

1998

Workmen's Auto Insurance Company v. Chubb Customer Center, Inc., dba Chubb Group of Insurance Companies : Brief of Respondent

Utah Court of Appeals

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Brett Marshall Godfrey; Godfrey & Associates; Counsel for Appellee.

Unknown.

Recommended Citation

Brief of Respondent, *Workmen's Auto Insurance v. Chubb Customer Center*, No. 981413 (Utah Court of Appeals, 1998).
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WORKMEN'S AUTO INSURANCE)
COMPANY,)

Plaintiff and Appellant,

VS.

CHUBB CUSTOMER CENTER, INC.,)
dba CHUBB GROUP OF INSURANCE)
COMPANIES,)

Defendant and Appellee.

Case Number: 981413

District Court Number: 960013632 CV

Priority Number:

**RESPONSE BRIEF OF APPELLEE CHUBB CUSTOMER CENTER, INC.
TO APPELLANT WORKMEN'S AUTO INSURANCE COMPANY'S BRIEF**

**APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE WILLIAM W. BARRETT, PRESIDING**

UTAH COURT OF APPEALS BRIEF

UTAH
DOCUMENT
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DOCKET NO. 981413

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dba Chubb Group of Insurance Companies

FILE

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Plaintiff and Appellant,)

VS.)

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PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

The case before the Third District Court was a declaratory judgment action involving Workmen's Auto Insurance Company (hereinafter "Workmen's") as Plaintiff and Appellant, Chubb Customer Center, Inc., d/b/a Chubb Group of Insurance Companies (hereinafter "Chubb"), as Defendant and Appellee, Civil Action No. 96001362CV.

Workmen's paid benefits to its insured, Catherine Jacobsen, as a result of liability she incurred when she allegedly caused an accident while driving her insured vehicle. Workmen's has asserted that it is entitled to indemnification from Chubb, the insurer of Catherine Jacobsen's employer at the time of the accident, Wagon Tongue.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(j), Utah Code Ann. (1953 as Amended).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

A. *Issue Presented for Review:* Was the District Court's entry of summary judgment in favor of Chubb proper? Utah Civ.P.56.

B. *Standard of Review:* Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Billings, ex rel. v. Union Bankers Inc. Co.*, 819 P.2d 803 (Utah 1991); Utah. Civ.P.56. Upon review of a grant of a motion for summary judgment, the Supreme Court applies the same standard as that applied by the trial court. *Durham v. Margetts*, 571 P.2d 1332 (Utah. 1977). Furthermore, the reviewing court may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied on below. *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993).

C. *Issue Presented for Review:* Does Chubb's insurance policy provide coverage to Catherine Jacobsen in this incident and, if so, is that coverage indeed excess to that provided by Workmen's?

D. *Standard of Review:* Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law. *Zions First Nat'l. Bank v. Nat'l. Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988). Furthermore, unless a language of an insurance contract is ambiguous or unclear, the court must construe it according to its plain and ordinary meaning. *First Am. Title Ins. Co. v. J.V. Ranch, Inc., et al.*, No. 960530, S.Ct. of Utah, 343, Utah Adv. Rep. 6, (1998). An

insurance policy is merely a contract between an insured and the insurer and is construed pursuant to the same rules applied to ordinary contracts. *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272 (Utah 1993). Furthermore, the terms of insurance contracts are to be interpreted in accordance with their usually accepted meanings and should be read as a whole and, in an attempt to harmonize and give effect to all of the contract provisions. If a policy is not ambiguous, no presumption in favor of the insured arises and the policy language is construed according to its usual and ordinary meaning. *Id.* at 1274.

DETERMINATIVE STATUTES

Utah Code Ann. § 78-33-1 Jurisdiction of District Courts-Form-Effect.

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Utah Code Ann. § 78-33-1.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDING, AND DISPOSITION BELOW

This case is an appeal of the District Court's ruling that the insurance policy issued by Defendant/Appellee Chubb Group of Insurance Companies ("Chubb") to Wagon Tongue, Inc. provided no coverage or excess coverage for an automobile accident which occurred on October 21, 1993, involving Wagon Tongue employee Catherine Jacobsen. The District Court ruled on

December 10, 1997 that Plaintiff/Appellant Workmen's Auto Insurance Company's ("Workmen's") policy provided primary coverage to Ms. Jacobsen as a result of this accident.

On April 17, 1997, Workmen's moved for summary judgment, alleging that its policy was secondary to Chubb's. On May 1, 1997, Chubb filed a cross-motion for summary judgment asking the Court to find that Workmen's policy was primary, and moreover, that Chubb's policy afforded no coverage whatsoever. The District Court ruled, in a minute entry on July 22, 1997, that Workmen's policy provided primary coverage, and therefore, granted summary judgment in favor of Chubb.

On July 28, 1997, Workmen's filed a motion for a new trial. After oral arguments were held on October 15, 1997, the District Court filed an amended ruling dated December 10, 1997 denying Workmen's motion. This Order set forth the Court's reasoning on this matter, final Judgment and Order of Dismissal of which was filed under the Third Judicial District Court on March 26, 1998.

II. STATEMENT OF FACTS

- a. On or around October 21, 1993, Catherine Jacobsen was involved in an automobile accident with Patti Zimmerman.
- b. At the time of the accident, Catherine Jacobsen was employed by Wagon Tongue, Inc.
- c. At the time of the accident, Catherine Jacobsen was insured through a policy of insurance issued by Workmen's Auto Insurance Company.
- d. At the time of the accident, Wagon Tongue, Inc. was insured by a policy of insurance issued by Chubb Group of Insurance Companies.

e. As a result of this accident, Workmen's Auto Insurance Company paid \$3,848.68 for property damage suffered by Patti Zimmerman in that accident, pursuant to its policy of insurance with Ms. Jacobsen.

f. This amount was determined and paid to Ms. Zimmerman without the knowledge of Wagon Tongue or its insurer, Chubb.

g. Workmen's brought an action against Defendant/Appellee in an effort to recover the money it paid to Ms. Jacobsen, on the grounds that they are entitled to indemnification from Defendant/Appellee.

SUMMARY OF ARGUMENT

Plaintiff/Appellant's primary assertion is that, since Catherine Jacobsen was in the course and scope of her employment with Wagon Tongue, Inc. at the time of the accident, her employer assumed her tort liability for any negligent acts that she might commit during that employment. The basis of the claim against Chubb is that the doctrine of *Respondeat Superior* establishes an "insured contract" between Wagon Tongue and Jacobsen, one which makes Chubb, as Wagon Tongue's insurer, primarily liable for Zimmerman's damages.

Workmen's reasoning is misguided. It is true that the "Other Insurance" clause in Chubb's policy provides that coverage under that policy is primary for liability assumed under an "insured contract." However, even if Wagon Tongue assumed liability of its employee under the doctrine of *respondeat superior*, no such contract exists with regard to the insurance policy. *Respondeat superior* is only a mechanism under tort law which enables an injured party to assert a claim directly against the employer for damages caused by its employee, while in the course and scope of his

employment. This is not an “insured contract” or any other type of a contractual obligation assumed by an employer, nor by the employer’s insurance company.

