

1987

# James Constructors, Inc., a Nevada Corporation v. Salt Lake City Corporation : Brief of Appellant

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT STATE OF UTAH

DOCKET NO. ~~870387-CA~~ :

JAMES CONSTRUCTORS, INC., :  
A Nevada Corporation, :

Plaintiff and Respondent, :

vs. :

SALT LAKE CITY CORPORATION, :

Defendant and Appellant, :

SALT LAKE CITY CORPORATION, :

Plaintiff and Appellant, :

vs. :

JAMES CONSTRUCTORS, INC., a :  
Nevada Corporation, HOOD :  
CORPORATION, a California :  
corporation, and INDUSTRIAL :  
INDEMNITY COMPANY, a California :  
corporation, :

Defendants and Respondent.:

Supreme Court No. 870103

Priority Classification 14(b)

BRIEF OF APPELLANT  
Salt Lake City Corporation

Appeal from Judgment of the Third Judicial District Court  
in and for Salt Lake County, State of Utah  
The Honorable Judith M. Billings, Judge, Presiding

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AUG 20 1987

Clerk, Supreme Court, Utah

IN THE SUPREME COURT STATE OF UTAH

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JAMES CONSTRUCTORS, INC.,  
A Nevada Corporation,

Plaintiff and Respondent,

vs.

SALT LAKE CITY CORPORATION,

Defendant and Appellant,

Supreme Court No. 870103

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SALT LAKE CITY CORPORATION,

Plaintiff and Appellant,

Priority Classification 14(b)

vs.

JAMES CONSTRUCTORS, INC., a  
Nevada Corporation, HOOD  
CORPORATION, a California  
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INDEMNITY COMPANY, a California  
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### STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the District Court err in granting Summary Judgment in favor of Hood Corporation on the issue of alter ego ?

2. Should the District Court have reconsidered the Summary Judgment granted in favor of Hood Corporation on the issue of alter ego and allowed SLCC to amend its Complaint in view of the substantial undisputed facts indicating that Hood Corporation is the alter ego of James Constructors ?

3. Did the District Court err in holding Salt Lake City Corporation to a higher standard in judicial proceedings than other parties ?

### STATEMENT OF DETERMINATIVE RULES

Following is the text of Rule 54(b), Utah Rules of Civil Procedure, which is discussed at length in Point II of the Argument below.

When more than one claim for relief is presented in an action, whether it was a claim, counterclaim, crossclaim, or third-party claim, and/or when multiple parties are involved the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

### STATEMENT OF THE CASE

This case arises out of a public construction contract between Salt Lake City Corporation ("SLCC") and James Constructors ("James") for the construction of a pipeline project known as Contract No. 35-4184, Big Cottonwood Conduit Extension-Terminal Park Transmission Pipeline ("The Project"). This matter was originally handled for SLCC by the Salt Lake City Attorney's office. In March of 1986, however, SLCC requested that Wilford A. Beesley, Esq., of the law firm of Beesley & Fairclough, make his appearance and represent SLCC in this matter.

The case centers on excessive settlement of the backfill in the trench line, damage to the installed pipe, underground utilities (sewer, gas and telephone lines, water service lines, etc.), and other improvements. Generally, SLCC seeks to recover from James and Hood Corporation ("Hood") for the costs of remedying these defects. James contends that the project defects were SLCC's responsibility and that it was wrongfully terminated from the project. The Complaint of SLCC alleged that defendant Hood was liable for remedial costs resulting from the project defects based upon SLCC's reliance upon Hood's promotional literature submitted during the bid selection process. SLCC also contends that Hood is the alter ego of James and any liability of James is imputed to Hood.

### DISPOSITION IN LOWER COURT

On August 21, 1985, the Court granted Hood's Motion for Summary Judgment with respect to SLCC's claims against Hood. (R.



162-63). The Court, in its Findings of Fact and Conclusions of Law, stated that "no factual issues have been raised" by SLCC with respect to its alter ego claim. (R. 165-66)

After substituted counsel made their appearance, SLCC moved for reconsideration of the Summary Judgment and for leave to amend its Complaint to plead its alter ego claim. (R. 223-24) SLCC argued that if the court had considered the alter ego theory on its merits, material issues of fact and undisputed facts supporting the alter ego claim precluded summary judgment. (R. 227-49). SLCC also argued, inter alia, that the alter ego claim was not a proper subject for decision as it had never been pleaded in its Complaint and moved for Leave to Amend its Complaint to plead alter ego.

