1988

American Bonding Co v. Maureen and Keith R. Nelson : Brief of Respondent

Utah Supreme Court

A Dennis Norton; Snow, Christensen & Martineau; Attorneys for Appellant.
John L McCoy; Attorney for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN BONDING COMPANY, a corporation, Plaintiff-Appellant, vs. MAUREEN NELSON, Defendant-Respondent, and KEITH R. NELSON, d/b/a AAA ELECTRIC SERVICE, and KEITH R. NELSON, an individual, Defendant.	Civil No. 86-0050 88-0090-CA

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Kenneth Rigtrup

JOHN L. McCOY
Attorney for Defendant-Respondent
310 S. Main Street, Suite #1309
Salt Lake City, Utah 84101

SNOW, CHRISTENSEN & MARTINEAU
A. DENNIS NORTON
Attorneys for Plaintiff-Appellant
10 Exchange Place
P. O. Box 3000
Salt Lake City, Utah 84110

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN BONDING COMPANY, a corporation, Plaintiff-Appellant, vs. MAUREEN NELSON, Defendant-Respondent, and KEITH R. NELSON, d/b/a AAA ELECTRIC SERVICE, and KEITH R. NELSON, an individual, Defendant.	)	Civil No. 86-0050

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Kenneth Rigtrup

JOHN L. McCOY
Attorney for Defendant-Respondent
310 S. Main Street, Suite #1309
Salt Lake City, Utah 84101

SNOW, CHRISTENSEN & MARTINEAU
A. DENNIS NORTON
Attorneys for Plaintiff-Appellant
10 Exchange Place
P. O. Box 3000
Salt Lake City, Utah 84110

TABLE OF CONTENTS

CASES CITED

Cases continued:

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN BONDING COMPANY, a corporation, Plaintiff-Appellant, vs. MAUREEN NELSON, Defendant-Respondent, and KEITH R. NELSON, d/b/a AAA ELECTRIC SERVICE, and KEITH R. NELSON, an individual, Defendant.	)	B R I E F Civil No. 86-0050

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the lower Court err in dismissing Maureen Nelson as an indemnitor from liability upon an indemnity agreement because the indemnitee, American Bonding Company failed to give Maureen Nelson notice of the fact that both the principal, AAA Electric Service and American, had asserted substantial contract claims against the obligee, and American further compromised those claims for a net sum of 7% of the total claims also without notice to Maureen Nelson.

STATEMENT OF CASE

This was an action upon an indemnity agreement for losses claimed by the plaintiff-appellant, who, after taking over two (2) construction jobs, where AAA Electric Service (AAA) was declared in default upon the jobs, which the obligee, the Federal Aviation Administration, (FAA) then finished. The FAA,

then refused to pay monies due upon the contracts and for asserted extras thereon, alleging various damage claims, all of which were compromised by appellant without notice to Maureen Nelson, the respondent. Appellant then made demand upon Mrs. Nelson for its alleged losses. Suit followed in which Mrs. Nelson denied any liability because of lack of notice and the failure of the appellants to properly settle the various claims and appeals.

DISPOSITION IN COURT BELOW

This matter was tried to the Honorable Kenneth Rigtrup commencing on February 2, 1981. At the end of appellant's case, Judge Rigtrup granted defendant Maureen Nelson's Motion to Dismiss and removed her from the litigation. The trial continued for an additional ten days as to the various claims and counter-claims between plaintiff and defendant Keith R. Nelson. The Findings of Fact and Conclusions of Law and Judgment of the Court were ultimately entered on December 13, 1985.

STATEMENT OF FACT

From the transcript of testimony, the following Facts were adduced at trial:

The appellants sued upon an indemnity agreement signed on September 17, 1973, by both the defendants, Keith R. Nelson and his wife, Maureen Nelson, for losses incurred in a construction job for the FAA at the Denver airport upon a per-

formance bond issued by the plaintiffs at the request of the defendant, Keith R. Nelson only, almost two (2) years after the indemnity agreement. The losses sued upon were incurred in 1976. The prayer of the complaint was for $87,667.37. (R. 1-5) No notice of a claim of such magnitude was given to Maureen Nelson until the alleged claim had been determined by the appellants in 1979. (R-2, 3 and 4).

Dean Vanatta, an attorney for the appellants was sworn in and testified as the only witness for the plaintiffs other than Maureen Nelson. (R-83).