Finally, Chubb asserts that to the extent the District Court’s Ruling is silent on the issue of Chubb’s policy coverage, coverage does not apply on at all to this accident. Ms. Jacobsen was driving here own personal auto at the time of the accident, and the policy excludes coverage in these circumstances. Although Ms. Jacobsen was in the course and scope of her employment at the time of the accident, she was driving her own automobile, which removed her from the scope of Chubb’s policy.

ARGUMENT

I. WAGON TONGUE DID NOT ASSUME LIABILITY FOR ITS EMPLOYEE UNDER AN “INSURED CONTRACT,” AND THEREFORE, CHUBB’S INSURANCE COVERAGE, TO THE EXTENT IT EXISTS, IS SECONDARY TO THAT OF WORKMEN’S AUTO INSURANCE COMPANY.

A. No Insured Contract Exists.

Section IV, Part B, Subsection 5(c) of the applicable policy of insurance provides:

Regardless of the provisions of Paragraph a. above, this coverage form’s liability coverage is primary for any liability assumed under and “insured contract.”

An “insured contact” is defined in Section 5, Part F, Subsections 1-6. Falling under the definitions provided are leases, easements, and other business contracts.¹ The facts here clearly do not give rise to any category of an “insured contract” appearing in that definition.

¹A copy of the policy is attached hereto as Exhibit “A.” The definition of “insured contract” is too lengthy to include in the text of this brief, so Defendant has attached it hereto for reference.

B. Respondeat Superior Is a Doctrine of Equity That Does Not Create a Basis for the Existence of an "Insured Contract."

Plaintiff has assumed that an insured contract is present in this case, because an employment contract exists under which the employer of the tortfeasor, Wagon Tongue, assumes the tort liability of its employer under the doctrine of *respondeat superior*. Black Dictionary defines *respondeat superior* as:

A master is liable in certain cases for the wrongful acts of his servant and the principal of those of his agent. Under this doctrine, a master is responsible for want of care on servant's part toward those who a master owes duty to use care, provided failure of servant to use such care occurred in the course of his employment.

This is clearly an equitable doctrine, not a contractual obligation assumed by an employer. There is no evidence in this case that Wagon Tongue, and moreover, Chubb, entered into any kind of contract with its employee and assumed the tort liability of that employee. As Judge Barrett stated in his ruling, "respondeat superior is merely a mechanism in tort law", which enables an injured party to assert a claim against an employer for torts of the employee.² It is not a mechanism which allows a tortfeasor's insurer to recover reimbursement from the employer's insurer, through an insured contract or otherwise.

C. Chubb's Coverage, to the Extent it Exists, Is Secondary, Pursuant to the Terms of its Policy.

Section IV, Part B, Subsection 5(a) of the applicable policy of insurance, which is attached hereto, states:

²Attached hereto as Exhibit "B."

For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance.

In this case, since Catherine Jacobsen was driving her own automobile at the time of the accident, any potential coverage afforded by this policy is excess over any other collectible insurance. Therefore, Workmen's insurance is primary in this case.

II. PLAINTIFF HAS NO RIGHT OF INDEMNITY AGAINST DEFENDANT AND THEREFORE, NO INSURED CONTRACT EXISTS IN THIS CASE.

Plaintiff has stated in its Appeal Brief that "the critical determination is not whether Catherine Jacobsen and Chubb's named insured executed a written contract, but whether the parties objectively manifested consent to the employment relationship." In fact, there is no doubt that there was an employer-employee relationship between Ms. Jacobsen and Wagon Tongue.

However, the relevant inquiry regarding whether an "insured contract" existed, is whether or not there was some type of contractual agreement regarding the assumption of tort liability by the employer. *Respondeat superior* is not an "insured contract" by terms of the policy, nor was it within the parties contemplation here. *Respondeat superior* is an equitable doctrine designed to provide an alternate means of recovery, in certain situations, to an injured party.

Plaintiff further claims its right to recovery is predicated on the existence of indemnity between Plaintiff and Defendant. Indemnity is outlined at 42 C.J.S. Indemnity Section 20 as follows:

"Where a person carefully and in good faith does an act which is not apparently illegal, at the request of or under the expressed directions of another person, and such act causes an injury to the rights of third persons, an implied contract arises on the part of the person for whom

the act is done, and who is primarily liable therefor to indemnify the person doing the act against the natural consequences thereof."

42 C.J.S. Indemnity Section 20.

Only if an employee is compelled to pay damages for injuries to a third person *not caused by his negligence* or wilful and wrongful act except as directed by his employer, may he recover from his *employer* [Emphasis added].

In this case, the acts committed by Catherine Jacobsen were simply negligent and as a result, no indemnity arises. While *respondeat superior* would likely have allowed Ms. Zimmerman to recover from Wagon Tongue in the event Plaintiff was insolvent, general principals of indemnity do not give the employee the right to recover from the employer, for a negligent act of the employee, simply because the employee has paid the judgment. For the Court to have found that a right of indemnity existed would be wholly inequitable. Any action which Workmen's may have had would be against Wagon Tongue, and not against Chubb. Chubb is not the proper Defendant in this matter, based on this argument.

III. NO COVERAGE IS AVAILABLE TO MS. JACOBSEN UNDER THE POLICY, BECAUSE SHE WAS DRIVING HER OWN CAR AT THE TIME OF THE ACCIDENT.

There is no dispute that at the time of the accident, Ms. Jacobsen was driving her own automobile. Workmen's has previously maintained that Catherine Jacobsen's argument is a "covered auto" under Chubb's policy, because one of the possible policy definitions of "covered auto" includes automobiles owned by employees when being used in connection with Wagon Tongue business.

In fact, "any" auto is a covered auto, under the terms of the policy, as specified on the declaration page. However, the broad definition in the policy at issue contains a specific exclusion provision which states that there is no coverage for an automobile owned by an employee, regardless of the use of that auto.

Section II, Part 1 of the policy defines who is an insured. It states:

- a. You [Wagon Tongue] for any covered "auto."
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
 - (2) Your employee if the covered "auto" is owned by that employee or a member of his or her household.

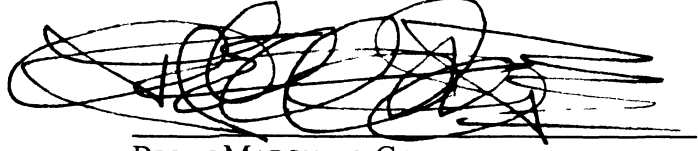
Section b(2) explicitly excludes from coverage any automobiles owned by Wagon Tongue employees, regardless of the vehicles use at the time of an accident. Therefore, even if Ms. Jacobsen was operating her own car at the direction of Wagon Tongue, there is no legal basis for recovery by Workmen's under this insurance policy. This conclusion necessarily follows because the policy at issue, when read together with the applicable declarations, specifically excludes coverage for vehicles that are owned by an employee. Since there is no coverage available to Ms. Jacobsen, there can be no right of indemnity available to Workmen's.

CONCLUSION

Based upon the foregoing, this Court should uphold the District Court's ruling, in which it was determined that Chubb's policy of insurance was excess to that of Workmen's Auto Insurance Company, or in the alternative, should find that the policy does not provide coverage at all for this accident.

