and possession of its building; Mountain States was making necessary improvements to the building for Voest-Alpine's occupancy; and Mr. Bakowski and Mr. Ramirez were working at the direction of and for the benefit of Mountain States in completing the improvements. There are no allegations or evidence of any negligence on the part of Voest-Alpine. Indeed, Voest-Alpine did not in any way contribute to the accident. All allegations of negligence were directed toward Mountain States and parties other than Voest-Alpine. To be sure, Mountain States does not allege that Voest-Alpine played any part in causing the accident. Accordingly, in equity and good conscience, Mountain States is the proper party to bear financial responsibility for the accident.

POINT III: Pursuant to the lease, Voest-Alpine, as the prevailing party in this action, is entitled to recover from Mountain States the reasonable attorney fees Voest-Alpine incurred in defending against this action. Voest-Alpine established that it incurred \$38,380.00 in attorney fees. Because this figure is reasonable and there is ample evidence to support it, the trial court abused its discretion in awarding Voest-Alpine only \$30,206.45.

ARGUMENT

I. BECAUSE THE LEASE HAD NOT COMMENCED AT THE TIME OF THE BAKOWSKI/RAMIREZ ACCIDENT, VOEST-ALPINE WAS NOT OBLIGATED TO INDEMNIFY MOUNTAIN STATES FOR THE ACCIDENT.

As a threshold matter, Voest-Alpine asks this Court to determine when a lease commences. This issue is potentially case-dispositive. If this Court finds that at the time of the accident Mountain States' and Voest-Alpine's lease had not commenced, Voest-Alpine's obligations under the lease, including the obligation to indemnify Mountain States, would not have been triggered and Mountain States properly bore responsibility for the accident.¹

Voest-Alpine submits that at the time of the Bakowski/Ramirez accident the lease had not commenced because Mountain States had yet to complete required improvements to the building necessary for Voest-Alpine's occupancy, and because Mountain States continued to retain possession of the building. Accordingly, Voest-Alpine further submits that until Mountain States completed the required improvements and tendered possession of the building to Voest-Alpine, the lease had not commenced and, therefore, Voest-Alpine had no obligation to procure liability insurance covering the building and Mountain States. To require Voest-Alpine to pay insurance premiums for a building

¹In the alternative, if this Court determines that the lease did commence on March 1, 1994 and Voest-Alpine was obligated to insure Mountain States' at the time of the accident, this Court must interpret the lease's waiver of subrogation provision discussed at Point II, *infra*.

which it did not possess or control would be unreasonable.

The terms of the lease are clear. Paragraph 2 provides:

2.1 Term.

The term of this lease shall be for a period commencing on the 1st day of March, 1994, and terminating twelve (12) months thereafter, unless sooner terminated or extended pursuant to any provision hereof.

. . . .

2.3 Delay in Commencement.

The parties acknowledge time is of the essence of this lease, particularly with respect to completion of improvements and commencement of occupancy. Lessor agrees to make improvements ("Lessor Improvements") set forth in Exhibit "C" and its attachments pursuant to the schedule for completion set forth therein ("Completion Schedule"). . . . If for any reason Lessor cannot deliver possession of the premises to Lessee on March 1, 1994, Lessee shall not be obligated to pay rent . . . until possession is delivered. Possession cannot be delivered until the completion of item numbers 2, 3, 6, 8, 9, 10, 11, and 15 of Attachment 1 to Exhibit "C".

It is undisputed that Mountain States did not complete the required improvements by March 1, 1994. Consequently, Mountain States could not and did not deliver possession of the building by that date. Because possession was not delivered, Voest-Alpine did not commence paying rent. Indeed, Voest-Alpine did not commence paying rent until Mountain States completed the required improvements and delivered possession of the building in April 1994.

The issue then is whether Mountain States' failure to deliver possession of the building by March 1, 1994, not only delayed Voest-Alpine's obligation to pay rent, but also delayed Voest-Alpine's other obligations under the contract. Specifically, did

Mountain States' failure to deliver possession of the building on March 1, 1994 delay Voest-Alpine's obligation to procure bodily injury and property damage public liability insurance insuring Voest-Alpine and Mountain States against "any liability arising out of the ownership, use, occupancy or maintenance of the premises and all areas appurtenant thereto." See Lease, paragraph 6.1 (R. 200). Fairness dictates that it would be unreasonable to require Voest-Alpine to insure a building which it did not possess or have control over. If Voest-Alpine's obligation to procure such insurance was delayed, there is no basis for Mountain States insurers' subrogation action against Voest-Alpine.

