

2000

Meadow Valley Contractors, Inc. v. Transcontinental Insurance Company : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MEADOW VALLEY)
CONTRACTORS, INC., a Nevada)
Corporation,) No. 20000262-~~SC~~CA
Appellee,)
Priority No. 15
TRANSCONTINENTAL INSURANCE)
COMPANY,)
Appellant.)
)
)
)

BRIEF OF APPELLANT

**APPEAL FROM THIRD DISTRICT COURT GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT BEFORE THE HONORABLE J.
DENNIS FREDERICK**

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FILED
Utah Court of Appeals

SEP 13 2000

Paulette Stagg
Clerk of the Court

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PARTIES ON APPEAL

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JURISDICTION OF THE APPELLATE COURT

This Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(k), 1953 as amended.

ISSUES FOR REVIEW

Did the trial court err in granting summary judgment to Meadow Valley where genuine issues of material fact precluded summary judgment. This issue was preserved for appeal (R. 151-168.)(R. 224 pages 1-21.)

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL

Utah Rules of Civil Procedure 56. Summary Judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of any the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim or cross-claim is asserted or declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of motion, by examining the pleadings and the evidence before it and

by interrogating counsel, shall be if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials in his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(Amended effective November 1, 1997.)

Utah Code Ann. § 13-8-1, 1953 as amended.

13-8-1. Construction industry - Agreements to indemnify.

(1) For purposes of this section:

(a) "Construction contract" means a contract or agreement relative to the design, construction, alteration, repair, or maintenance of a building, structure, highway, appurtenance, appliance, or other improvement to real property,

including moving, demolition, or excavating, connected to the construction contract between:

- (i) a construction manager;
- (ii) a general contractor;
- (iii) a subcontractor;
- (iv) a sub-subcontractor;
- (v) a supplier; or
- (vi) any combination of persons listed in Subsections (1)(a)(i) through (v).

(b) "Indemnification provision" means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:

- (i) the damages arise out of:
 - (A) bodily injury to a person;
 - (B) damage to property; or
 - (C) economic loss; and
- (ii) the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees.

(2) Except as provided in Subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable.

(3) When an indemnification provision is included in a contract related to a construction project between an owner and party listed in Subsection (1)(a), in any action for damages described in Subsection (1)(b)(i), the fault of the owner shall be apportioned among the parties listed in Subsection (1)(a) pro rata based on the proportional share of fault of each of the parties listed in Subsection (1)(a) if:

- (a) the damages are caused in part by the owner; and
- (b) the cause of the damages defined in Subsection (1)(b)(i) did not arise at the time and during the phase of the project when the owner was operating as a party defined in Subsection (1)(a).

(4) This section may not be construed to affect or impair the obligations of contracts or agreements, that are in existence at the time this section or any amendment to this section becomes effective.

STATEMENT OF THE CASE

INTRODUCTION

This case arises out of a complaint filed by the plaintiff and appellee, Meadow Valley Contractors, Inc., (hereinafter "Meadow Valley") for insurance coverage under an insurance policy issued by Transcontinental Insurance Company (hereinafter "Transcontinental") to BT Gallegos Construction Company, Inc. (hereinafter "BT Gallegos"). Although there are genuine issues of material fact which precluded summary judgment in this case, the trial court granted summary judgment in favor of Meadow Valley and against Transcontinental on March 2, 2000. From that grant of summary judgment, Transcontinental now appeals.

STATEMENT OF FACTS

1. This case arises out of a complaint filed by Meadow Valley, for insurance coverage under an insurance policy issued by Transcontinental to BT Gallegos. (R. 2-3.)
2. Meadow Valley was the general contractor on a highway construction project located at the I-15/I-215 merge to 2600 South, Woodscross in Davis County, Utah. (R. 54-55.)
3. BT Gallegos was a subcontractor on the same project. (R. 55.)
4. Pursuant to the subcontractors agreement between BT Gallegos and Meadow Valley, BT Gallegos was to purchase an insurance policy covering Meadow Valley for damages arising out of BT Gallegos' work. (R. 71.)