Respectfully submitted this 6th day of Nov., 1998.

GODFREY & ASSOCIATES, PC

A large, stylized handwritten signature in black ink, appearing to read "Brett Marshall Godfrey", written over a horizontal line.

BRETT MARSHALL GODFREY

1st Eric Singleton
ERIC SINGLETON

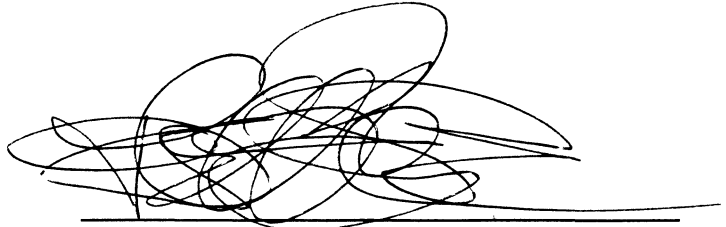
Attorneys for Plaintiff/Appellant,
Chubb Customer Center, Inc., dba
Chubb Group of Insurance Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of Nov., 1998, a true and correct copy of the foregoing RESPONSE BRIEF OF APPELLEE CHUBB CUSTOMER CENTER, INC. TO APPELLANT WORKMEN'S AUTO INSURANCE COMPANY'S BRIEF was mailed, via U.S. Mail, postage prepaid, to the following:

Trent J. Waddoups, Esq.
CARR & WADDOUPS
8 East Broadway, Suite 201
Salt Lake City, Utah 84111

Eric Singleton, Esq.
201 South Main Street, Suite 900
Salt Lake City, UT 84111



A handwritten signature in black ink, appearing to read "Brett Marshall Godfrey", is written over a horizontal line.

BRETT MARSHALL GODFREY

Tab A



Chubb Group of Insurance Companies

15 Mountain View Road Warren NJ 07059

DECLARATIONS
BUSINESS AUTO POLICY

Prior Number NEW

Producer Number 12787

Policy Number BAP (94 0320 70 99

ITEM ONE

Named Insured & Mailing Address

WAGON TONGUE, INC.

DBA: FRONTIER PIZZ

894 E. 3900 S.

SALT LAKE CITY, UTAH 84107

Name Mailing Address of Producer

CONNOR & KELLY INSURANCE BROKERS

400 S. JEFFERSON, SUITE 408

SPOKANE, WA 99204

THIS POLICY HAS BEEN

issued by the stock insurance company indicated below

GREAT NORTHERN INSURANCE COMPANY

Incorporated under the laws of Minnesota

SCHEDULE
RATED

FORM OF NAMED INSURED'S BUSINESS ☒ CORPORATION ☐ PARTNERSHIP ☐ INDIVIDUAL or ☐ OTHER

NAMED INSURED'S BUSINESS FAMILY RESTAURANT

POLICY PERIOD

Policy covers FROM 6/1/93

TO 6/1/94

COMM: 15Z

12 01 AM Standard Time at your mailing address shown above

UCC: 06500/58

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

ITEM TWO

SCHEDULE OF COVERAGES AND COVERED AUTOS

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those autos shown as covered autos. Autos are shown as covered autos for a particular coverage by the entry of one or more of the symbols from the COVERED AUTOS Section of the Business Auto Coverage Form next to the name of the coverage.

COVERAGES	COVERED AUTOS (Entry of one or more of the symbols from the COVERED AUTOS Section of the Business Auto Coverage Form shows which autos are covered autos)	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS	PREMIUM
LIABILITY	1	\$ 1,000,000.	2,674.
PERSONAL INJURY PROTECTION (or equivalent No fault coverage)	5	SEPARATELY STATED IN EACH PIP ENDORSEMENT MINUS \$ NIL Deductible	99.
ADDED PERSONAL INJURY PROTECTION (or equivalent added No fault coverage)		SEPARATELY STATED IN EACH ADDED PIP ENDORSEMENT	
PROPERTY PROTECTION INSURANCE (Michigan only)		SEPARATELY STATED IN THE PPI ENDORSEMENT MINUS \$ Deductible FOR EACH ACCIDENT	
AUTO MEDICAL PAYMENTS		\$	
UNINSURED MOTORISTS	2	\$ 1,000,000.	391.
UNDERINSURED MOTORISTS (When not included in Uninsured Motorists Coverage)		\$	
PHYSICAL DAMAGE COMPREHENSIVE COVERAGE	7	ACTUAL CASH VALUE OR COST OF REPAIR WHICHEVER IS LESS MINUS \$ 250. Ded FOR EACH COVERED AUTO BUT NO DEDUCTIBLE APPLIES TO LOSS CAUSED BY FIRE OR LIGHTNING See ITEM FOUR for hired or borrowed autos	290.
PHYSICAL DAMAGE SPECIFIED CAUSES OF LOSS COVERAGE		ACTUAL CASH VALUE OR COST OF REPAIR WHICHEVER IS LESS MINUS \$25 Ded FOR EACH COVERED AUTO FOR LOSS CAUSED BY MISCHIEF OR VANDALISM See ITEM FOUR for hired or borrowed autos	
PHYSICAL DAMAGE COLLISION COVERAGE	7	ACTUAL CASH VALUE OR COST OF REPAIR WHICHEVER IS LESS MINUS \$ 50. Ded FOR EACH COVERED AUTO See ITEM FOUR for hired or borrowed autos	861.
PHYSICAL DAMAGE TOWING AND LABOR (Not Available in California)		\$ for each disablement of a private passenger auto	
FORMS AND ENDORSEMENTS ATTACHED TO THIS POLICY AT ITS INCEPTION SEE ATTACHED		PREMIUM FOR ENDORSEMENTS	
		ESTIMATED TOTAL PREMIUM	\$ 4,315.

These Declaration Pages with Policy Provisions and Endorsement(s) complete above numbered policy

See to be a true
copy of
this policy

[Handwritten signature]



DECLARATIONS—BUSINESS AUTO POLICY—(Continued)

ITEM THREE

Policy Number BAP (94) 7320 70 99

SCHEDULE OF COVERED AUTOS YOU OWN

Covered Auto No	DESCRIPTION				PURCHASED		TERRITORY Town & State Where the Covered Auto will be principally garaged
	Year Model	Trade Name	Body Type	Serial Number (S), Vehicle Identification Number (VIN)	Original Cost New	Actual Cost & NEW (N) USED(U)	
1	PER SCHEDULE ATTACHED						
2							
3							
4							
5							

Covered Auto No	CLASSIFICATION							EXCEPT FOR Towing, all physical damages loss is payable to you and the loss payee named below as interests may appear at the time of the loss.
	Radius of Operation	Business Use s = service r = retail c = commercial	Size GVW, GCW or Vehicle Seating Capacity	Age Group	Primary Rating Factor Liab Phy Dam	Secondary Rating Factor	Code	
1								
2								
3								
4								
5								