Voest-Alpine submits that the trial court erred in holding that the lease commenced on March 1, 1994 and that only Voest-Alpine's obligation to pay rent was delayed as a result of Mountain States' failure to complete the required improvements and deliver possession of the building. Initially, the trial court concluded that the lease was "clear and unambiguous."² (R. 454) The trial court noted that the term of the lease was to

²In the event this Court disagrees with the trial court and finds the lease is vague and ambiguous, this Court should be aware that Voest-Alpine provided the trial court with extrinsic evidence of Mountain States' and Voest-Alpine's intent regarding the commencement of the lease. (R. 384) Specifically, Voest-Alpine submitted the testimony of Chris Olsen, Mountain States' agent who negotiated the lease with Voest-Alpine. Mr. Olsen testified that he believed the commencement of the lease was delayed and extended by virtue of Mountain States' failure to complete the required improvements and failure to deliver possession of the building by March 1, 1994. (R. 366) Further, Mr. Olsen testified that he believed that at the time of the Bakowski/Ramirez accident, Voest-Alpine's obligation to obtain insurance covering Mountain States had not been triggered. (R. 366)

Because the trial court found the lease clear and unambiguous, the court did not consider extrinsic evidence and made no findings of fact with regard to the intent of the

commence on March 1, 1994 and run for 12 months. (R. 454) The trial court further noted that the lease expressly provided that Mountain States' failure to deliver possession of the building postponed Voest-Alpine's obligation to pay rent. However, because no provision of the lease specifically addressed modification of the term of the lease if possession was not delivered by March 1, 1994, and no provision addressed a delay in obligations other than payment of rent, the trial court held that the lease commenced on March 1, 1994 and Voest-Alpine was obligated to procure the insurance required under the lease. (R. 452)

Admittedly, the trial court was correct in finding that no provision of the lease expressly provided that Voest-Alpine's obligations under the lease would be delayed if Mountain States had failed to deliver possession by March 1, 1994. Nevertheless, Voest-Alpine submits that the trial court's interpretation of the lease produces an inequitable result and should be rejected by this Court. There is no justifiable basis for finding that Voest-Alpine was obligated to procure a bodily injury and property damage liability insurance policy covering Mountain States and Mountain States' building where Mountain States failed to deliver possession of the building. The purpose of the insurance provision was to protect Mountain States' interest in the building once Voest-Alpine took possession. Requiring Voest-Alpine to insure the building while Mountain

parties. Accordingly, if this Court finds the lease vague and ambiguous, this Court should remand this issue to the trial court with instructions to consider evidence of the parties' intent. See Dixon v. Pro Image, Inc., 987 P.2d 48 (Utah 1999).

States retained full control and possession of the building would unjustly benefit Mountain States and prejudice Voest-Alpine. This is an unreasonable and inequitable interpretation.

When asked to interpret contracts, this Court interprets “the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature, and purpose of the contract.” Peirce v. Peirce, 994 P.2d 193, 198 ¶ 19 (Utah 2000). Moreover, this Court does not favor interpreting contracts in a manner that produces inequitable results. Specifically, this Court has held that:

where there is a doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it.

Id. (quoting Plain City Irr. Co. v. Hooper Irr. Co., 356 P.2d 625, 628 (Utah 1960)).

Here, the trial court’s interpretation of the lease agreement produces a harsh and unreasonable result.

In looking at the lease agreement as a whole, as well as the circumstances, nature, and purpose of the agreement, it is clear that Voest-Alpine’s obligations under the lease were triggered when Voest-Alpine took possession of the building and not before. By the express terms of the lease, Voest-Alpine was not obligated to pay rent until Mountain States delivered possession of the building. In the context of a lease agreement, the primary obligation of a lessee is to pay rent. It stands to follow that if that obligation is

delayed, all other obligations should similarly be delayed. Furthermore, the purpose of the insurance requirement was to protect Mountain States once Voest-Alpine took possession of the building. No mutually beneficial purpose would be served by requiring Voest-Alpine to insure Mountain States and the building while Mountain States had exclusive possession of the building. Voest-Alpine would be conferring a benefit upon Mountain States and receive nothing in return.