5. BT Gallegos did, in fact, purchase such insurance from Transcontinental.

However, under the terms of the insurance agreement and in compliance with the subcontract agreement, Transcontinental was to cover damages arising out of BT Gallegos' work only. (R. 138.)

6. Specifically, BT Gallegos purchased a blanket additional insured endorsement naming Meadow Valley as an additional insured. (R. 138-139.)

7. The blanket additional insured endorsement does not cover Meadow Valley for any liability arising out of Meadow Valley's, or any other person's work. (R. 138.)

Rather, the blanket additional insured endorsement is limited to liability "arising out of" BT Gallegos' work only. (R. 138.)

8. The language of the blanket additional insured endorsement is as follows:

The insurance provided to the additional insured is limited as follows:

1. That person or organization is only an additional insured with respect to liability arising out of:

- a. Premises you own, rent, lease, or occupy; or
- b. "your work" for that additional insured by or for you.

2. The limits of insurance applicable to the additional insured are those specified in the written contract or agreement or in the declarations for this policy, whichever is less. These limits of insurance are inclusive and not in addition to the limits of insurance shown on the declarations. (R138.)

9. The insurance policy defines "your work" as used in the blanket additional insured endorsement as follows:

"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:

a. Warranties or representations made at anytime with respect to the fitness, quality, durability, performance or use of “your work”; and

b. The providing of or failure to provide warnings or instructions.

(R. 137.)

10. In May of 1997, BT Gallegos was working on the I-15/I-215 project in the area of 2600 South in Woodscross, Utah. (R. 164.)

11. Pursuant to the subcontract agreement, the work being performed by BT Gallegos at or near the time in question consisted of extending existing drainage lines approximately 15 feet and tying those in with the existing drainage system. (R. 164.)

12. Part of extending the drainage line required construction of large concrete drainage boxes. (R. 164.)

13. In order to construct these boxes, it was necessary to divert an ongoing stream of water from the pipes under I-15 into a drainage ditch before pouring the boxes. (R. 164.)

14. The work performed by BT Gallegos did not include construction or maintenance of the drainage or diversion ditches into which the ongoing stream of water was diverted. There were such drainage ditches constructed on the site and identified in the construction documents. However, those ditches were neither built nor maintained by BT Gallegos. (R. 164.)

15. On May 19 or 20, 1997, Jeff Maughan, the foreman for BT Gallegos, met with Richard Craig Jessop, the superintendent of Meadow Valley, and discussed the timing of the construction in question. Because of a threatening weather forecast, Mr. Maughan asked Mr. Jessop if Mr. Jessop wanted BT Gallegos to wait before beginning their work. (R. 164.)

16. At that meeting, Mr. Jessop directed Mr. Maughan to proceed immediately. (R. 164.)

17. The last forms were set and the last concrete was poured at about 3:00 pm on the afternoon of Friday, May 23, 1997. (R. 164.)

18. Under the plans and specifications applicable to the project, BT Gallegos was not permitted to strip the forms off the construction for 24 hours. (R. 164.)

19. When Mr. Maughan arrived at the work site at approximately 3:00 am on the morning of May 23, 1997, the work area was flooding. The drainage ditches, which had not been constructed by BT Gallegos, had failed and water was flowing into the parking lot of S.S. Marine, a business located nearby. (R. 165.) Mr. Maughan then went with Mr. Jessop so Mr. Jessop could get another piece of equipment, a large backhoe in order to shore up the failing drainage ditch. During this period of time, Mr. Maughan requested that Mr. Jessop remove an existing metal pipe to let water run directly into the newly formed box. This would allow the water to flow into an existing drainage system. Mr.

Jessop had not done so before because he said he did not want to ruin BT Gallegos' work.
(R. 165.)

20. By the time Mr. Jessop agreed to tear up the metal pipe, the drainage ditch had failed. Water from the ditch and another drainage pipe located south of the job site flooded an office building located to the south of the area where BT Gallegos had been working. (R. 165.)

21. According to Mr. Maughan, the flooding was a result of Mr. Jessop's direction to BT Gallegos to proceed with the construction in this area and his decision to divert the flood water into the drainage ditch instead of the existing system. Both of these decisions were made by Meadow Valley's superintendent Richard Jessop. (R. 165.)