Mrs. Nelson, who was a housewife at the time, recalled signing documents such as the indemnity agreement in 1973, but presumed that those documents were only for the Salt Lake Airport job bond, a job not involved in the instant case. (R. 198, L. 13-25, R. 199, L. 1-25).

Keith and Maureen Nelson had lived apart from each other from July of 1975 until October of 1976 and then were divorced. (R-196, lines 5-13). Mrs. Nelson had no knowledge whatsoever of any bond which had been issued for the Denver job. (R.200-201, line 1), so that she was not aware of any problems with the Denver job or any disposition of contract rights that AAA Electric had in the Denver job until 1979 at which time she received certain letters from the appellant and took them to her divorce attorney, Sandy Dolowitz. (R. 202, lines 1-13).

Thus from 1973 until 1979, a period of six (6) years, Mrs. Nelson never heard anything from the bonding company until they made demand on her to pay the sum of $27,000.00. (R. 202, lines 14-19). Mrs. Nelson, up to the time of the divorce had been a housewife all of her life and had not worked outside of the home. (R. 203, lines 14-25). Since the divorce, she had worked as a hostess in a restaurant, a clerk in a department store and as an office worker for a department store. (R. 204, lines 5-12).

Exhibit P-7, the only notice sent to Maureen Nelson, is a copy of a letter dated November 19, 1975, from American Bonding Company to Maureen Nelson. Mr. Vanatta did not send the letter, but received copies of the letter as the surety company's legal representative directly from American Bonding Company. This letter reminded the indemnitors that they had signed the blanket indemnity agreement and then gave notice "that claims and suits have been filed against American Bonding Company" and that the surety expected the Nelsons to abide by the terms of the indemnity agreement. Mrs. Nelson did not recall receiving this letter and did not have it in her file of correspondence which she had saved regarding this matter. (R. 201).

Appellant sent Exhibit 7 by certified and regular mail. It received the certified copies of the letter back marked "unclaimed." Its files do not show that the regular mail was returned. After the notices were given, various con-

versations took place between Vanatta, Keith Nelson and Bob Rich who was the superintendent for AAA Electric upon the Denver-Stapleton job. (R. 94-95).

The only claims which had been made against the payment bond as of the sending of Exhibit 7 were by subcontractors by the name of Westbrook, Ortiz Electric and Sierra-Crete. The Westbrook claim was filed in State Court and later dismissed with no loss paid because of failure to file in Federal Court which had exclusive jurisdiction of Miller Act claims. (R-112 and 113). The Ortiz claim was dismissed after the plaintiff's attorney withdrew and no further attorney was appointed. (R-113, lines 10-22).

Out of the claims filed by Westbrook and Ortiz, the appellants suffered no loss except for their attorney's fees incurred in defending those actions. (R-179, lines 20-24; R-262 lines 14-25). However, these attorney fees were never segregated from the balance of $18,000.00 in attorney fees claimed.

When Mr. Vanatta, who began representing American Bonding Company in October of 1975, first attempted to find out the facts of the case and received the file from American Bonding Company, he attempted to call only Mr. Nelson, initially without success. There was no evidence that he attempted to contact Maureen Nelson. (R-87, lines 12-19). He knew as early as October 1975 that Keith Nelson was having marital difficulties.

(R. 256, lines 6-13).

Vanatta subsequently learned that both of the contracts upon which AAA Electric was performing had been declared in default by the FAA as of October 31, 1975. No notice of this fact was given to Mrs. Nelson. However, AAA Electric, through their attorney had met with contracting officers for the FAA and had been given an extension for the completion of both jobs. (R-88, lines 7-21). Vanatta first contacted Keith Nelson on November 13, 1975. (R-89, line 4). In talking to Mr. Nelson about the claim that had been made by one of the sub-contractors, Mr. Nelson told him that the sub-contractor making the claim had refused to work because the FAA had withheld $92,000.00 from AAA for over twenty (20) days in violation of its contract and that he intended to sue the FAA because it was putting him behind schedule on both of the contracts because of refusal to pay on time. (R-89, lines 18-24).

Meetings took place on December 30, 1975, (R-99, line 2) between the FAA, Mr. Vanatta, Mr. Nelson, Mr. Nelson's attorney and Bob Rich, a superintendant for AAA. Thereafter, a takeover agreement, P-6, was signed between the FAA, the appellants and Mr. Nelson. This agreement assigned all contract rights of AAA in the contracts with FAA to appellants. (R-100, lines 2-5). The appellants then took over the prosecution of work upon the contracts. (R-102, lines 8-13).