The more reasonable interpretation would hold that Voest-Alpine's obligation to procure insurance was triggered when Voest-Alpine took possession of the building. This provides a fair and equitable result. So long as Mountain States retained possession and control of the building, Mountain States was responsible for insuring itself and its building. Once Mountain States delivered possession to Voest-Alpine, Voest-Alpine would then be obligated to provide insurance for the protection of Mountain States. Under this interpretation, the party in control of the building bears responsibility for insuring against any liability arising out of the ownership, use, occupancy, or maintenance of the building.

Therefore, because the Bakowski/Ramirez accident occurred while Mountain States possessed and controlled the building, Mountain States and its insurers properly bore responsibility for the accident. Moreover, Mountain States' insurers subrogation action against Voest-Alpine is without basis because at the time of the accident, Voest-Alpine was not obligated to provide insurance benefitting Mountain States.

II. BECAUSE THE BAKOWSKI/RAMIREZ ACCIDENT WAS COVERED BY MOUNTAIN STATES' INSURANCE, THE TRIAL COURT PROPERLY ENFORCED THE LEASE'S WAIVER OF SUBROGATION PROVISION AND DISMISSED MOUNTAIN STATES' INSURERS' CLAIMS AGAINST VOEST-ALPINE.

Because Voest-Alpine and Mountain States mutually agreed to waive all rights of recovery against one another for losses or damages covered by any insurance, and because the Bakowski/Ramirez accident was in fact covered by Mountain States' insurance, the trial court properly granted summary judgment dismissing Mountain States' insurers' subrogation action against Voest-Alpine.

Paragraph 6.4 of the lease states:

Waiver of Subrogation. [Voest-Alpine] and [Mountain States] waive any and all rights of recovery against the other, or against the officers, employees, agents and representatives of the other, for loss of or damage to such waiving party or its property or the property of others under its control where such loss or damage is insured against under any insurance policy in force at the time of such loss or damage. [Voest-Alpine] and Mountain States shall, upon obtaining the policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this lease, and shall obtain endorsements to the respecting policies recognizing the waiver. (Emphasis added.)

The broad and unambiguous language of this waiver clearly bars Mountain States' insurers' claims against Voest-Alpine. Voest-Alpine and Mountain States waived any and all rights of recovery against one another for losses insured by any insurance policy. These sophisticated parties elected to shift the risks of loss associated with their lease agreement to their respective insurers. As it happens, the Bakowski/Ramirez accident

was covered under an insurance policy issued to Mountain States. Consequently, the trial court correctly held that Mountain States and its insurers have no right of recovery against Voest-Alpine.

Nevertheless, Mountain States' insurers employ two arguments in an attempt to circumvent the plain, unambiguous language of the waiver provision. First, they assert that because Mountain States did not inform them of the waiver and obtain an endorsement recognizing the waiver, the waiver is unenforceable. Second, the waiver applies only to insurance required under the lease and because the insurance which covered the Bakowski/Ramirez accident was not required under the lease, the waiver is not applicable. However, for the reasons set forth below, these arguments must fail.

A. The Waiver of Subrogation Provision Applies to Any Insurance, Not Just the Insurance Required by the Lease.

Because the Bakowski/Ramirez accident was covered under an insurance policy issued to Mountain States, any rights of recovery Mountain States may have against Voest-Alpine are waived. The waiver of subrogation provision plainly and unambiguously provides that Mountain States waives "any and all rights of recovery" against Voest-Alpine for "loss of or damage to" Mountain States where "such loss or damage is insured against under any insurance policy in force at the time of such loss or damage." Lease ¶ 6.4 (emphasis added) (R. 199). Accordingly, Mountain States has no right of recovery against Voest-Alpine. Moreover, because "an insurer-subrogee stands

in the shoes of its insured and any defenses that are valid against the insured are also valid against the insurer,” Fashion Place Inv. v. Salt Lake County, 776 P.2d 941, 945 (Ut. App. 1989), Mountain States’ insurers similarly have no right of recovery against Voest-Alpine.