Covered Auto No	COVERAGES—PREMIUMS LIMITS AND DEDUCTIBLES (Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)						
	LIABILITY		PERSONAL INJURY PROTECTION		ADDED PIP	PROP PROT (Mich only)	
	Limit	Premium	Limit stated in each PIP end minus deductible shown below	Premium	Limit stated in each Added PIP end Premium	Limit stated in PPI end, minus deductible shown below	Premium
1							
2							
3							
4							
5							
Total Premium							

Covered Auto No	COVERAGES—PREMIUMS LIMITS AND DEDUCTIBLES (Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)					
	AUTO MEDICAL PAYMENTS		UNINSURED MOTORISTS		UNDERINSURED MOTORISTS	
	Limit	Premium	Limit	Premium	Limit	Premium
1						
2						
3						
4						
5						
Total Premium						

SA/new 6/17/93

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DECLARATIONS—BUSINESS AUTO POLICY—(Continued)

Policy Number BAP (94) 7320 70 99

ITEM THREE—(Continued)

Covered Auto No	COVERAGES—PREMIUMS, LIMITS AND DEDUCTIBLES (Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)						
	COMPREHENSIVE		SPECIFIED CAUSES OF LOSS		COLLISION		TOWING & LABOR
	Limit stated in ITEM TWO minus deductible shown below	Premium	Limit stated in ITEM TWO Premium	Limit stated in ITEM TWO minus deductible shown below	Premium	Limit Per Disabling	Premium
1							
2							
3							
4							
5							
Total Premium							

ITEM FOUR

SCHEDULE OF HIRED OR BORROWED COVERED AUTO COVERAGE AND PREMIUMS

LIABILITY COVERAGE—RATING BASIS, COST OF HIRE

STATE	ESTIMATED COST OF HIRE FOR EACH STATE	RATE PER EACH \$100 COST OF HIRE	FACTOR (If Liab. Cov. is primary)	PREMIUM
UTAH, ARIZ.	IF ANY	1.289		\$64. M.P.
TOTAL PREMIUM				\$64. M.P.

Cost of hire means the total amount you incur for the hire of autos you don't own (not including autos you borrow or rent from your partners or employees or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.

PHYSICAL DAMAGE COVERAGE

COVERAGES	LIMIT OF INSURANCE THE MOST WE WILL PAY DEDUCTIBLE	RATE	PREMIUM
COMPREHENSIVE	ACTUAL CASH VALUE, COST OF REPAIRS OR \$ WHICHEVER IS LESS, MINUS \$ Ded. FOR EACH COVERED AUTO, BUT NO DEDUCTIBLE APPLIES TO LOSS CAUSED BY FIRE OR LIGHTNING		
SPECIFIED CAUSES OF LOSS	ACTUAL CASH VALUE, COST OF REPAIRS OR \$ WHICHEVER IS LESS, MINUS \$25 Ded. FOR EACH COVERED AUTO FOR LOSS CAUSED BY MISCHIEF OR VANDALISM		
COLLISION	ACTUAL CASH VALUE, COST OF REPAIRS OR \$ WHICHEVER IS LESS, MINUS \$ Ded. FOR EACH COVERED AUTO		
TOTAL PREMIUM			

PHYSICAL DAMAGE COVERAGE for covered autos you hire or borrow is excess unless indicated below by "X"

- ☐ If this box is checked, PHYSICAL DAMAGE COVERAGE applies on a direct primary basis and for purposes of the condition entitled OTHER INSURANCE, any covered auto you hire or borrow is deemed to be a covered auto you own

SA/haw 6/17/93

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DECLARATIONS—BUSINESS AUTO POLICY—(Continued)

ITEM FIVE

Policy Number BAP (94) 7320 70 99

SCHEDULE FOR NON-OWNERSHIP LIABILITY

Named Insured's Business	Rating Basis	Number	Premium
Other than a Social Service Agency	Number of Employees	175	\$ 219.
	Number of Partners		\$
Social Service Agency	Number of Employees		\$
	Number of Volunteers		\$
			\$ 219.

ITEM SIX

SCHEDULE FOR GROSS RECEIPTS OR MILEAGE BASIS—LIABILITY COVERAGE—PUBLIC AUTO OR LEASING RENTAL CONCERNS

Estimated Yearly	RATES		PREMIUMS	
	<input type="checkbox"/> Per \$100 of Gross Receipts	<input type="checkbox"/> Per Mile		
<input type="checkbox"/> Gross Receipts	LIABILITY COVERAGE	AUTO MEDICAL PAYMENTS	LIABILITY COVERAGE	AUTO MEDICAL PAYMENTS
<input type="checkbox"/> Mileage				
		TOTAL PREMIUMS		
		MINIMUM PREMIUMS		

When used as a premium basis

FOR PUBLIC AUTOS

Gross Receipts means the total amount to which you are entitled for transporting passengers, mail or merchandise during the policy period regardless of whether you or any other carrier originate the transportation. **Gross Receipts** does not include:

- A Amounts you pay to railroads, steamship lines, airlines and other motor carriers operating under their own ICC or PUC permits
- B Advertising Revenue
- C Taxes which you collect as a separate item and remit directly to a governmental division
- D COD collections for cost of mail or merchandise including collection fees

Mileage means the total live and dead mileage of all revenue producing units operated during the policy period.

FOR RENTAL OR LEASING CONCERNS

Gross Receipts means the total amount to which you are entitled for the leasing or rental of autos during the policy period and includes taxes except those taxes which you collect as a separate item and remit directly to a governmental division.

Mileage means the total of all live and dead mileage developed by the autos you leased or rented to others during the policy period.



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement changes the policy effective on the inception date of the policy unless a different date is indicated below

(The following need be completed only when this endorsement is issued subsequent to preparation of the policy)

This endorsement, effective on 6/1/93 at 12 01 A M. standard time forms a part of

policy No 8AP (94) 7320 70 99 of the GREAT NORTHERN INSURANCE COMPANY
(DATE)
(NAME OF INSURANCE COMPANY)

issued to WAGON TONGUE, INC.
DBA: FRONTIER PIES

Producer CONNOR & KELLY INSURANCE BROKERS

FORMS AND ENDORSEMENTS CONTAINED IN THIS POLICY:

CA111(6/92), CA334A(3/91), CA374E(12/91),
CA763(1/93), CA441C(1/93)

AUTO.1

SA/baw 6/17/93

All Other Terms and Conditions Remain Unchanged

Authorized Representative

CA 00 01 06 92

BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to **SECTION V—DEFINITIONS**.

SECTION I—COVERED AUTOS

ITEM TWO of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos." The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos."

A. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

- | SYMBOL | DESCRIPTION |
|--|---|
| 1 = ANY "AUTO." | |
| 2 = OWNED "AUTOS" ONLY. | Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins. |
| 3 = OWNED PRIVATE PASSENGER "AUTOS" ONLY. | Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins. |
| 4 = OWNED "AUTOS" OTHER THAN PRIVATE PASSENGER "AUTOS" ONLY. | Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins. |
| 5 = OWNED "AUTOS" SUBJECT TO NO-FAULT. | Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged. |
| 6 = OWNED "AUTOS" SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW. | Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement. |
| 7 = SPECIFICALLY DESCRIBED "AUTOS." | Only |

those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).

8 = HIRED "AUTOS" ONLY. Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your employees or partners or members of their households.