After the appellants took over the job, as of February of 1976, Mr. Vanatta was contacted in February of 1976 by the contracting officers and told that the Government was considering declaring the appellants in default upon the contracts. (R-104, lines 4-7). Whereupon Mr. Vanatta conferred with Mr. John Brown, the job superintendent and Bob Rich about the delay in the electrical work. (R-104, lines 19-21). A substitute contractor, Weekly Electric, was hired directly by appellants to complete the electrical portion of the work after consultations with Keith Nelson and Bob Rich. (R-107, lines 9-24). Thereafter, the job was completed under FAA suprevision by Weekly Electric, final inspection was made and settlement negotiations begun on both the Government's claim for reprocurement costs on the ILS contract and for actual damages because of AAA Electric's alleged default and AAA's claim for equitable adjustments, more commonly known as extras, prior to the bonding company takeover and for certain extra work that had been done after the bonding company takeover. (R-111, lines 11-22).

From December 15, 1975 to January 15, 1976, Mr. Vanatta was involved in negotiating the takeover agreement which was signed between the FAA, appellants and Keith Nelson on 1-15-76. (R. 225, lines 1-4). The takeover agreement provided for a 45 day completion, yet the bonding company in a situation where the subcontractors were claiming that AAA had not paid them and

AAA's claim was that the Government had not paid extras due AAA, did not pay out any money to any subcontractors on the job until eleven (11) days after the takeover agreement was signed. (R. 226).

Both Keith Nelson and Bob Rich had many repeated discussions with Dean Vanatta regarding actions the FAA had taken, ie: they wrongfully withheld progress payments based upon a claim that AAA had failed to submit payroll evidence to the Government and they had refused to pay any of the extra claims filed by AAA. (R-115, lines 9-17). The various claims of AAA for extras before bonding company takeover and the claims of the bonding companies for extras and the decision of the Government to declare the appellants in default were appealed to the Board of Contract Appeals for the U. S. Government by Mr. Vanatta. However, Vanatta settled all of the claims prior to the hearing before the Board of Contract Appeals. (R-120).

There were four or five negotiation meetings involving the various contract claims with the FAA and James Kruetz, AAA's attorney was present in the earlier sessions; however after the first or an early session, Mr. Kruetz bowed out because he was not being paid. (R. 129, lines 7-16).

A letter was mailed to Keith Nelson on August 9, 1978 by the appellants with a copy to his attorney, Jim Kruetz, advising them of a settlement conference with the FAA and

requesting that Mr. Nelson approve and sign a proposed settlement agreement which the appellants had negotiated with the Government. (R-129-130). A second letter was sent to Mr. Nelson on the 24th day of August, 1978 by Exhibit 14. No such letters were sent to the defendant, Maureen Nelson. Mr. Nelson refused to sign such an agreement unless he was relieved of any liability to the appellants. (R. 131-132). The appellants ultimately settled the claim for extras and money due upon the original contract for the total sum of $30,000.00 without the signature of Mr. Nelson and without any notice to Mrs. Nelson. (R. 145, lines 3-6, R. 263-264).

The net effect of the settlement by Mr. Vanatta on behalf of the appellants with the FAA was that the bonding company received the sum of $21,266.41 as a compromise of some $140,000.00 in extras in claims made by the defendant, Keith Nelson dba AAA Electric and the appellants, but no claim by claim analysis could be made by Mr. Vanatta in his testimony before the court. (R. 150-152). Once again, no communication was ever made to the defendant, Maureen Nelson, of any intent to compromise any such claims, or for that matter, that such claims existed.

There was due upon the original contracts at the time of settlement, the sum of $61,410.00 which the FAA refused to pay the appellants because of an FAA claim for reprocurement (cost of procuring materials) and actual damages. (R-153) (R-

142-143). (See Findings of Fact). Mr. Vanatta could not, at the trial recall what comprised either of the claims for reprocurement costs or actual damages. No evidence upon these issues was produced at the trial even though the trial was continued for sixteen (16) days. (R. 300). The reprocurement costs were comprised essentially of a claim where the U. S. Government had declared that the appellants were in fact in default after they had taken over the contract. The appellants had appealed that particular finding and the issue of reprocurement costs, but then settled for no value to that claim, giving the FAA full value for the unproved reprocurement costs and claimed damages. (R.160-162).

Mr. Vanatta could not remember whether or not he was licensed before the Department of Transportation Contract Appeals Board to which Board the extra reprocurement costs and damages were appealed. (R. 167).