First and foremost, the waiver of subrogation provision is an exculpatory provision whereby the parties manifested their mutual intent to have the risks associated with their lease agreement be borne by their insurers. To be sure, Mountain States and Voest-Alpine mutually agreed to “waive any and all rights of recovery against the other . . . for loss or damage . . . where such loss or damage is insured against under any insurance policy[.]” Lease ¶ 6.4 (R. 199). The language of the waiver is clear and unambiguous: if a loss is insured, the parties will not seek recovery against each other.

Mountain States’ insurers’ attempt to circumvent the clear language of the provision by arguing that the term “any insurance” should be limited to the insurance required by the contract. However, the language used does not support such a reading. If the parties intended to tie the waiver to insurance specifically required by the contract, they would have so specified. For example, in Town of Silverton v. Phoenix Heat Source, 948 P.2d 9 (Colo. App.), the Colorado Court of Appeals interpreted a construction contract’s waiver of subrogation provision which read:

The Owner and Contractor waive all rights (1) against each other and any of their subcontractors, sub-subcontractors, agents and employees,, each of the other, and (2) the Architect, Architect’s consultants . . . for damages caused

by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the work[.]

Id. at 11 (omission in original; emphasis added). The highlighted language clearly ties the waiver to insurance required by the contract. See also, Lloyd's Underwriters v. Craig & Rush, Inc., 32 Cal. Rptr. 2d 144, 146 (Cal. Ct. App. 1994) (“The Owner and Contractor waive all rights against each other . . . to the extent covered by property insurance obtained pursuant to this paragraph[.]”)

In stark contrast, Mountain States and Voest-Alpine elected not to limit the waiver's application to insurance required under the contract. The language clearly provides that any insurance will satisfy the waiver. Mountain States' insurers' contention that the waiver applies only to insurance required under the lease is directly contrary to the clear language of the provision.

Admittedly, the second sentence of the provision contemplates that when Mountain States and Voest-Alpine procured the insurance required under the contract they would inform their insurers of the waiver. However, that sentence by no means limits the scope of the first sentence. Mountain States and Voest-Alpine are large companies and naturally carry comprehensive general liability insurance policies covering their respective operations. Because both carried such insurance, they reasonably elected to shift any risks inherent in their association with one another to their insurers. Thus, the parties specified that if a loss was covered by any insurance, the

parties would not pursue recovery against each other. However, because the lease contained specific insurance requirements which might not have been covered by policies the parties already had in place, it was possible that the parties would need to obtain additional insurance to meet the lease requirements. Therefore, the provision provided that “upon obtaining the policies of insurance required hereunder” the parties would notify their insurers of the waiver and obtain an endorsement recognizing the waiver.³

The Washington Supreme Court addressed a similar situation in the case of Touchet Valley Grain v. Opp. & Seibold, 831 P.2d 724 (Wash. 1992). In Touchet, the owner of a collapsed grain storage building sued the general contractors who constructed the building. Paragraph 12 of the construction contract required the contractor to provide insurance protecting both the contractor and owner from “any and all claims which may arise or result from operations under this Contract.” Id. at 726. The owner was required to “obtain casualty insurance for the Project during construction.” Id. at 726.

Furthermore, the contract provided that:

Subrogation rights, if any, are expressly waived by each party to the extent of insurance coverage afforded on any claim, loss or casualty arising from or in connection with the Project.

Id. at 726 (italics omitted). Soon after the building was completed, the owner obtained property insurance on the building.

³Of course, as set forth in subpoint B *infra*, the enforceability of the waiver was not contingent upon notice to and the receipt of endorsements from the parties’ insurers.

About a year after its completion, the building collapsed. When the owner's insurer denied coverage for the repairs, the owner filed suit against the contractor and subcontractors. The trial court held that the owner's property insurance policy covered the building, and enforced the construction contract's waiver of subrogation provision against the owner, and dismissed the owner's claim. Id.

On appeal, the owner argued that the subrogation waiver applied "only to insurance stipulated in paragraph 12 of the contract." Id. at 728. The owner also argued that "enforcing the subrogation waiver would be unfair, in essence penalizing it for its good fortune in carrying [its own property insurance.]" Id. The Washington Supreme Court flatly rejected these contentions, stating:

The plain language of the waiver states that subrogation rights are "expressly waived . . . to the extent of insurance coverage" on losses "arising from or in connection with the Project."

Id. The Court consequently enforced the subrogation waiver against the owner.