22. As stated before, BT Gallegos did not construct the drainage ditch that flooded. (R. 164.)

23. Several businesses that were flooded apparently made claims against Meadow Valley for reimbursement of expenses associated with the flooding. (R. 142.)

24. To date, no lawsuits have been filed arising out of any of these claims. (R. 224 at page 7.)

25. On March 24, 1999, Meadow Valley filed a lawsuit against Transcontinental and BT Gallegos. (R. 1-6.)

26. Essentially, Meadow Valley alleged that BT Gallegos was negligent and BT Gallegos' negligence led to the flooding of area businesses. Furthermore, Meadow

Valley argued that Transcontinental owed Meadow Valley coverage to indemnify it for any losses associated with the flooding. (R. 1-6.)

27. On or about May 14, 1999, BT Gallegos and Transcontinental brought a motion to sever the complaints alleged against each. (R. 23-30.)

28. The order granting the motion to sever was entered on or about September 16, 1999. (R. 52-53.)

29. On or about December 1, 1999, Meadow Valley filed a motion for partial summary judgment. (R. 146-147.)

30. That motion was granted on or about March 2, 2000. (R. 216-218.)

SUMMARY OF ARGUMENTS

This Court should reverse the trial court's granting of summary judgment as there are disputed issues of material fact precluding summary judgment. Furthermore, summary judgment was inappropriate because the facts of the case, when viewed in the light most favorable to the Appellant, show that the damages claimed by the Appellee did not arise out of a claim covered by the Appellant. Finally, the Appellee's argument is contrary to Utah Statutory Law. Therefore, this Court should reverse the trial court's grant of summary judgment and remand this case for further proceedings on the merits.

ARGUMENT

POINT I

THIS COURT SHOULD REVERSE THE TRIAL COURT'S GRANTING SUMMARY JUDGMENT AS THERE ARE DISPUTED ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT.

Utah courts have clearly held that summary judgment is inappropriate where genuine issues of material facts exist. According to the Utah Supreme Court, summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment in matter of law. See Utah Rules of Civil Procedure 56(c). The Supreme Court held that, “in reviewing the summary judgment, we accord no difference to the trial court and review it’s ruling for correctness.” See Johnson v. Redevelopment Agency of Salt Lake County, 913 P.2d 723, 727 (Utah 1995); K & T, Inc. v. Koroulis, 888 P.2d 623, 627 (Utah 1994). Quoting Price Development Company v. Orem City, 995 P.2d 1237 (Utah 2000).

Furthermore, when reviewing summary judgment determinations, the Supreme Court considers “the facts and incidents in the light most favorable to the non-moving party.” See Nelson v. Salt Lake City, 919 P.2d 568, 571 (Utah 1996). With these standards in mind, this Court should clearly reverse the trial court’s grant of summary judgment and remand this case for trial.

There are several issues of material fact which preclude summary judgment.

Those issues are as follows:

1. Jeff Maughan, foreman for BT Gallegos, testified that BT Gallegos did not construct or maintain any drainage or diversion ditches. It was the drainage and diversion ditches which failed and caused the flooding in this case. (R. 164.) On the other hand, Richard Jessop, the Meadow Valley superintendent, testified that Gallegos constructed the diversion ditch to divert drainage around the construction area. (R. 118.)

2. Mr. Maughan testified that he asked Mr. Jessop if Mr. Jessop wanted BT Gallegos to wait before beginning their work as there was a threatening weather forecast. (R. 164.) Mr. Jessop testified that Mr. Maughan told him he would strip the form in time as there was heavy rain forecast for the following day. (R. 118.)

3. Mr. Maughan testified that Mr. Jessop refused to remove a drainage pipe which would have prevented the flooding until it was too late. (R. 164.) Mr. Jessop, on the other hand, testified that the decision to pull the pipe from the outlet box was a mutual decision between Mr. Maughan and Mr. Jessop and assigns no fault to himself on that point. (R. 119.)

4. In spite of the fact it would take five days to complete Meadow Valley's work, Mr. Jessop ordered Mr. Maughan to begin work on the project in the face of a forecast of inclement weather. (R. 164.)