Exhibit 1, the blanket indemnity agreement, contained an assignment of all contract rights of the principals and AAA in any contracts and was stamped as recorded at the Department of State for Colorado on January 9, 1976. The issue as to whether or not the plaintiffs disposed of the contract rights of AAA in a commercially reasonable manner was raised at trial, as indicated by counsel for the appellants. (R. 210, lines 13-25).

The appellants were owed $61,410.00, the balance due

upon the contracts which the FAA contended they could withold because of an equal amount of reprocurement costs and other claimed actual damages, together with another $142,000.00 in claims for extras which totalled roughly $200,000.00 which the appellants settled for a total of amount of $30,000.00, (R. 272-273) and Mr. Vanatta's fees exceeded $18,000.00 out of that sum. (R. 274).

ARGUMENT

POINT I

THE INDEMNIFICATION AGREEMENT REQUIRED THAT NOTICE BE GIVEN TO THE INDEMNITOR

The trial Court found that Paragraph 11 of the Indemnity Agreement, which was Exhibit P-1, in fact waived notice of default; however, the trial Court also found that Paragraph 13 of the Indemnity Agreement gave the indemnitors the right to use the surety to litigate any claim or demand involved and request that a defense be asserted. The language of Paragraph 13 is as follows:

> "Thirteenth: The surety shall have the right to adjust, settle or compromise any claim, demand, suit or judgment upon the bonds, unless the principle and the indemnitors shall request the surety to litigate such claim or demand or defend such suit, or to appeal from such judgment, and shall deposit with the surety, at the time of such request, cash or collateral satisfactory to the surety in kind and amount to be used in paying any judgment or judgments rendered or that may be rendered, without interest, costs, expenses and attorney's fees including those of the surety." (Emphasis added)

The trial Court, in its oral ruling, found:

> "implicit in that particular provision is some requirement of notice, otherwise the provisions of the Indemnity Agreement would have no meaning."

It is clear that the plain terms of the above paragraph gives the principal and the indemnitors the right to request the surety to litigate claims or demand or to defend suits or appeal from judgments upon the deposit with the surety of security. If, however, the indemnitor had no notice or knowledge whatsoever of the fact that suits or judgments or that appeals could be made from certain judgments or appeals or suits, the indemnitor would have no way of exercising the right which Paragraph 13 gives to the indemnitor. Thus if a notice requirement is not implied from the terms of Paragraph 13, the rights which it gives the indemnitor become totally meaningless.

The significance of the right given by Paragraph 13 is seen when it is considered that the appellants compromised some $200,000.00 in claims for monies claimed due upon the contract plus extras asserted, for a total of $30,000.00, or roughly 15 cents on the dollar. If the attorney's fees expended by the surety of $18,000.00 are deducted from the recovery, there would be a net recovery upon the various claims of less than seven (7) cents on the dollar. Certainly such a result cries out for an explanation. It was abundantly apparent from a review of the testimony of Mr. Vanatta that he

could never explain in detail, on a claim by claim basis, why the surety company settled these claims for the sums received or what the causal basis was for the claims of the FAA were or what items made up the total. (R. 297).

The only notice sent to Mrs. Nelson was Exhibit P-7, which the Court found to be insufficient on its face to satisfy the requirement of paragraph 13 of the Indemnity Agreement. The reason for that was very simple, ie: The letter only recited generally that claims had been asserted against the appellants in connection with the Denver job. The letter did not state who the claimants were, the amounts of the claims, the nature of the claims, nor more importantly, the peril in which the indemnitors found themselves thereafter. (R-287).

Actually, from a canvas of the record, it is apparent that the only claims that were in existence against the surety at the time of the notice on November 19, 1975 were claims of sub-contractors, all of which were subsequently dismissed with no proved loss to the appellants. Thus the notice given had no bearing upon the loss for which Mrs. Nelson was being sued.

The trial court further found that the notice was too vague to afford reasonable notice to Maureen Nelson to intelligently form any rational basis to decide whether she should exercise her rights under paragraph 13 of the indemnity agreement to defend or to prosecute any particular claim that AAA

might have had against the U. S. Government which would either avoid or reduce liability against her as an indemnitor. (R. 287). The correctness of this ruling is quite apparent because it was clearly proved by appellants own witnesses that all of the significant facts of this case occurred several months after the sending of P-7, thus P-7 did not mention the declaration by the FAA that AAA was in default, that the sureties were thereafter declared in default; that AAA asserted $140,000.00 in extra claims on the contract; that AAA or the sureties had additional contract claims of over $60,000.00 against which the FAA claimed damages and reprocurement costs of an equivalent amount; that these claims were heard before a contracting officer; that the decision of the officer was appealed; that all of the foregoing claims were settled for a net amount to be credited to the indemnitor of approximately seven cents on the dollar, leaving the indemnitors liable to the appellants for a substantial amount. Written notice of all of these matters was given to the co-indemnitor, Keith Nelson.