A similar result is warranted in this case. By the plain language of the contract, Mountain States and Voest-Alpine agreed to hold one another harmless for loss or damage covered by "any insurance." Where the Bakowski/Ramirez accident was covered by Mountain States' insurance, the provision should be enforced.

Interestingly, Mountain States' insurers offer no case law to support their position that the "any insurance" language should be interpreted to mean only insurance required by the contract. Instead, Mountain States insurers attack cases supportive of Voest-

Alpine's position arguing that the cases are not "true" subrogation cases because the plaintiffs were individuals and not insurers.⁴ The argument is meritless. Mountain States' insurers offer no legal reason why a waiver should be non-binding upon them, but binding on an individual. Whether the party seeking to avoid the waiver is an insurer or an individual is irrelevant. It is the language of the provision which matters. Here, the language is clear and the trial court properly enforced the provision against Mountain States' insurers by granting summary judgment in favor of Voest-Alpine.

B. The Waiver of Subrogation Provision Is Not Contingent Upon Notice to the Insurers and Receipt of Endorsements.

The language of the waiver does not require notice to or endorsements from Mountain States' and Voest-Alpine's insurers in order for the waiver to be enforceable.

To the contrary, the notice requirement simply states:

[Voest-Alpine] and [Mountain-States] shall, upon obtaining policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in the lease, and shall obtain endorsements as to the respective policies recognizing the waiver.

Noticeably absent from this sentence is any sort of contingency language. For example, if this requirement were intended as a precondition to the enforceability of the waiver, the

⁴See, e.g. Touchet Valley Grain v. Opp & Seibold, 831 P.2d 724 (Wash. 1992) (enforcing waiver of subrogation provision against plaintiff building owner who received a "loan" from insurer); Town of Silverton v. Phoenix Heat Source, 948 P.2d 9 (Colo.App. 1997) (enforcing waiver of subrogation provision against plaintiff town that received by assignment its insurer's subrogation rights against defendant).

waiver would have provided that “unless notice is given to and endorsements received from the insurers, this waiver will not be enforceable” or “only if notice is given to and endorsements received from the insurers’ will this waiver be binding.” As it stands, no such limiting language was used.

The case of Harlington Realty Corp. v. S.L.G. Discount Corp., 556 N.Y.S.2d 308 (N.Y.A.D. 1 Dept. 1990), cited in Mountain States’ insurers’ brief, illustrates this point. In Harlington, the lease at issue “provided for mutual release and waiver of the right of subrogation by either party’s insurer, only if each party’s insurance policy contained a clause providing that such a release or waiver would not invalidate the policy or increase its premiums.” Id. (emphasis added). Because the plaintiff’s insurer clearly reserved its right to subrogate for losses paid by it on its insured’s behalf, the court allowed the plaintiff’s insurer to pursue its subrogation claim. Id.

In contrast, there is no “only if” language in Mountain States’ and Voest-Alpine’s waiver, and no such intention is apparent from the language actually used. The provision simply does not require notice to and endorsement from the insurers as a precondition to its enforceability.

The sentence does serve a useful purpose, however. Clearly, Mountain States desired that Voest-Alpine notify its insurers of the waiver to ensure that the waiver would not be disputed in the event of a loss. Similarly, Voest-Alpine desired that Mountain States inform its insurers of the waiver to preclude Mountain States’ insurers from

bringing an action against Voest-Alpine. By encouraging each other to notify their insurers of their intent to hold each other harmless for losses covered by insurance, Mountain States and Voest-Alpine sought to make certain that they would not be bothered by insurer-driven subrogation actions. However, the language they employed made certain that even if they failed to notify their insurers, the provision would still be enforceable.

Mountain States insurers' interpretation of the provision renders the provision meaningless. If notice and endorsements were required, either party could unilaterally destroy the waiver simply by failing to inform its insurers of the provision or by failing to obtain an endorsement. Instead, the language of the provision prevents such a result by stating that each party is to inform its insurer of the provision, but if either party fails to do so, the rights of the other party are not prejudiced by the failure. Mountain States' failure to inform its insurers of the waiver does not preclude Voest-Alpine from enforcing the waiver. If Mountain States' insurers believe their rights have been unfairly prejudiced by the waiver, they should seek reimbursement from Mountain States and not Voest-Alpine. Mountain States' failure should not prejudice Voest-Alpine's rights under the lease. In any event, although Mountain States' insurers may be dissatisfied with the contract executed by Mountain States, their attempt to seek a better contract for Mountain States must fail. This Court has stated that it will not "make a better contract for the parties than they have made for themselves." Rio Algom Corp. v. Jimco Ltd., 618 P.2d

497, 505 (Utah 1980) (citation omitted).