9 = NONOWNED "AUTOS" ONLY. Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your employees or partners or members of their households but only while used in your business or your personal affairs.

B. OWNED AUTOS YOU ACQUIRE AFTER THE POLICY BEGINS

1. If symbols 1, 2, 3, 4, 5 or 6 are entered next to a coverage in ITEM TWO of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if symbol 7 is entered next to a coverage in ITEM TWO of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:
 - a. We already cover all "autos" that you own for that coverage or it replaces an "auto" you previously owned that had that coverage; and
 - b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

C. CERTAIN TRAILERS, MOBILE EQUIPMENT AND TEMPORARY SUBSTITUTE AUTOS

If Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered "autos" for Liability Coverage:

1. "Trailers" with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.
2. "Mobile equipment" while being carried or towed by a covered "auto."
3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute

for a covered "auto" you own that is out of service because of its:

- a. Breakdown;
- b. Repair;
- c. Servicing;
- d. "Loss"; or
- e. Destruction.

SECTION II - LIABILITY COVERAGE

A. COVERAGE

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos." However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident."

We have the right and duty to defend any "suit" asking for such damages or a "covered pollution cost or expense." However, we have no duty to defend "suits" for "bodily injury" or "property damage" or a "covered pollution cost or expense" not covered by this Coverage Form. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

1. WHO IS AN INSURED

The following are "insureds":

- a. You for any covered "auto."
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
 - (1) The owner or anyone else from whom you hire or borrow a covered "auto." This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.
 - (2) Your employee if the covered "auto" is owned by that employee or a member of his or her household.
 - (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.
 - (4) Anyone other than your employees, partners, a lessee or borrower or any of their employees, while moving property

or from a covered "auto."

- (5) A partner of yours for a covered "auto" owned by him or her or a member of his or her household.

- c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

2. COVERAGE EXTENSIONS

- a. Supplementary Payments. In addition to the Limit of Insurance, we will pay for the "insured":

- (1) All expenses we incur.
- (2) Up to \$250 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.
- (3) The cost of bonds to release attachments in any "suit" we defend, but only for bond amounts within our Limit of Insurance.
- (4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to \$100 a day because of time off from work.
- (5) All costs taxed against the "insured" in any "suit" we defend.
- (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

- b. Out-of-State Coverage Extensions.

While a covered "auto" is away from the state where it is licensed we will:

- (1) Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- (2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

B. EXCLUSIONS

This insurance does not apply to any of the following:

1. EXPECTED OR INTENDED INJURY

"Bodily injury" or "property damage" expected or

intended from the standpoint of the "insured."

2. CONTRACTUAL

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- b. That the "insured" would have in the absence of the contract or agreement.

3. WORKERS' COMPENSATION

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY

"Bodily injury" to:

- a. An employee of the "insured" arising out of and in the course of employment by the "insured"; or
- b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph a. above.

This exclusion applies:

- (1) Whether the "insured" may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to "bodily injury" to domestic employees not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract."

5. FELLOW EMPLOYEE

"Bodily injury" to any fellow employee of the "insured" arising out of and in the course of the fellow employee's employment.

6. CARE, CUSTODY OR CONTROL

"Property damage" to or "covered pollution cost or expense" involving property owned or transported by the "insured" or in the "insured's" care, custody or control. But this exclusion does not apply to liability assumed under a sidetrack agreement.

7. HANDLING OF PROPERTY

"Bodily injury" or "property damage" resulting from the handling of property:

- a. Before it is moved from the place where it is accepted by the "insured" for movement into or onto the covered "auto"; or

- b. After it is moved from the covered "auto" to the place where it is finally delivered by the "insured."

8. MOVEMENT OF PROPERTY BY MECHANICAL DEVICE

"Bodily injury" or "property damage" resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered "auto."

9. OPERATIONS

"Bodily injury" or "property damage" arising out of the operation of any equipment listed in paragraphs 6.b. and 6.c. of the definition of "mobile equipment."

10. COMPLETED OPERATIONS

"Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.

In this exclusion, your work means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

Your work includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in paragraphs a. or b. above.

Your work will be deemed completed at the earliest of the following times:

- (1) When all of the work called for in your contract has been completed.
- (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
- (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

11. POLLUTION

"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled, or handled for movement into, onto or from, the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or

- (3) Being stored, disposed of, treated or processed in or on the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "Insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured."

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury," "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in paragraphs 6.b. and 6.c. of the definition of "mobile equipment."

Paragraphs b. and c. above of this exclusion do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (1) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (2) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

12. WAR

"Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.

C. LIMIT OF INSURANCE

Regardless of the number of covered "autos," "insureds," premiums paid, claims made or vehicles involved in the "accident," the most we will pay for the total of all damages and "covered pollution cost or expense" combined, resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations.

All "bodily injury," "property damage" and "covered pollution cost or expense" resulting from continuous

or repeated exposure to substantially the same conditions will be considered as resulting from one "accident."

SECTION III—PHYSICAL DAMAGE COVERAGE

A. COVERAGE

1. We will pay for "loss" to a covered "auto" or its equipment under:
 - a. Comprehensive Coverage. From any cause except:
 - (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.
 - b. Specified Causes of Loss Coverage. Caused by:
 - (1) Fire, lightning or explosion;
 - (2) Theft;
 - (3) Windstorm, hail or earthquake;
 - (4) Flood;
 - (5) Mischief or vandalism; or
 - (6) The sinking, burning, collision or derailment of any conveyance transporting the covered "auto."
 - c. Collision Coverage. Caused by:
 - (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

2. Towing.

We will pay up to the limit shown in the Declarations for towing and labor costs incurred each time a covered "auto" of the private passenger type is disabled. However, the labor must be performed at the place of disablement.

3. Glass Breakage—Hitting a Bird or Animal—Falling Objects or Missiles.

If you carry Comprehensive Coverage for the damaged covered "auto," we will pay for the following under Comprehensive Coverage:

- a. Glass breakage;
- b. "Loss" caused by hitting a bird or animal; and
- c. "Loss" caused by falling objects or missiles.

However, you have the option of having glass breakage caused by a covered "auto's" collision or overturn considered a "loss" under Collision Coverage.

4. Coverage Extension. We will also pay up to \$15 per day to a maximum of \$450 for transportation expense incurred by you because of the total theft of a covered "auto" of the private passenger type. We will pay only for those covered "autos" for which you carry either Comprehensive or Specified Causes of Loss Coverage. We will pay for transportation expenses incurred during the period beginning 48 hours after the theft and

ending, regardless of the policy's expiration, when the covered "auto" returned to use or we pay for its "loss."

B. EXCLUSIONS

1. We will not pay for "loss" caused by or resulting from any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."

a. Nuclear Hazard.

- (1) The explosion of any weapon employing atomic fission or fusion; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused.

b. War or Military Action.