The Court refused to review the merits of SLCC's alter ego claim, (R. 299, 302, 303), stating that it had "fully considered" the alter ego issue when Hood moved for summary judgment, that it was not in the interests of justice to consider the matter again, and that to do so would prejudice Hood. (R. 302-304) The District Court also held that SLCC's Complaint was sufficient to raise the alter ego issue and that it was properly before the Court at the prior hearing of Hood's motion. (R. 304). The District Court further ruled, as a matter of law, that SLCC is held to a higher standard than other parties to judicial proceedings, thereby increasing its burden otherwise normally applicable in such matters. (R. 304).

The District Court's decisions with respect to Hood's Motion for Summary Judgment and SLCC's Motion to Reconsider were thereafter certified for appeal pursuant to Rule 54(b), Utah Rules of Civil Procedure. (R. 299, 303, 304). Jurisdiction of this matter is conferred upon the Supreme Court by Utah Code Annotated, 78-2-2(3)(i) (Cumm. Supp. 1986).

#### STATEMENT OF FACTS

The following undisputed facts bear upon SLCC's alter ego claim:

1. SLCC contracted with James, a wholly owned subsidiary of Hood, for the construction of the pipe-line project. (Laulhere dep., p. 7; R. 366).

2. James submitted Hood promotional literature and financial statements to SLCC for consideration during the process of deciding whether to award the project to James Constructors. (Foreman Dep., pp. 45 - 47; Dep. Exhibit "3"; R. 365).

3. Hood owns 100% of the stock of James Constructors. (Laulhere Dep., p. 7; R. 366).

4. Hood installed James Foreman, one of its long time employees, as General Manager and Vice-President of James prior to Hood's acquisition of 100% of the stock in said entity. During this same period of time Foreman was an employee and representative of Hood. (Laulhere Dep., p. 11, R. 366; Foreman Dep. p. 7; R. 365).

5. After Hood acquired 100% of the stock of James, it then placed Foreman as President of James. Hood admitted that this action may have been taken directly by Hood's Board of Directors. (Laulhere Dep., p. 12; R. 366).

6. James kept no separate or formal minutes of any meetings of its Board of Directors. (James' Answers to Salt Lake City's First Set of Interrogatories, No. 77).

7. Foreman was an employee of Hood for several years prior to his placement with James by Hood (James Foreman Dep., pp. 5-6; R. 365).

8. When Hood placed Foreman with James, Foreman did not sever his ties with Hood but rather was acting as the representative of Hood and was paid his salary by Hood. (Foreman Dep., p. 7; R. 365).

9. Hood advanced funds to James without any repayment provisions or security. These advancements were not loans. (Laulhere Dep., p. 17; R. 366).

10. Hood also guaranteed loans made by third-parties to James, including one in an approximate amount of \$300,000.00 from First Security Bank. (Laulhere Dep., p. 18; R. 366).

11. No security was ever provided by James for money advanced or the loans guaranteed by Hood. (Laulhere Dep., p. 34; R. 366).

12. Industrial Indemnity, Hood's bonding company, also bonded James on its Projects. (Foreman Dep., p. 10; R. 365).

13. Industrial Indemnity, when bonding James' projects, relied upon Hood's financial information and strength and did not ask for financial statements from James. (Ken Evans Dep., pp. 8, 9, 14, 15; R. 362).

14. Industrial Indemnity's arrangement in bonding James was to consider the financial position of Hood and its subsidiaries as one single account. (Ken Evans Dep., pp.14, 15 & 32; R. 362).

15. The President of Hood Corporation, Marc Laulhere, signed Jame's Indemnity Contract as President of Hood. (Evans Dep., p. 18; R. 362).

16. When Staker Paving brought a claim against James on the Salt Lake City Pipe Line Project, Marc Laulhere, President of Hood, rather than James' personnel, dealt directly with the bonding company, Industrial Indemnity, with respect to the claim against James. (Evans Dep., p. 23; R. 362).

#### SUMMARY OF ARGUMENT

SLCC contends that the District Court erred in granting Hood summary judgment on the alter ego issue in view of the issues of fact and undisputed facts supporting that claim. The Court stated that it had "fully considered" the issue, (R. 304), and that no issue of fact was present relative to the alter ego claim. (R. 165-166). The facts set forth above, however, refute the Finding of the District Court and establish Hood as the alter ego of James. The District Court erred, therefore, in granting Hood's Summary Judgment inasmuch as material issues of fact exist

relative to the alter ego claim and Hood is not entitled to judgment as a matter of law.