This is not an uncommon dispute. Indeed, waiver of subrogation provisions are quite common in contracts and often the contracting parties neglect to inform their insurers of the waiver. Courts have enforced such waivers against insurers even though the insurers were not informed of the waiver. See generally, 16 Couch on Insurance 2d (Rev. ed. 1983) § 61:194, 251-52. See also, Continental Ins. Co. v. Boraie, 672 A.2d 274 (N.J. Super. Ct. Law Div. 1995); Richmond Steel, Inc. v. Legal & General Assurance Soc., Ltd., 821 F.Supp. 793 (D. Puerto Rico 1993); Millican of Wash. v. Wienker Carpet Service, 722 P.2d 861 (Wash. App. 1986).

For example, in Continental Ins. Co. v. Boraie, 672 A.2d 274 (N.J. Super. Ct. Law Div. 1995), a landlord and tenant executed a lease agreement with a waiver of subrogation provision. The provision required the parties to obtain insurance covering the leased premises and further required that the insurance policies “contain provisions for waiver of subrogation against the Landlord or the Tenant, as the case may be.” Id. at 275. The tenant obtained an insurance policy that did not include a subrogation waiver and the insurer was not aware of the tenant’s waiver of subrogation. Nevertheless, when the tenant’s insurer brought an action against the landlord to recover proceeds paid by the insurer as a result of a fire that occurred in the leased premises, the court enforced the subrogation waiver against the insurer and granted summary judgment in favor of the landlord. Id. at 278. The court reasoned that “business people have the right to determine

that the risks of a transaction will be borne by insurance.” Id. at 277. Accordingly, where the tenant had waived all rights against the landlord, the insurer had no rights against the landlord. Id.

Candidly, there is a split of authority on this issue. Some courts have held that an insured may not unilaterally waive its insurers’ rights of subrogation against a tortfeasor. See generally, Continental Ins. Co. v. Boraie, 672 A.2d 274 (N.J. Super. Ct. Law Div. 1995) (surveying cases). Voest-Alpine submits that the better reasoned approach is to place the burden on insurers to protect their subrogation rights by including prohibitions against unilateral subrogation waivers in their insurance policies. For example:

When it is foreseeable to the insurer that the insured will customarily enter into loss allocation agreements with third parties, the burden may be placed on insurers to apprise insureds that such conduct puts the policy at risk. This may be seen as preferable to requiring insureds to notify insurers and seek the insurer’s agreement to the loss allocation agreement with the third party, unless the insurance policy otherwise so provides in clear, unambiguous language. The insurer may be expected, during its underwriting process, to be able to determine the extent to which exculpation or hold harmless clauses are a customary practice of the insured, subjecting the insurer to increased risk. The insurer may either adjust the premium to reflect the increased risk or condition coverage on the insured’s consent to the waiver of its subrogation rights. Since the insurer is in the superior position to assess the impact of waiver on its economic interests, it may be required to assume the burden of notifying the insured whether a waiver will affect coverage.

James M. Fischer, *The Presence of Insurance and the Legal Allocation of Risk*, 2 Conn.

Ins. L. J. 1, 14-15 (1996). Where insurance contracts are essentially contracts of adhesion drafted exclusively by the insurer without input from the insured, it is entirely reasonable

to place responsibility on the insurer to protect its subrogation rights.

In this case, because the waiver of subrogation provision did not require as a precondition to its enforceability that Mountain States and Voest-Alpine inform their respective insurers of the waiver, the fact that the parties failed to do so does not defeat the provision. The trial court's entry of summary judgment in favor of Voest-Alpine should be affirmed because Mountain States' insurers are barred from maintaining a subrogation action against Voest-Alpine.