Where the terms of a contract may be vague, the conduct of the parties relating to said contract is persuasive evidence of what the parties in fact meant by the agreement. Zeese v. Siegels Estate, 534 P2d 85 (1975), Bullfrog Marina v. Lentz, 28 Utah 2d 261 501 P2d 266 (1972). Also, conduct of parties in conflict with the clear terms of the agreement may create

an ambiguity in the written document. Bullough v. Sims, 400 P2d 20, 16 Utah 2d 304 (1965). Finally, the undisputed conduct of the parties showing that they intended something different than the clear terms of an agreement will be enforced rather than the terms of the writing, Eie v. St. Benedicts Hospital, Utah 638 P2d 1190 (1981).

The following questions are posed by the facts of this case, first, if notice was not required by paragraph 13, why did appellants send not only one (1) notice; but two (2) notices to Keith Nelson? They obviously felt that some sort of notice was necessary under their agreement or they would not have gone to such lengths. The second question is, having sent all the notices to Keith Nelson, was it such a high burden to require of a bonding company to have them spend the rather small amount of postage and effort that it would have taken to send photocopies thereof to Maureen Nelson?

A contract of indemnity is construed in accordance with the rules for the construction of contracts generally. King v. Northwest Wheel, Inc., 12 WA App. 946 532 P2d 1181. The cardinal rule is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. To do this it has been held that the Courts must consider not only the language of the contract, but the facts and surrounding circumstances under which the contract was

made. 175 ALR 30 Ruysser v. Smith, 293 SW2d 930 MO., 41 Am Jur 2d 697, §13:

> "...It has also been said that all fair doubts are to be resolved in favor of the indemnitee. On the other hand, in some jurisdictions it has been held that indemnity agreements are strictly construed against one who claims to be an indemnitee. But whatever the rule may be otherwise, where the indemnitee's contract has been drawn by the indemnitor, the general principle of contract law--that a contract, when ambiguous or uncertain, is construed most strongly against the party who prepared it--is applicable to indemnity contracts." (41 Am Jur 2nd 698 §13) (Emphasis added)

As to notice, the general rule is clear that where notice to the indemnitor is required by the terms of the contract, it must be given. 41 Am Jur 2d 340 p.730. This rule is cited favorably in appellants brief, thus should be followed in this case. Paragraph 13 of the indemnity agreement gives the indemnitors the right to post security with the surety and require the surety to litigate claims or demands which the surety otherwise could settle. The rights given to the indemnitors by this paragraph would be meaningless if the indemnitors were not aware of the claims. There is no dispute that Maureen Nelson did not know about the claims of the appellants and AAA, and that appellants knew that she had not been given notice of those claims, thus, notice should have been given to her. No notice was given, thus plaintiff's claim fails and the trial court was correct in its ruling.

There are cases which have held that where no notice

is required by the contract or where notice is waived, that notice is not necessary to fix the liability of the indemnitor. McCormick v. Boylan, 83 CT 686 78 Atlantic 335 (1910), 41 Am Jur §40 730. However, none of these cases involve the compromise of contractual rights belonging to the indemnitors. Furthermore, the more recent and better reasoned cases have held that where an indemnitor has not been given notice of the suit against his indemnitee, the failure of notice changes the burden of proof and imposes upon the indemnitee the necessity of again litigating and establishing all of the actional facts that the original obligee had against the principal. Citing 42 CJS §32(2) p. 618. McArthur v. Gains, 286 S2d 608 FL App. (1913). Pan American Petroleum Corp. v. Maddux Well Service, WY 586 P2d 20, 1220 (1978), Cheney v. City of Mountain Lake Terrace, 20 WA App 854, 583 P2d 1242 (1978), Feuer v. Menkes Feuer Inc., 187 NYS 2d 116; Delaware & Aderondack Farmers Co-op Exchange Inc., 306 NYS 2d 1002. Under such a rule, appellants case would fail against Maureen Nelson, because appellants never attempted to show any breach of the contract which AAA Electric had with the FAA.