SLCC further contends that the District Court erred in treating the Summary Judgment as a final judgment and refusing to review and revise the interlocutory decision as requested under Rule 54(b), Utah Rules of Civil Procedure. If the Court had fully considered, at the first hearing, all the above facts bearing upon the alter ego issue, then it erred in granting summary judgment. If, on the other hand, any of the above facts were not considered at the first hearing, then the Court erred in refusing to review its decision when notified by SLCC of such facts. Under Rule 54(b), the interlocutory determination of the District Court was not a final judgment and was subject to review and revision.

Furthermore, the District Court erred in holding SLCC to a higher standard in these proceedings than the law required. SLCC was prejudiced in this respect in that its arguments and claims were not considered under the appropriate standards.

#### ARGUMENT

##### POINT I

THE DISTRICT COURT ERRED IN GRANTING HOOD'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF ALTER EGO.

This Court has consistently held that on appeal from a summary judgment, this court will view the evidence in a light most favorable to the losing party. Geneva Pipe Company v. S & H Insurance Company, 714 P.2d 648, 649 (Utah 1986). Furthermore, because of the drastic and harsh nature of summary judgment, "the

Court should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial." Welchman v. Wood, 9 Utah 2d 25, 337 P.2d 410 (1959).

Rule 56(c) of the Utah Rules of Civil Procedure, provides that summary judgment cannot be granted where there exists a genuine issue of fact. Summary judgment is clearly improper, therefore, where, as in this case, material issues of fact are present. Geneva Pipe Company v. S & H Ins. Co., 714 P.2d 648 (Utah 1986); Union Bank v. Swenson, 707 P.2d 663 (Utah 1985); Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776 (1984).

A. Genuine and Material Issues of Fact Exist as to Alter Ego

The very nature of an alter ego claim raises issues of fact and precludes the entry of summary judgment. In Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53 (Utah 1981), this Court reversed a summary judgment dismissing a claim of alter ego. Finding that summary judgment with respect to the alter ego claim was improper, the Court stated:

The District Court made no mention of plaintiff's alter ego claim in its Order of Dismissal, but it is clear that issues of fact are raised by the claim.

Id. at 55 (emphasis added).

Alter ego is seldom a proper subject for summary judgment in view of the doctrine's dependency on the facts and circumstances of the individual case:

Moreover, the conditions under which the corporate entity may be disregarded or the corporation be regarded as the alter ego of the stockholders vary according to the circumstances in each case inasmuch as the doctrine is an equitable one...

Shaw v. Bailey-McCune Company, 11 Utah 2d 93, 355 P.2d 321, 322 (1960). The question of alter ego itself raises an issue of fact which is rarely disposed of through Summary Judgment. In Plotkin v. National Lead Company, 482 P.2d 323 (Nevada 1971), an order granting summary judgment was reversed where a claim of alter ego presented a question of fact.

Many factual considerations are involved in determining whether or not an alter ego claim is appropriate, such as whether (1) the parent corporation owns all or a majority of the stock of the subsidiary, (2) the parent corporation finances the subsidiary, (3) the parent corporation pays the salaries or expenses of the subsidiary, (4) the formal legal requirements of the subsidiary are not observed, or (5) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. Fish v. East, 114 F.2d 177, 191 (10th Circuit 1940); Intern. U., United Auto., etc. v. Cardwell Mfg. Co., 416 F.Supp. 1267 (D. Kansas 1976); Cruttenden v. Mantura, 97 N.M. 432, 640 P.2d 932 (1982).

The Summary Judgment in favor of Hood on the alter ego issue ignores the undisputed presence of all the above factors; Hood owns 100% of the stock in James (Laulhere Dep., p. 7; R. 366); Hood finances James through funds advanced to James without

repayment provisions or security; such advances to James were not loans (Laulere Dep., p. 17; R. 366); Hood has also guaranteed loans by third parties to James, including one in an approximate amount of \$300,000.00 (Laulere Dep., p. 18; R. 366); no security was ever provided by James for money advanced or the loans guaranteed by Hood. (Laulere Dep., p. 34; R. 366).

When Hood Corporation negotiated to acquire James, it installed James Foreman, a long time Hood employee, with James. (James Foreman dep., pp. 5-6; R.365). Foreman, however, did not sever his ties with Hood but continued to act as a representative of Hood and was paid his salary by Hood (Foreman dep., p. 7; R. 365). With respect to corporate formalities, James kept no formal minutes of any meetings of its Board of Directors. (James Answers to SLCC's first set of Interrogatories No. 77).