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. Other Exclusions.

a. We will not pay for "loss" to any of the following:

- (1) Tape decks or other sound reproducing equipment unless permanently installed in a covered "auto."
- (2) Tapes, records or other sound reproducing devices designed for use with sound reproducing equipment.
- (3) Sound receiving equipment designed for use as a citizens' band radio, two-way mobile radio or telephone or scanning monitor receiver, including its antennas and other accessories, unless permanently installed in the dash or console opening normally used by the "auto" manufacturer for the installation of a radio.
- (4) Equipment designed or used for the detection or location of radar.

b. We will not pay for "loss" caused by or resulting from any of the following unless caused by other "loss" that is covered by this insurance:

- (1) Wear and tear, freezing, mechanical or electrical breakdown.
- (2) Blowouts, punctures or other road damage to tires.

C. LIMIT OF INSURANCE

The most we will pay for "loss" in any one "accident" is the less of:

1. The actual cash value of the damaged or stolen property as of the time of the "loss", or
2. The cost of repairing or replacing the damaged or stolen property with other property of like kind and quality.

D. DEDUCTIBLE

For each covered "auto," our obligation to pay for, repair, return or replace damaged or stolen property will be reduced by the applicable deductible shown in the Declarations. Any Comprehensive Coverage deductible shown in the Declarations does not apply to "loss" caused by fire or lightning.

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

A. LOSS CONDITIONS

1. APPRAISAL FOR PHYSICAL DAMAGE LOSS

If you and we disagree on the amount of "loss," either may demand an appraisal of the "loss." In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss." If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

2. DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS

a. In the event of "accident," claim, "sue" or "loss," you must give us or our authorized representative prompt notice of the "accident" or "loss." Include:

- (1) How, when and where the "accident" or "loss" occurred;
- (2) The "insured's" name and address; and
- (3) To the extent possible, the names and addresses of any injured persons and witnesses.

b. Additionally, you and any other involved "insured" must:

- (1) Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.
- (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the

- 3) Cooperate with us in the investigation, settlement or defense of the claim or "suit."
- 4) Authorize us to obtain medical records or other pertinent information.
- 5) Submit to examination, at our expense, by physicians of our choice, as often as we reasonably require.

c. If there is "loss" to a covered "auto" or its equipment you must also do the following:

- 1) Promptly notify the police if the covered "auto" or any of its equipment is stolen.
- 2) Take all reasonable steps to protect the covered "auto" from further damage. Also keep a record of your expenses for consideration in the settlement of the claim.
- 3) Permit us to inspect the covered "auto" and records proving the "loss" before its repair or disposition.
- 4) Agree to examinations under oath at our request and give us a signed statement of your answers.

No one may bring a legal action against us under this Coverage Form until:

- #### 4. LOSS PAYMENT- PHYSICAL DAMAGE COVERAGES

- a. Pay for, repair or replace damaged or stolen property;
- b. Return the stolen property, at our expense. We will pay for any damage that results to the "auto" from the theft; or
- c. Take all or any part of the damaged or stolen property at an agreed or appraised value.

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

Bankruptcy or insolvency of the "insured" or the "insured's" estate will not relieve us of any obligations under this Coverage Form.

If we revise this Coverage Form to provide more coverage without additional premium charge, your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Liability Coverage this Coverage Form provides for the "trailer" is:

- b. For Hired Auto Physical Damage coverage, any covered "auto" you lease, hire, rent or borrow is deemed to be a covered "auto" you own. However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto."

- c. Regardless of the provisions of paragraph a. above, this Coverage Form's Liability Coverage is primary for any

liability assumed under an "insured contract."

- d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

6. PREMIUM AUDIT

- a. The estimated premium for this Coverage Form is based on the exposures you told us you would have when this policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund.
- b. If this policy is issued for more than one year, the premium for this Coverage Form will be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

7. POLICY PERIOD, COVERAGE TERRITORY

Under this Coverage Form, we cover "accidents" and "losses" occurring:

- a. During the policy period shown in the Declarations; and
- b. Within the coverage territory.

The coverage territory is:

- a. The United States of America;
- b. The territories and possessions of the United States of America;
- c. Puerto Rico; and
- d. Canada.

We also cover "loss" to, or "accidents" involving, a covered "auto" while being transported between any of these places.

8. TWO OR MORE COVERAGE FORMS OR POLICIES ISSUED BY US

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same "accident," the aggregate maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this

Coverage Form.

SECTION V—DEFINITIONS

- A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage."
- B. "Auto" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads but does not include "mobile equipment."
- C. "Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these.
- D. "Covered pollution cost or expense" means any cost or expense arising out of:

- 1. Any request, demand or order; or
- 2. Any claim or "suit" by or on behalf of a governmental authority demanding

that the "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants."

"Covered pollution cost or expense" does not include any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled or handled for movement into, onto or from the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured";
 - (3) Being stored, disposed of, treated or processed in or upon the covered "auto"; or
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured."

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury," "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in paragraphs 6.b. or 6.c. of the definition of

"mobile equipment."

Paragraphs b. and c. above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (1) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
 - (2) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.
- E. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.
- F. "Insured contract" means:
1. A lease of premises;
 2. A sidetrack agreement;
 3. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 4. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
 6. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your employees, of any "auto." However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your employees to pay for "property damage" to any "auto" rented or leased by you or any of your employees.
- An "insured contract" does not include that part of any contract or agreement.
- a. That indemnifies any person or organization for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing; or
 - b. That pertains to the loan, lease or rental of an "auto" to you or any of your employees, if the "auto" is loaned, leased or rented with a driver; or
 - c. That pertains to a person or organization engaged in the business of transporting property by "auto" for hire harmless for your use of a covered "auto" over a route or territory that person or organization is authorized to serve by public authority.
- G. "Loss" means direct and accidental loss or damage.
- H. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 2. Vehicles maintained for use solely on or next to premises you own or rent;
 3. Vehicles that travel on crawler treads;
 4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - a. Power cranes, shovels, loaders, diggers or drills; or
 - b. Road construction or resurfacing equipment such as graders, scrapers or rollers.
 5. Vehicles not described in paragraphs 1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - b. Cherry pickers and similar devices used to raise or lower workers.
 6. Vehicles not described in paragraphs 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
 - a. Equipment designed primarily for:
 - (1) Snow removal;
 - (2) Road maintenance, but not construction or resurfacing; or
 - (3) Street cleaning;
 - b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
 - c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well servicing equipment.
- I. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, recondi-

tioned or reclaimed.

J. "Property damage" means damage to or loss of use of tangible property.

K. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or

"covered pollution cost or expense," to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages or "covered pollution cost or expense" to which you must submit or submit with our consent.

L. "Trailer" includes semitrailer.

BAP (94) 7320 70 99
WAGON TONGUE, INC.
DBA: FRONTIER PIES

#1

CA 334a
(3-91)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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UTAH CHANGES

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
BUSINESS AUTO PHYSICAL DAMAGE COVERAGE FORM
GARAGE COVERAGE FORM
TRUCKERS COVERAGE FORM

For a covered "auto" licensed or principally garaged in or "garage operations" conducted in, Utah, CONDITIONS are changed as follows.

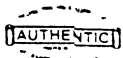
- A. The Legal Action Against Us Condition does not apply.
- B. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US is changed by adding the following.
 - a. We shall be entitled to a recovery only after the "insured" has been fully compensated for damages.
 - b. If we make any payment and the "insured" recovers from another party, the 'insured' shall hold the proceeds in trust for us and pay us back the amount we have paid.