Most of the cases which have held that notice of the claim is not a requirement to prove the liability of the indemnitee have done so on the theory that knowledge of the claim is as much within the knowledge of the indemnitor as the surety. Ward v. Henry, 5 CT 595, 74 Am Jur 2d 119 §170. It is obvious

that such was not true in the instant case, as respondent had absolutely no knowledge of the existence of the claims and the appellants were well aware of that fact, as they knew that the Nelsons were having domestic difficulties and that Mrs. Nelson was not actively involved in any of the claims. Appellants, on the other hand, had their own attorney on the case and had knowledge or the means to acquire knowledge of the facts concerning the claims.

To imply, as the appellant does in its brief, that because Keith Nelson was given notice of all important events, that the rights of Mrs. Nelson were protected by Mr. Nelson is not in any way supported by the record, because, when it came time to pursue the appeals, Mr. Nelson, for his own reasons, chose to ignore them, in the same manner as he chose not to appeal the judgment rendered in the instant case. Mrs. Nelson would have been able, through the coercive power of a divorce court to require that Mr. Nelson pursue the appeals or she could have pursued the appeals herself by the use of witnesses upon the job other than Mr. Nelson. By failing to give her notice of the declaration of default by the FAA, against AAA firstly, the appellants secondly, the filing of the appeals of those claims, and the compromising of the claims totalling $200,000.00 for $30,000.00 in contract proceeds and extras, the bonding companies left Mrs. Nelson at the mercy of Mr. Nelson at a time

when the appellants knew that the Nelsons were having domestic problems and it would be a reasonable assumption that Mr. Nelson would not be revealing to Mrs. Nelson the fact that he was ignoring a duty to protect her as an indemnitor. Further, plaintiffs could not assume under any circumstances that Keith Nelson was an agent of Maureen Nelson since they did not do so in the signing of the original agreement.

In order for any notice to comply with the requirements of Paragraph 13 and its meaning as shown by the conduct of the parties, Maureen Nelson, should have been made aware of the nature of the claims by the sureties and AAA against the FAA or that an appeal existed from a particular judgment or decision. No notice was given to Mrs. Nelson of the proposed settlement which settled for $30,000.00, claims of $200,000.00, against the FAA. While it could be argued that the appellants did the best that they could under the circumstances, there were several factors which weighed against such an argument. First, Mr. Vanatta could not recall whether or not he was licensed to practice before the Appeals Board before which the appeals were to be heard. Thus, his opinion as to whether or not the appeals would be successful would be entitled to little, if any weight. Secondly, the conduct of the appellants in settling $61,410.00 of money due under the contract for government reprocurement costs and claimed damages by the government which were never proved at

trial (R. 277, L. 1-17), would give rise to substantial questions as to the reasonableness of the entire settlement by the appellants of the extras which totalled over $140,000.00.

It is submitted that the wording of paragraph 13 of the indemnity agreement implicitly, but quite clearly required notice to the indemnitors; otherwise, the rights it gives the indemnitors are as meaningless as the Roman laws printed at the top of the pillars during the Roman Empire. The trial Court so found. While such a decision is reviewable on appeal, it is impossible to reason how a person in the position of Maureen Nelson would have any rights under said paragraph if she did not know about those rights and the only practical way for her to have knowledge would be to receive notice thereof from the entity who ultimately settled the claims and appeals. In addition, the undisputed conduct of the parties showed an intent to give notice to the indemnitors. Under the general rule cited by appellants, that if notice is required by the contract and not given, no liability will accrue to the indemnitors, Maureen Nelson is not liable for the loss.

POINT II

IT WAS NOT NECESSARY FOR MAUREEN NELSON TO SHOW PREJUDICE IN THE ABSENCE OF NOTICE.

Appellant cites 42 CJS 593 §15, for the proposition that the indemnitee must show prejudice because of the delay in

notice. The case of Aetna Bank v. Hollister, 10 AT1.550 (1886) is cited by appellant for this proposition. No further or more recent cases since 1886 propounding this ruling are found. The bond in that case specifically provided that no notice to the obligor was necessary. (See page 554 of the opinion). At page 555, the Court ruled that because "of the strong provisions of the bond, we do not think the above facts constitute a defense." The Court ruled further that the defendant, where the agreement provided that no notice was required, must show estoppel on the part of the obligee, which was missing in that case. The point is that the actual holding of this case does not stand for the proposition cited. The agreement in question, rather than requiring notice as set forth in appellants brief, explicitly provided that no notice was required, thus this case is not applicable to the instant case.