The above Statement of Facts demonstrates that the directors and officers of James did not act independently in the interest of the subsidiary James, but rather were directed by the parent corporation, Hood. These undisputed facts create an issue of fact as to whether Hood is the alter ego of James. It is clear, therefore, that summary judgment for Hood was improper and the District Court's decision should be reversed.

B. Hood was not Entitled to Summary Judgment on the Alter Ego Issue as a Matter of Law.

Assuming, arguendo, the non-existence of any material issue of fact, summary judgment is nevertheless proper only where the moving party has made a "showing which precludes, as a matter of



law, the awarding of any other relief to the losing party." Tanner v. Utah Poultry and Farmers Cooperative, 11 Utah 2d 353, 359 P.2d 18, 19 (1961). Hood must "clearly" show that "there is no reasonable probability that the party moved against could prevail." Frisbee v. K & K Construction Company, 676 P.2d 387, 389 (Utah 1984).

Hood failed to satisfy the above standard. The existence in this case of the factors discussed above relevant to alter ego is undisputed. These factors, particularly when viewed in the light most favorable to SLCC, create a reasonable probability that SLCC may prevail on the alter ego issue. In reality, these undisputed facts **preponderate** so favorably towards a finding of alter ego that summary judgment with respect to the alter ego issue would have been more appropriate against Hood and in favor of SLCC. Summary judgment, therefore, was improper and should be reversed.

## POINT II

THE DISTRICT COURT ERRED IN REFUSING TO REVISE ITS INTERLOCUTORY DECISION REGARDING SLCC'S CLAIM OF ALTER EGO.

Subsequent to the appearance of substituted counsel for SLCC, SLCC moved the District Court, pursuant to Rule 54(b), Utah Rules of Civil Procedure, for revision of its decision regarding the issue of alter ego. (R. 223-224). SLCC's motion requested the Court to review the alter ego decision as provided under Rule 54(b) contending the decision was not final and did not terminated the lawsuit as to Hood or the alter ego claim. **The**

alter ego claim, as the subject of an interlocutory decision, was subject to the same principles governing summary judgment, and the Court should have viewed the evidence presented by SLCC in a light most favorable to SLCC. Notwithstanding Rule 54(b), the Court apparently treated the decision as a final judgment and refused to review the merits of the alter ego claim.

Under Rule 54(b), the District Court's interlocutory summary judgment was not a final decision. The lawsuit was not terminated as to either Hood or the alter ego claim, absent a Rule 54(b) certification and entry of final judgment. Rule 54(b) provides:

When more than one claim for relief is presented in an action, whether it was a claim, counterclaim, crossclaim, or third-party claim, and/or when multiple parties are involved the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added).

In this case there are multiple parties (Hood, James, Industrial Indemnity), and the District Court's decision involved only one of those parties (Hood). Therefore, the Summary Judgment in favor of Hood was not a final judgment and was subject to

revision. Neider v. State Department of Transportation, 665 P.2d 1306 (Utah 1983).

Rule 54(b) makes clear that the Summary Judgment did not terminate the action as to Hood or the alter ego claim until a final disposition of all parties and claims or until a Rule 54(b) certification was entered. At the time the Summary Judgment was granted, Hood elected not to request a Rule 54(b) certification. Absent such certification, the Summary Judgment did not terminate the action as to Hood or SLCC's alter ego claim. The interlocutory decision had no res judicata effect on SLCC, Warner Bros. v. American Broadcasting Companies, 720 F.2d 231 (2nd Cir. 1983), and was subject to revision. Williams v. State, 716 P.2d 806 (Utah 1986); General Motors Acceptance Corp. v. Martinez, 712 P.2d 243 (Utah 1985).

The wisdom of Rule 54(b) is evident in situations such as this case where discovery is still continuing. As discovery progresses, the complexion of the case changes and facts develop which may impact interlocutory decisions made without consideration of such facts. In this case, SLCC has unanswered discovery requests regarding the issue of alter ego. This discovery has been objected to based upon the Court's decision. Under these circumstances, a final order on an issue such as alter ego is premature and precludes proper disposition of claims on their merits. The policy of favoring decisions of cases on their full merits, Interstate Excavating, Inc. v. Agla

Development Corp., 611 P.2d 369 (Utah 1980), is furthered by the provisions of Rule 54(b).

Rather than treating its decision as interlocutory under Rule 54(b), the District Court apparently considered its decision as a final judgment having res judicata force and refused to review the alter ego issue. The District Court based its refusal to review alter ego on factors tantamount to a Rule 60(b) motion for relief from final judgments. The lower court ruled that it is not in the interest of justice to consider a matter more than once, that Hood would be prejudiced if the decision were revised, and further held SLCC to higher standards than other parties. (R. 302-304).