C. Equity Favors Voest-Alpine's Position.

As stated by this Court, "Subrogation is a creature of equity, its purpose is to work out an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who, in equity and in good conscience ought to pay it." Allstate v. Ivie, 606 P.2d 1197, 1202 (Utah 1980). Here, the debt for the Bakowski/Ramirez accident was paid by Mountain States through its insurers. In equity and good conscience, Mountain States' insurers were the proper parties to bear responsibility for this loss.

First, there is no contention that Voest-Alpine in any way contributed to or caused the Bakowski/Ramirez accident. It is undisputed that at the time of the accident, Mountain States was in possession and control of the building. Mountain States was performing construction work on the building to prepare it for Voest-Alpine's occupancy. Further, it is undisputed that Bakowski and Ramirez were working on behalf of and at the

direction of Mountain States. Voest-Alpine had nothing to do with the accident and there is no reason why, in fairness, it should bear any responsibility for it.

Second, Mountain States' insurers issued an insurance policy to Mountain States which provided coverage for this accident, and, in turn, the insurers received a premium for the coverage. The accident occurred in a building owned, possessed, and controlled by Mountain States. The injured parties were working for and at the direction of Mountain States. Consequently, Mountain States' insurers properly paid the loss and were in no way prejudiced.

Through this action, Mountain States' insurers seek reimbursement for payments which they were contractually obligated to pay, and for which they received a premium. There is no equitable reason to justify their contention that the loss should be borne by Voest-Alpine. To be sure, Mountain States' insurers offer no explanation why, in equity and good conscience, Voest-Alpine should bear responsibility for the Bakowski/Ramirez accident. Accordingly, where there is no equitable basis for Mountain States' insurers' claims against Voest-Alpine, equity compels the affirmance of the trial court's grant of summary judgment in favor of Voest-Alpine.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING VOEST-ALPINE ONLY \$30,206.45 IN ATTORNEY FEES, WHERE THE EVIDENCE ESTABLISHES THAT VOEST-ALPINE INCURRED \$38,380.00 IN ATTORNEY FEES.

Because Voest-Alpine prevailed in defending against Mountain States' insurers'

suit, the trial court correctly awarded attorneys' fees to Voest-Alpine as provided for by the lease agreement.⁵ However, the trial court abused its discretion in awarding only \$30,206.45. The evidence submitted to the trial court supported an award of \$38,380.00 in attorneys' fees and the trial court gave no basis for its award of a lesser amount.

Concededly, Voest-Alpine initially motioned the trial court for an award of fees in the amount of \$30,206.45. (R. 1015) The motion was supported by an affidavit from Voest-Alpine's counsel. (R. 1011) The trial court granted Voest-Alpine's motion. (R. 1052) Thereafter, in preparing the judgment as directed by the court, Voest-Alpine's counsel discovered that the amount of attorneys' fees incurred by Voest-Alpine actually totaled \$38,380.00. (R. 1061 ¶ 6) Due to an arithmetic error and change in billing system, Voest-Alpine's counsel had omitted \$8,173.55 in attorney fees from the initial motion for attorney fees. (R. 1061 ¶ 6,7,8,9) Accordingly, Voest-Alpine submitted to the trial court a proposed Findings of Fact and Conclusions of Law Regarding Attorney's Fees and a proposed judgment with both documents reflecting an award of \$43,250.33 in attorneys' fees.⁶ (R. 1143; 1139)

⁵Paragraph 15.13 of the lease provides, "Attorney Fees. If either party brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party shall be entitled to its reasonable attorney fees." (R. 86)

⁶This figure included the additional \$8,173.55 in attorneys' fees, plus \$4,870.33 in costs which also were inadvertently omitted from the initial motion. On appeal, Voest-Alpine concedes that a strict construction of the lease does not provide for an award of costs. Accordingly, Voest-Alpine does not challenge the trial court's failure to award Voest-Alpine the \$4,870.33 in costs.