Further, the case of Weaver Bros., Inc., v. Chappel, 684 P2d 123 (AK 1984) cited by appellant involved the opposite relationship of parties to the instant case, ie: an insurance company invoking its notice requirement to defeat coverage to a lay person. The Alaska Supreme Court, noting that insurance contracts were contracts of adhesion and further, that because information as to prejudice was more readily available to insurors than the insured, ruled that the insuror be required to show prejudice in order to invoke lack of notice as a defense to

an action for third party contribution. In the instant case, the principles of Weaver would defeat the appellants because appellant was in control of the jobs, the claims and the appeals. Maureen Nelson had no such information nor was she informed of such matters until the appellants had negotiated away all of her rights. At the trial of the instant case, it was the bonding company who had all of the documentation of the claims and their merits who refused to produce further documents or did not know and could not prove the relative merits of the various claims. Further, when Mrs. Nelson attempted to testify as to what she would have done if properly notified, she was squelched by the objection by appellants that such was speculation. (R. 203). How can the appellants now be heard to say that she failed to show how she was prejudiced by lack of notice?

The case of Hallsey v. Fireman's Fund Ins., Co., 681 P2d 168 (OR App. 1984), cited by appellants was also another automobile insurance notice case where a trial court, on the sole assertion of lack of notice, ruled as a matter of law that the insured was not entitled to coverage. The appellate court merely ruled that there was an issue of fact and remanded the case for trial.

The case of Thompson v. Grange Insurance Assn, 660 P2d 307 (1984) is also an insurance case requiring that prejudice be shown by the insurance company for delay in notice.

A reading of all of the foregoing cases, cited by appellants compels any reader to ask what any of these courts would have done had the insureds in those cases failed to give notice to the insurance companies and litigated the cases to the appellate level, settled alleged claims for specified sums, then turned to the insuror and and requested reimbursement without any evidence, on an item by item basis, as to the relative merits or demerits of the claims. They would be defeated as the appellants were defeated below.

It is apparent from the record and obvious from the ruling of the trial court that the trial court felt that Maureen Nelson was, in fact prejudiced by the actions of the appellants. In the insurance notice cases cited by appellants, the issue was whether or not the mere passage of time without notice to the carrier resulted in prejudice to the insuror. In none of these cases had any of the rights of the insurance carriers to defend been negotiated away by the insured. In the instant case, the appellants had negotiated all terms of a takeover agreement, whereby they took over the bonded jobs; then had allowed themselves to be declared in default by the FAA; made claims against the FAA, tried those claims, appealed them, then settled all of the claims finally and irrevocably with the FAA, all without notice to Maureen Nelson.

To say as appellants do, that Maureen Nelson has not

been prejudiced after the appellants have negotiated away any and all contract rights that she would have had as an indemnitor for seven cents on the dollar, and have no real evidence of the precise reasons for such a compromise staggers the imagination and lacks common business sense.

POINT III

THE ACTIONS OF THE BONDING COMPANY IN SETTLING ALL CLAIMS OF THE PRINCIPAL AGAINST THE OBLIGEE WAS A DISPOSITION OF COLLATERAL PURSUANT TO THE UNIFORM COMMERCIAL CODE IN THE STATE OF COLORADO REQUIRING THAT NOTICE BE GIVEN TO ANY DEBTORS THEREUNDER.

The Indemnity Agreement in the third paragraph thereof creates an assignment as collateral of all rights of the principal and indemnitors or any of them growing out of any and all contracts referred to in the bond, all machinery, equipment, tools and materials at the construction site, all right, title and interest of the principal and indemnitors to all sub-contracts, all causes of actions, claims or demand of the principals against any sub-contractors, laborers, materials or any other persons, firms or corporations agreeing to furnish or supply labor, materials, supplies and machinery upon the contract, and any and all percentages retained and any and all sums that may be due on all contracts referred to in the bond.

The fifth paragraph of the agreement provides that that agreement shall constitute a security agreement to the surety and a financing statement to comply with the provisions of

the Uniform Commercial Code.

Further, the Indemnity Agreement has been in fact stamped as being recorded in the State of Colorado as a security agreement.

§4-9-504(3) Colorado Revised Statutes, CRS 1973 requires that notice be given of the disposition of collateral under secured transactions. Under Colorado law, if there was no notice prior to sale of the collateral, it is presumed that the value of the collateral sold was equal to the balance owing on the agreement of the debtor. Community Management Association of Colorado Springs, Inc. v. Tousley, 32 CO App 33, 505 P2d 1314 (1973); United Bank of Denver v. Reed, CO App 635 P2d 922 (1981).