These factors upon which the Court predicated its decision are inapplicable where the lawsuit was not terminated as to Hood and the alter ego claim. The decision of the Court was not a final judgment and had no res judicata effect. Warner Bros. v. American Broadcasting Companies, 720 F.2d 231 (2nd Cir. 1983). The request of SLCC to review the decision, therefore, was not a request to consider for a second time a matter finally determined on its merits. Furthermore, Hood could not have been prejudiced by the Court's review of the alter ego issue since the lawsuit was never terminated as to Hood and Hood elected not to finalize the decision by requesting a Rule 54(b) certification. SLCC was entitled to have the matter fully considered on its merits when it moved for revision of the decision. The denial of SLCC's

Motion to Reconsider, therefore, should be reversed and remanded for further proceedings.

### POINT III

THE DISTRICT COURT ERRED IN HOLDING SALT LAKE CITY CORPORATION TO A HIGHER STANDARD IN THESE PROCEEDINGS THAN OTHER PARTIES.

In addition to the above discussed errors, SLCC was further prejudiced by the inappropriately high standards to which the lower court held SLCC, denying SLCC the consideration of its claims to which it was entitled. In its Conclusions of Law entered January 15, 1987, the District Court concluded:

That because SLCC is a government entity, it should be held to a higher standard of performance inasmuch as it has vast resources to draw from in pursuing a legal action against a private entity.

(R. 304). This conclusion is contrary to established principles of law.

It is well established that when governmental entities consent or agree to participate in litigation, such entities are treated the same as any other parties in judicial proceedings.

The government, when appearing as a litigant, is like a private individual...the State having consented to a suit, is now in a position of an ordinary litigant to whom the rules of civil procedure ordinarily apply.

State v. Taira, 78 New Mexico 276, 430 P.2d 773, 777 (1967).

In Bank Line v. United States, 163 F.2d 133 (2nd Circuit 1947), the Court similarly stated:

It has been the policy of the American as well as of the English courts to treat the

government when appearing as a litigant like any private individual.

Many other jurisdictions have held that a governmental entity participating in judicial proceedings occupies the same position as any other litigant. Campbell Building. Co. v. State Road Commission, 70 P.2d 857, (Utah 1937); Alpert v. Commonwealth, 258 N.E.2d 755 (Mass. 1970); State v. Jasco Aluminum Products Corp., 421 S.W.2d 409 (Texas 1967); Lyon & Sons v. N.C. State Bd. of Ed., 238 N.C. 24, 76 S.E.2d 553 (1953); Commonwealth v. Bowman, 267 Kty. 50, 100 S.W.2d 801 (1937).

In view of the Court's ruling that SLCC was to be held to a higher standard than other parties, it appears that the Court failed to apply the appropriate standards discussed above relative to summary judgments. When SLCC moved for reconsideration, the lower court continued to hold SLCC to an inappropriately high standard. At that hearing, the Court refused to even consider the alter ego claim and the evidence of material issues of fact which should have precluded summary judgment. Furthermore, the Court abused any discretion it had in refusing to reconsider the alter ego claim and denying SLCC's Motion to Amend when it failed to treat SLCC as any other litigant.

SLCC was obviously prejudiced by the above treatment in the District Court. Rather than being on an equal footing with the other parties in this litigation, SLCC was disadvantaged in any proceedings in this matter and was denied the right normally afforded litigants to have its motions, claims and arguments

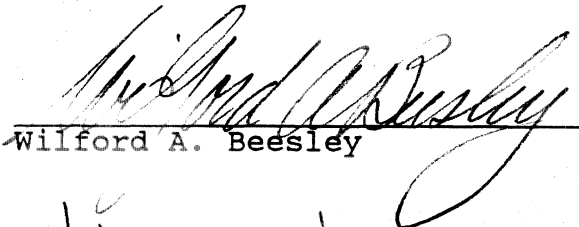
considered fairly and on an equal footing with other parties. SLCC should have been allowed to have its arguments with respect to Hood's summary judgment considered according to the proper standards as any other litigant.

CONCLUSION

In view of the above, it is manifest that the District Court erred in granting summary judgment in favor of Hood Corporation on the issue of alter ego. The lower court further erred in treating its decision regarding alter ego as a final judgment and refusing to consider the matter on its merits when SLCC moved for reconsideration. Prejudicial error is equally evident with respect to the District Court holding Salt Lake City Corporation to a higher standard than other parties in judicial proceedings. Salt Lake City Corporation, therefore, respectfully requests this Court to reverse the Summary Judgment granted in favor of Hood Corporation and remand the matter to the District Court for further proceedings.