- C. *The Concealment, Misrepresentation or Fraud Condition is replaced by the following.*

FRAUD OR MISREPRESENTATION

Subject to Utah Code Ann. Section 31A-21-105, this Coverage Form may be voided in the event of fraud or misrepresentation by you or any other "insured" relating to.

- a. This Coverage Form;
- b. The covered "auto";
- c. Your interest in the covered "auto", or
- d. A claim under this Coverage Form



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Authorized Representative)

See also: ["The 100 Most Influential People in the World"](#)

after the date of the "bodily injury", this three day elimination period shall not be applicable; and

- b. An allowance for services actually rendered or reasonably incurred that, but for the "bodily injury" the "insured" would have performed during his or her lifetime for his or her household commencing three days after the date of the "bodily injury" and continuing for a maximum of 365 consecutive days thereafter. If such "insured's" inability to perform such services continues in excess of 14 consecutive days after the date of the "bodily injury", this three day elimination period shall not be applicable.

3. **Funeral expenses** Funeral, burial or cremation expenses incurred.

4. **Survivor loss** Compensation on account of the death of the "insured" and is payable only to natural persons who are the "insured's" heirs.

B. WHO IS AN INSURED

1. You, unless you are injured in an "accident" which resulted from the use or operation of any motor vehicle which is owned by you and which is not a covered "auto"
2. If you are an individual, any "family member", unless the "family member" is injured in an "accident" which resulted from the use or operation of any motor vehicle which is owned by such "family member" and which is not a covered "auto".
3. Any person while "occupying" a covered "auto" with the consent of the "insured".
4. Any person while "occupying" any other "auto" other than a public or livery conveyance, operated by you or a "family member"
5. A "pedestrian" if the "accident" involves the use of a covered "auto"

C. EXCLUSIONS

We will not pay Personal Injury Protection benefits for "bodily injury"

1. Sustained by the "insured" while "occupying" an "auto" owned by, or furnished for the regular use of, that "insured", or if you are an individual any "family member", that is not a covered "auto"
2. Sustained by any person while operating the covered "auto" without the express or implied consent of the "insured" or while not in lawful possession of the covered "auto"
3. Sustained by a "pedestrian" if the "accident" occurs outside the state of Utah. This exclusion does not apply if you are an individual, to you or any "family member"

4. Sustained by any person if such person's conduct contributed to his injury under either of the following circumstances.

- a. Causing injury to himself or herself intentionally, or
- b. While committing a felony.

5. Sustained by any person arising out of the use of any "auto" while located for use as a residence or premises.

6. Due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing.

7. Resulting from the radioactive, toxic, explosive or other hazardous properties of nuclear material

D. LIMIT OF INSURANCE

1. Regardless of the number of "insureds", policies or bonds applicable, claims made, premiums paid or covered "autos" to which this coverage applies, the most we will pay for Personal Injury Protection benefits for "bodily injury" sustained by an "insured" in any one "accident" is the Limit Per Person amount shown in the Schedule.
2. Any amount payable under this coverage will be reduced by the amount paid, payable or required to be provided for "bodily injury":
 - a. Under any workers' compensation plan or any similar statutory plan;
 - b. By the United States or any of its agencies because of his or her being on active duty in the military services;

E. CHANGES IN CONDITIONS

The following is added to the DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS Condition:

- d. If an "insured" or his or her legal representative or survivor institutes legal action to recover damages for "bodily injury", he or she must promptly give us a copy of the summons and complaint or other process served in connection with the legal action.
- e. The "insured" or someone on his or her behalf must promptly give us written proof of claim, under oath if required, including
 - (1) Full particulars of the nature and extent of the "bodily injury", treatment and rehabilitation received and contemplated, and
 - (2) Such other information that will help us determine the amount due and payable

The following CONDITIONS are added

REIMBURSEMENT AND TRUST

1. If we make any payment to any "insured" under

This coverage shall not be subject to recovery by any other party, he or she shall hold the proceeds in trust for us and pay us back the amount we have paid. We will have a lien against such payment, and may give notice of the lien to the person or organization causing "bodily injury", his or her agent or insurer or a court having jurisdiction in the matter.

2. Any "insured" receiving payment must hold in trust for our benefit all rights of recovery he or she has against the party causing "bodily injury".
3. That person must do everything necessary to secure such rights and must do nothing to impair them.
4. That person must execute and deliver to us instruments and papers that may be appropriate to secure his or her and our rights and obligations established by this provision.

COORDINATION AND NON-DUPLICATION

1. No "insured" may recover duplicate payments for the same elements of "loss" under this or any other insurance.
2. This insurance is primary only for "bodily injury" sustained by an "insured" in an "accident" arising out of the use or operation of a covered "auto".
3. If an "insured" is entitled to Personal Injury Protection benefits under more than one policy, the maximum recovery under all policies combined will not exceed the amount payable under the policy with the highest dollar limit of benefits. Our share is the proportion that our Limit of Insurance bears to the total of all applicable limits covering on the same basis.
4. Personal Injury Protection benefits paid or payable under this Coverage Form or any other Coverage Form or policy providing auto insurance because of "bodily injury" sustained by an "insured" shall be

subject to the provisions of the Coverage Form provided by this Coverage Form.

PREMIUM RECOMPUTATION

The premium for this policy is based on rates which have been established in reliance upon the limitations on the right to recover for damages imposed by the provisions of Title 31A, Utah Code Annotated. If a court declares any or these provisions unenforceable, we have the right to recompute the premium, and the provisions of this endorsement are voidable or subject to amendment at our option.

F. ADDITIONAL DEFINITIONS

1. The definition of "auto" in the DEFINITIONS Section is replaced by the following.

"Auto" means every self-propelled vehicle which is designed for use upon a highway, including trailers and semi-trailers designed for use with such vehicles, except traction engines, road rollers, farm tractors, tractor cranes, power snows, and well drillers, and every vehicle which is propelled by electric power obtained from overhead wires but not operated on rails.
2. The following are added to the DEFINITIONS Section:
 - a. "Family member" means a person related to you by blood, marriage or adoption, including a ward or foster child, who is a resident of your household, whether or not temporarily residing elsewhere.
 - b. "Occupying" means being in or upon an "auto" as a passenger or operator or engaged in the immediate acts of entering, boarding or alighting from an "auto".
 - c. "Pedestrian" means any person not "occupying" or riding upon an "auto".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CA 21 62 01 93

UTAH UNINSURED MOTORISTS COVERAGE

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM

GARAGE COVERAGE FORM

TRUCKERS COVERAGE FORM

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle."
2. If this insurance provides a limit in excess of the amounts required by the applicable law where a covered "auto" is principally garaged, we will pay only after all liability bonds or policies have been exhausted by judgments or payments.
3. Any judgment for damages arising out of a "suit" brought without our written consent is not binding on us.

B. WHO IS AN INSURED

1. You.
2. If you are an individual, any "family member."
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto." The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."