Under §4-9-501(3)(d) CRS 1973, notice requirements of the Uniform Commercial Code, as to dispositions of collateral cannot be waived and the Supreme Court of Colorado has so ruled. See First National Bank v. Cillessen, CO App 622 P2d 598 (1980); thus paragraph 11 which purports to waive notice to the indemnitors is not effective.

The appellants as the assignee of the contract rights, a secured party, settled the claimed amounts due from the FAA upon the contracts of approximately $200,000 for a total of $30,000, and thereby disposed of the collateral owned by AAA without any notice whatsoever to Mrs. Nelson, thus it is presumed under Colorado law that any balance owed by Mrs. Nelson was

discharged since no independent evidence of value was presented at the trial.

The case of Wiley v. Bank of Fountain Valley, Colo App. 632 P2d 282 (1981) is most appropriate to this case because it involved the sale of a promissory note having a face value of $39,672.26 for $10,000.00 with notice of the sale having been given once, so the debtor knew that the note was going to be sold. The sale was then continued, with conflicting evidence of whether or not notice was sent of the new sale. The trial court directed as a matter of law that notice had been given and entered a deficiency judgment fo the secured party ruling that the dispositions of security were reasonable as a matter of law.

The Colorado Court of Appeals reversed the trial court, sending the case back for a new trial both as to notice and citing the Tousley case supra for the proposition that the secured party assumed the burden of proving the value of the security by a manner other than the price of obtained in its sale, and further noted that if the jury found that no notice was sent, without further proof as to the value of the security the presumption was that the security was sold for the total amount owed.

POINT IV

THE SETTLEMENT BY APPELLANTS OF THE CONTRACT CLAIMS OF THE PRINCIPAL, AAA, AGAINST THE FAA WAS A DISPOSITION OF CONTRACT RIGHTS REQUIRING APPELLANTS TO PROCEED IN A COMMERCIALLY REASONABLE MANNER AND APPELLANTS FAILED TO MEET THEIR BURDEN OF PROOF AS TO WHAT IS COMMERCIALLY REASONABLE.

§4-9-502 of the Colorado Revised Statutes in 1973, sub-section 2 thereof provides as follows:

> "(2) A secured party, who by agreement is entitled to charge back on collected collateral or otherwise to full or limited recourse against the debtor and to undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency."

In the instant case, the plaintiff did not put on any evidence of what was a commercially reasonable manner in which to proceed in collecting the receivables and contract rights of AAA Electric. The witness, Mr. Vanatta, when questioned on the specifics of the claims and their merits could not recall any specific facts of the various claims, nor did this witness or any other witness for the plaintiffs testify as to what was commercially reasonable in the construction industry in disposing of contract rights and receivables under Government contracts. Furthermore, there was no proof that Mr. Vanatta was licensed to practice before the Federal Board of Appeals before which the

claims were filed upon the appeals. When asked such a question he stated that he could not remember. How could such a person give testimony of the probability of success for an appeal? It was the burden of the plaintiff to prove that the disposition of collateral was commercially reasonable under all the circumstances if notice is not given, thus the trial court was correct in its ruling.

CONCLUSION

In conclusion, it is clear that in order for the effective terms of the indemnity agreement to have any meaning, notice of the existence of the contract rights and claims had to be given to Maureen Nelson; further, the appellant gave notice of those rights and other rights to the co-indemnitor who was knowledgable of those claims and conducted itself in accordance with the proposition that notice to the indemnitor was required by the agreement. Further, the contract rights were security under the Colorado Commercial Code which prohibits waiver of notice of sale or disposition of collateral and further provides that if no notice of disposition is given, the collateral is presumed to equal the amount owed. No evidence of a commercially reasonable method of sale or value was adduced at the trial, thus the appellants claim against Maureen Nelson was

properly dismissed by the trial court.

Respectfully submitted this 21st day of January, 1987.

JOHN L. McCOY, Attorney for
Respondent-Maureen Nelson

MAILING CERTIFICATE

I hereby certify that I hand delivered to the Utah Supreme Court, Utah State Capitol Building, Salt Lake City, Utah 84103, ten (10) copies of Respondent's Brief, and to attorney for plaintiff-appellant, A. Dennis Norton, 10 Exchange Place, Salt Lake City, Utah 84110, two (2) copies of Respondent's Brief, this 21st day of January, 1987.