Dated this 20<sup>th</sup> day of August, 1987.

BEESLEY & FAIRCLOUGH

  
Wilford A. Beesley

  
Stanford P. Fitts

## ADDENDUM



DAVID A. REEVE #2717  
ARMSTRONG, RAWLINGS & WEST  
Attorney for Defendant  
Hood Corporation  
1300 Walker Center  
Salt Lake City, Utah 84111  
Telephone: (801) 359-2093

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

JAMES CONSTRUCTORS, INC.,  
a Nevada corporation,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

---

SALT LAKE CITY CORPORATION,  
a municipal corporation of  
the State of Utah,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC.,  
a Nevada corporation, HOOD  
CORPORATION, a California  
corporation, and INDUSTRIAL  
INDEMNITY COMPANY, a  
California corporation,

Defendants.

SUMMARY JUDGMENT

Civil No. C84-2857  
Judge Judith M. Billings

---

The third party defendant Hood Corporation's Motion for Summary Judgment came on regularly for hearing before the Honorable Judith M. Billings, District Judge, on the 2nd day of August, 1985, such defendant being represented by their attorney of record David A. Reeve, and third party plaintiff Salt Lake City Corporation being represented by their

attorney Arthur L. Keesler, Jr., and the plaintiff and third party defendant James Constructors, Inc. being represented by their attorney of record C. Reed Brown. The court having reviewed the pleadings on file herein, together with third party defendant Hood Corporation's Motion for Summary Judgment, supported by the Affidavit of Marc Laulhere and the Memorandum of Points and Authorities in support thereof, and having reviewed the reply affidavit of Arthur L. Keesler, Jr., attorney for Salt Lake City Corporation, and having heard arguments from the respective counsel, and based upon the motion of third party defendant's attorney, David A. Reeve, the court does hereby enter the following:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That all causes of action brought by the third party plaintiff Salt Lake City Corporation against third party defendant Hood Corporation are hereby dismissed with prejudice. Further, both parties hereto are to bear their own attorney's fees and costs of court incurred herein.

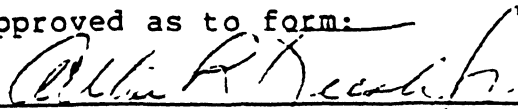
DATED this \_\_\_\_ day of August, 1985.

BY THE COURT:

---

JUDITH M. BILLINGS  
District Court Judge

Approved as to form:

  
\_\_\_\_\_  
ARTHUR L. KEESLER, JR.  
Attorney for Salt Lake City  
Corporation

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

JAMES CONSTRUCTORS, INC.,  
a Nevada corporation, HOOD  
CORPORATION, a California  
corporation, and INDUSTRIAL  
INDEMNITY COMPANY, a  
California corporation,

Civil No. C84-2857  
Judge Judith M. Billings

Third party defendant Hood Corporation's Motion for Summary Judgment came on regularly for hearing before the Honorable Judith M. Billings, District Judge, on the 2nd day of August, 1985. Third party defendant Hood Corporation being represented by their attorney of record David A. Reeve, third party plaintiff Salt Lake City Corporation being

represented by their attorney Arthur L. Keesler, Jr., and the plaintiff and third party defendant James Constructors, Inc. being represented by their attorney of record C. Reed Brown. The court having reviewed the pleadings on file herein, together with third party defendant Hood Corporation's Motion for Summary Judgment, supported by the Affidavit of Marc Laulhere and the Memorandum of Points and Authorities in support thereof, and having reviewed the reply affidavit of Arthur L. Keesler, Jr., attorney for Salt Lake City Corporation, and having heard arguments from the respective counsel, and being further fully advised in the premises, hereby makes the following Findings of Fact:

#### FINDINGS OF FACT

1. Third party defendant Hood Corporation is entitled to a summary judgment as prayed, dismissing all causes of action brought by Salt Lake City Corporation against such third party defendant.

2. That the third party plaintiff Salt Lake City Corporation has not raised any material fact issues as to the alter ego theory of recovery against third party defendant Hood Corporation, which would prevent a summary judgment from issuing.

Based upon the foregoing Findings of Fact, the court does hereby make the following Conclusions of Law:

#### CONCLUSIONS OF LAW

1. Third party defendant Hood Corporation is granted a summary judgment, dismissing all causes of action brought

by the third party plaintiff Salt Lake City Corporation.