Mountain States' insurers objected to amended attorneys' fees figure arguing that they had not had the opportunity to review the basis for the higher amount. (R. 1057) In response, Voest-Alpine's counsel submitted a second affidavit substantiating the higher amount. (R. 1061) Voest-Alpine argued that because the trial court had previously concluded that Voest-Alpine's counsel's fees were reasonable, the trial court should award the additional \$8,173.55 which was inadvertently omitted from the initial motion and should have been included. (R.1074) Voest-Alpine submitted that it should not be denied its fair attorneys' fees simply because of its counsel's arithmetic error. (R. 1069)

On November 13, 2000, the trial court entered the proposed judgment and proposed findings of fact and conclusions of law submitted by Voest-Alpine. (R. 1141; 1138) However, the trial court, without explanation, crossed out the \$43,250.33 amount on both documents and handwrote in \$30,206.45. (R. 1141; 1138)⁷

The trial court's denial of Voest-Alpine's request for \$38,380.00 in attorney fees constitutes an abuse of discretion. While calculation of reasonable attorney fees is in the sound discretion of the trial court, the award must be supported by evidence in the record. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (citations omitted). Here, the evidence in the record supports a higher award than that actually awarded by the trial court. The fee sought by Voest-Alpine is reasonable, supported by evidence in the

⁷Again, Voest-Alpine does not challenge the trial court's failure to award Voest-Alpine's \$4,870.33 in costs.

record, and Mountain States has not alleged or offered evidence indicating that \$38,380.00 is an unreasonable figure. Nevertheless, the trial court awarded a lesser amount without stating its reasons for doing so.

This is an abuse of discretion. As stated by the Utah Court of Appeals:

Where the evidence supporting the reasonableness of requested attorney fees is both adequate and entirely undisputed, the court abuses its discretion in awarding less than the amount requested unless the reduction is warranted by one or more of the factors described in Dixie State Bank v. Bracken, 985, 987-91 (Utah 1988).

Hoth v. White, 799 P.2d 213, 220 (Ut. App. 1990). The Dixie factors include: (a) the legal work actually performed, (b) the reasonable necessity of the legal work to adequately prosecute the matter, (c) the consistency of the attorney's billing with the rates customarily charged in the locality for similar services, and (d) any other circumstances requiring consideration of other factors. Id. Here, the trial court's award of the lesser amount is not warranted by these factors. The trial court initially determined that the fees sought by Voest-Alpine satisfied the Dixie factors and awarded the fees. Therefore, where the attorneys' fees which were inadvertently omitted from the Voest-Alpine's initial request did not differ from the fees previously granted, the trial court should have awarded the additional \$8,173.55.

Simply put, this Court should remand the judgment on attorneys' fees to the trial court with instructions to revise the judgment and award Voest-Alpine \$38,380.00 in attorneys' fees. Voest-Alpine should not be denied its fair attorneys' fees simply because

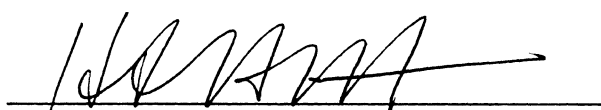
of its counsel's error in arithmetic.

CONCLUSION

This Court should reverse the trial court's holding that the lease commenced on March 1, 1994, and find that because Mountain States failed to deliver possession of the building to Voest-Alpine as agreed, the lease had not commenced at the time of the Bakowski/Ramirez accident and Voest-Alpine had no obligation to indemnify Mountain States for the accident. In the alternative, this Court should affirm the trial court's grant of summary judgment in favor of Voest-Alpine because Mountain States' insurers' claims against Voest-Alpine are barred by the lease's waiver of subrogation provision. Finally, this Court should remand the trial court's judgment on attorneys' fees with instructions to revise the judgment to award Voest-Alpine's reasonable attorneys' fees which total \$38,380.00

DATED this 23rd day of May, 2001.

PLANT, WALLACE, CHRISTENSEN & KANELL

A handwritten signature in black ink, appearing to read 'Terry M. Plant', is written over a horizontal line.

TERRY M. PLANT

H. JUSTIN HITT

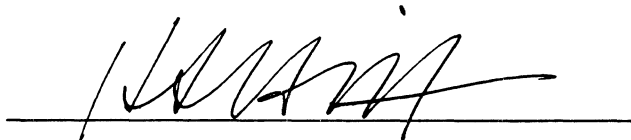
Attorneys for Appellee and Cross-Appellant

Voest-Alpine Services & Technologies Corp.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 23 day of May, 2001, two true and correct copies of Appellee and Cross-Appellant Voest-Alpine Services & Technologies Corp.'s Brief to the following:

Donald L. Dalton
DALTON & KELLEY
Post Office Box 58084
Salt Lake City, UT 84158

A handwritten signature in black ink, appearing to read "DL Dalton", is written over a horizontal line.