C. EXCLUSIONS

This insurance does not apply to any of the following:

1. Any claim settled without our consent.
2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.
3. "Bodily injury" sustained by you or any "family member" while "occupying" or struck by any vehicle owned by you or any "family member" for which the security required by the Utah Safety Responsibility Act is not in effect. This includes a trailer of any type used with that vehicle.
4. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.

5. Punitive or exemplary damages.

D. LIMIT OF INSURANCE

1. Regardless of the number of covered "autos," "Insureds," premiums paid, claims made or vehicles involved in the "accident," the most we will pay for all damages resulting from any one "accident" is the LIMIT OF INSURANCE for UNINSURED MOTORISTS COVERAGE shown in the Declarations.
2. Any amount payable under this coverage shall be reduced by:
 - a. All sums paid or payable under any workers' compensation, disability benefits or similar law, and
 - b. All sums paid by or for anyone who is legally responsible, including all sums paid under this Coverage Form's LIABILITY COVERAGE.
3. Any amount paid under this coverage will reduce any amount an "Insured" may be paid under this Coverage Form's LIABILITY COVERAGE.

E. CHANGES IN CONDITIONS

The CONDITIONS are changed for UNINSURED MOTORISTS COVERAGE as follows:

1. The OTHER INSURANCE Condition is replaced by the following:

If there is any other applicable similar insurance available under more than one policy or provision of coverage:

 - a. The maximum recovery under all coverage forms or policies combined will not exceed the maximum amount payable for any one vehicle under the coverage form or policy with the highest applicable limit of liability.
 - b. Subject to paragraph a. above, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.
 - c. We will pay only our share of the loss. Our share is the proportion that our Limit of Insurance bears to the total of all applicable limits covering on the same basis.
2. DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS is changed by adding the follow-

ing:

- a. Promptly notify the police if a hit-and-run driver is involved, and
 - b. Promptly send us copies of the legal papers if a "suit" is brought.
3. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US is changed by adding the following:
- a. We shall be entitled to a recovery only after the "insured" has been fully compensated for damages.
 - b. If we make any payment and the "insured" recovers from another party, the "insured" shall hold the proceeds in trust for us and pay us back the amount we have paid.
4. The following Condition is added. However, this Condition does not apply if a small claims court having jurisdiction resolves the matter or matters upon which we and an "insured" do not agree.

ARBITRATION

- a. If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally.
- b. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to arbitration procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding.

F. ADDITIONAL DEFINITIONS

The following are added to the DEFINITIONS Section:

1. "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.
 2. "Occupying" means in, upon, getting in, on, out or off.
 3. "Uninsured motor vehicle" means a land motor vehicle or trailer:
 - a. For which no liability bond or policy at the time of an "accident" provides at least the amounts required by the applicable law where a covered "auto" is principally garaged;
 - b. For which an insuring or bonding company denies coverage or is or becomes insolvent; or
 - c. That is a hit-and-run vehicle whose operator or owner cannot be identified and that hits or causes an "accident" resulting in "bodily injury" without hitting:
 - (1) You or any "family member";
 - (2) A vehicle which you or any "family member" are "occupying"; or
 - (3) Your covered "auto."
- If there is no physical contact with the hit-and-run vehicle, the facts of the "accident" must be proved. We will only accept clear and convincing evidence, which must consist of more than the "Insured's" testimony.
- However, "uninsured motor vehicle" does not include any vehicle:
- a. Owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer who is or becomes insolvent and cannot provide the amounts required by that motor vehicle law;
 - b. Owned by a governmental unit or agency; or
 - c. Designed for use mainly off public roads while not on public roads.
 - d. For which a bodily injury liability bond or policy applies at the time of the "accident" but the amount paid for "bodily injury" under that bond or policy to an "insured" is not enough to pay the full amount the "insured" is legally entitled to recover as damages caused by the "accident."

Tab B

THIRD DISTRICT COURT DIVISION TWO, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

WORKMEN'S AUTO INSURANCE CO.)	<i>Amended</i>
Plaintiff)	RULING
)	
vs.)	CASE # 960013632 CV
)	
CHUBB CUSTOMER CENTER, INC d/b/a)		
CHUBB GROUP OF INSURANCE COMPANIES)		
Defendant)	

For the benefit of a clear record the following has occurred in this case:

1. Plaintiff filed a Motion for Summary Judgement on April 17, 1997
2. Defendant filed a Memorandum in Support of Defendant's Response to Plaintiff's Motion for Summary Judgement and Defendant's Cross-Motion for Summary Judgment.
3. On May 2, 1997 Plaintiff filed a Notice to Submit for Decision.
4. On July 22, 1997 the court issued a ruling granting Defendant's Cross-Motion for Summary Judgment.
5. Prior to signing the order granting Summary Judgement Plaintiff Filed a Motion for a New Trial and Motion for a Statement of the Ground for decision and Request for Hearing. (July 28, 1997 motion filed)
6. The Court, Pursuant to Plaintiff's request for a hearing, scheduled a hearing which was held on October 15, 1997.

The court, after listening to the arguments of counsel during the hearing on October 15, 1997 and carefully reviewing all of the memoranda filed by the parties and being fully advised, hereby rules as follows;

1. The courts minute entry of July 22, 1997 wherein Defendant's cross motion for Summary Judgment was granted is set aside.
2. After a careful review of the language contained in defendant's insurance policy the court does not agree with Plaintiff's reading of the policy with respect to the issue of coverage. Plaintiff's view is that under the "other Insurance" provision in Defendant's policy the coverage is primary for liability assumed under an "insured contract". Plaintiff then concludes that an insured contract is present in this case, arguing that an employment contract exists under which the employer of the tortfeasor, Wagon Tongue, assumes the tort liability of it's employer under the doctrine of respondent superior. The Court sees no evidence of any such contract. The fact that Wagon Tongue may have been held liable for the tort of it's employee under a theory of respondeat superior does not create an insured contract. Respondeat superior is only a mechanism under tort law which enables an injured party to assert a claim for damages against an employer for injuries caused by it's employee while in the course and scope of employment. This is not a contractual obligation assumed by an employer.
There is no evidence in this case that Wagon Tongue entered into any kind of contract with it's employee and assumed the tort liability of the employee.

Based upon the foregoing, the Court hereby denies Plaintiff's Motion for Summary Judgement and grants ~~Plaintiff's~~ ^{Defendant's} cross motion for Summary Judgement. Defendant's counsel is to prepare an order and judgment and submit to Plaintiff's counsel in accordance with rule 4-504.

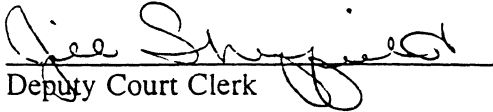
CERTIFICATE OF MAILING

I hereby certify that on this 12th day of December, 1997, I mailed, postage prepaid, a true and correct copy of the **Ruling** to:


TRENT J. WADDOUPS
8 East Broadway, Suite 201
Salt Lake City, Utah 84111

ERIC C. SINGLETON
136 South Main Street
Salt Lake City, Utah 84101

BRETT MARSHALL GODFREY
370 Seventeenth Street, Suite 3280
Denver, CO 80202-5632


Deputy Court Clerk

Dated this the 10th day of December 1997


William W. Barrett
Judge