2. That no factual issues have been raised by third party plaintiff Salt Lake City Corporation to prevent the summary judgment from being issued.


DATED this \_\_\_\_ day of August, 1985.

BY THE COURT:

---

JUDITH M. BILLINGS  
District Court Judge

Approved as to form:



---

ARTHUR L. KEESLER, JR.  
Attorney for Salt Lake City  
Corporation

DAVID A. REEVE #2717  
ARMSTRONG, RAWLINGS & WEST  
Attorney for Defendant  
Hood Corporation  
1300 Walker Center  
Salt Lake City, Utah 84111  
Telephone: (801) 359-2093

---

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

JAMES CONSTRUCTORS, INC.,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

---

SALT LAKE CITY CORPORATION,  
a municipal corporation of  
the State of Utah,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC., a  
Nevada corporation; HOOD  
CORPORATION, a California  
corporation; and INDUSTRIAL  
INDEMNITY COMPANY, a  
California corporation,

Defendants.

SECOND AMENDED ORDER

Civil No. C-84-2857

Judge Judith Billings

---

Salt Lake City Corporation's (SLCC) Motion for  
Reconsideration and Leave to Amend Their Complaint as to the  
defendant Hood Corporation, came on regularly for hearing on the  
22nd day of December, 1986, before the Honorable Judith Billings,  
District Court Judge. SLCC being represented by their attorneys  
of record, Wilfred A. Beasley and Stanford P. Fitts, the Hood

Corporation being represented by their attorney of record David A. Reeve, James Constructors, Inc. being represented by their attorneys of record, Jay Jensen and C. Reed Brown, and Industrial Indemnity Company being represented by their attorney of record C. Reed Brown. The court having heard the arguments of counsel with regard to the procedural aspects of SLCC's motion for reconsideration, and having heard arguments with regard to their motion for leave to amend their complaint, and having reviewed all pleadings and memorandum submitted in support and in opposition to said motions, and the court having made and entered its Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Salt Lake City Corporation's motion to reconsider, pursuant to Rule 54(b), the prior entry of summary judgment against the Hood Corporation is denied.

2. That Salt Lake City Corporation's motion to amend their Complaint to add a cause of action under the alter ego theory, against the Hood Corporation, is denied.

3. That the prior Summary Judgment entered on the 21st day of August, 1985, in favor of the Hood Corporation, is hereby certified and directed by the court to be a final judgment, for appeal purposes, inasmuch as the court makes an express finding that there is no reason for delay.

DATED this \_\_\_\_\_ day of January, 1987.

BY THE COURT:

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JUDITH BILLINGS  
District Court Judge

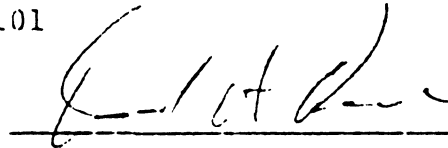
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing instrument, postage prepaid, this 15 day of January, 1987 to the following:

Wilford A. Beesley  
Stanford P. Fitts  
BEESLEY, SPENCER & FAIRCLOUGH  
Attorneys for Salt Lake City Corporation  
310 Deseret Book Building  
40 East South Temple  
Salt Lake City, Utah 84111

C. Reed Brown  
HINTZE & BROWN  
Attorney for James Constructors, Inc.  
and Industrial Indemnity Company  
3450 Highland Drive, Suite 301  
Salt Lake City, Utah 84106

Jay Jensen  
CHRISTENSEN, JENSEN & POWELL  
900 Kearns Building  
Salt Lake City, Utah 84101



---





Corporation being represented by their attorney of record David A. Reeve, James Constructors, Inc. being represented by their attorneys of record, Jay Jensen and C. Reed Brown, and Industrial Indemnity Company being represented by their attorney of record C. Reed Brown. The court having heard the arguments of counsel with regard to the procedural aspects of SLCC's motion for reconsideration, and having heard arguments with regard to their motion for leave to amend their complaint, and having reviewed all pleadings and memorandum submitted in support of and in opposition to said motions, and the court being further fully advised in the premises, makes the following:

#### FINDINGS OF FACT

1. That the prior summary judgment was granted inasmuch as that order was signed on the 21st of August, 1985 and this motion was heard on the 22nd of December, 1986. Based on the time elapsed, it would be prejudicial to the Hood Corporation if the court was to reconsider their prior order.

2. That discovery has taken place during the period of time after the summary judgment was granted and the current motion, including the depositions of the following individuals: Tim Doxey, November 4, 1985; Milt Winward, November 5, 1985; Elaine D. Christensen, January 6, 1986; Sharon Bennett, January 6, 1986; Lawrence Allen, November 4, 1985; Larry Christensen, November 5, 1985; Clyde Bennett, November 5, 1985; and Mark Stanley, November 5, 1985.

3. That the court feels it is not proper to reconsider a matter which has been argued and resolved on the merits, such

being the case at hand.

4. That the alter ego theory of liability raised by SLCC, though not mentioned specifically, was pleaded in the Amended Complaint of SLCC, based upon the factual allegations between the said companies, inasmuch as the Complaint was inartfully drafted, and no legal claims specifically were set forth therein, such wording can be interpreted to plead the alter ego theory of liability.

5. That the prior entry of summary judgment, entered on the 21st day of August, 1985, should be certified as a final judgment, for appeal purposes, the court finding there is no just reason for delay.

Based upon the foregoing Findings of Fact, the court makes the following:

#### CONCLUSIONS OF LAW

1. That pursuant to Rule 54(b) the court has the authority to reconsider their prior entry of summary judgment in favor of the Hood Corporation.

2. That it is not in the interest of justice that a party have more than one day in court concerning the same factual issues.

3. That the alter ego theory of liability raised by SLCC, though not mentioned specifically, was pleaded in the Amended Complaint of SLCC, based upon the factual allegations between the said companies, inasmuch as the Complaint was inartfully drafted, and no legal claims specifically were set forth therein, such wording can be interpreted to plead the alter ego theory of

liability.

4. That the affidavit submitted by the attorney for SLCC, Arthur Kessler, raised the alter ego theory in detail at the time of Hood's initial summary judgment motion, and the court did enter summary judgment in behalf of the Hood Corporation, after fully considering the alter ego theory of liability inasmuch as it was argued as if raised by the pleadings and was fully discussed by SLCC's affidavit in their summary judgment argument.

5. That because SLCC is a government entity, it should be held to a higher standard of performance inasmuch as it has vast resources to draw from in pursuing a legal action against a private entity. Further, SLCC is bound by the actions of the counsel they retain and the performance of such counsel.

6. That the court feels it is not proper to reconsider a matter which has been argued and resolved on the merits, such being the case at hand.

7. That SLCC's motion to reconsider the prior entry of summary judgment granted in favor of the Hood Corporation is denied.

8. That SLCC's motion to amend their Complaint, to advance the the alter theory against the Hood Corporation is denied.

9. That the prior entry of summary judgment in favor of the Hood Corporation, entered on the 21st day of August, 1985, is hereby certified as a final judgment, for appeal purposes, the court finding there is no just reason for delay.

DATED this \_\_\_\_ day of January, 1987.

BY THE COURT:

JUDITH BILLINGS  
District Court Judge

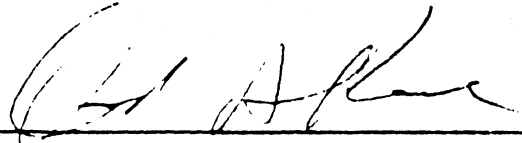
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of  
the foregoing instrument, postage prepaid, this 15 day of  
January, 1987 to the following:

Wilford A. Beesley  
Stanford P. Fitts  
BEESLEY, SPENCER & FAIRCLOUGH  
Attorneys for Salt Lake City Corporation  
310 Deseret Book Building  
40 East South Temple  
Salt Lake City, Utah 84111

C. Reed Brown  
HINTZE & BROWN  
Attorney for James Constructors, Inc.  
and Industrial Indemnity Company  
3450 Highland Drive, Suite 301  
Salt Lake City, Utah 84106

Jay Jensen  
CHRISTENSEN, JENSEN & POWELL  
900 Kearns Building  
Salt Lake City, Utah 84101



A handwritten signature, likely of the District Court Judge, is written over a horizontal line.


CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing BRIEF OF APPELLANT were Hand Delivered this 20th day of August, 1987, postage prepaid to the following:

C. Reed Brown, Esq.  
HINTZE & BROWN  
Attorneys for James Constructors  
3450 Highland Drive, Suite 301  
Salt Lake City, Utah 84106

Jay Jensen, Esq.  
CHRISTENSEN, JENSEN & POWELL  
Attorneys for James Constructors  
900 Kearns Building  
Salt Lake City, Utah 84101

David A. Reeve, Esq.  
ARMSTRONG, RAWLINGS & WEST  
Attorneys for Defendant-Respondent  
Hood Corporation  
1300 Walker Bank Building  
175 South Main Street  
Salt Lake City, Utah 84111



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