5. Mr. Maughan testified that it was the acts and omissions of Meadow Valley which led to the flooding. (R. 165.)

6. Mr. Jessop testified that it was the acts and omissions of BT Gallegos which caused the flooding. (R. 119.)

Under the circumstances in this case, these disputed issues of material facts preclude summary judgment in this case.

POINT II

SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE THE FACTS OF THIS CASE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO TRANSCONTINENTAL, SHOW THAT THE FLOODING DID NOT “ARISE OUT OF” BT GALLEGOS’ WORK.

This case involves the interpretation of an insurance contract. Under Utah law, “unless the language of an insurance contract is ambiguous or unclear, the court must construe it according to its plain and ordinary meaning.” First American Title Insurance Company v. JB Ranch, Inc., 966 P.2d 834 (Utah 1998). Furthermore, “an insurance policy is merely a contract between the insured and the insurer and is construed pursuant to the rules applied to ordinary contracts.” Alf v. State Farm Fire and Casualty Company, 850 P.2d 1272, 1274 (Utah 1993). Therefore, “the terms of insurance contracts...are to be interpreted according to their usually accepted meanings and should be read as a whole, in an attempt to harmonize and give affect to all of the contract provisions.” Nielsen v. O’Rielly, 848 P.2d 664, 665 (Utah 1992).

With these rules of interpretation in mind, it is essential to note that Meadow Valley is not an insured for all purposes under the policy of insurance issued by Transcontinental. Rather, Meadow Valley is given coverage only pursuant to a blanket additional insured endorsement with limited coverage. The terms of that limited blanket additional insured endorsement are as follows:

1. That person or organization is only an additional insured with respect to liability arising out of:
 - a. Premises you own, rent, lease, or occupy; or
 - b. "your work" for that additional insured by or for you.
2. The limits of insurance applicable to the additional insured are those specified in the written contract or agreement or in the declarations for this policy, whichever is less. These limits of insurance are inclusive and not in addition to the limits of insurance shown on the declarations. (R138.)

Therefore, according to the plain and unambiguous meaning of the blanketed additional insured endorsement, in order for there to be coverage under the terms of the policies of Meadow Valley's liability, the liability must "arise out of" "your work", meaning BT Gallegos' work. "Your work" is defined in a limited manner in the policy. According to the insurance policy "your work" is defined as follows:

"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:

- a. Warranties or representations made at anytime with respect to the fitness, quality, durability, performance or use of "your work"; and
- b. The providing of or failure to provide warnings or instructions.

(R. 137.)

This language is plain and unambiguous. The facts in this case, when viewed in the light most favorable to Transcontinental, show that this incident does not “arise out of” “[BT Gallegos’] work.” First, it is clear that the flooding was caused when a drainage ditch which had been constructed by someone other than by BT Gallegos failed. Since BT Gallegos did not construct or design the drainage ditch, the drainage ditch was not “[BT Gallegos’] work,” within the meaning of the policy. Again, the policy defines “your work” as work or operations performed by you or on your behalf. BT Gallegos had no duty under the subcontract to construct and design this ditch; therefore it was not “work performed by [BT Gallegos] or on [BT Gallegos’] behalf.”

Because the ditches were not BT Gallegos’ work within the terms of the contract, the failure of those ditches did not arise out of BT Gallegos’ work within the meaning of the insurance policy.

Furthermore, the facts of this case, when viewed in the light most favorable to Transcontinental, indicate that it was Meadow Valley’s actions which caused the flooding, not BT Gallegos’ actions. Meadow Valley directed BT Gallegos to commence work even though Meadow Valley knew or should have known that inclement weather was approaching. Meadow Valley’s foreman refused to remove a pipe which would have prevented the flooding on the excuse that it might harm BT Gallegos’ already completed work. Instead of removing this pipe immediately, Meadow Valley’s foreman attempted to shore up the failing ditch wasting valuable time which could have been used to remove

the pipe and prevent flooding. Therefore, these facts, when viewed in the light most favorable to Transcontinental, show that the flooding was caused by Meadow Valley, not BT Gallegos.

Under similar circumstances, courts have held that there was no insurance coverage. In Granite Construction v. Bituminous Insurance, 832 SW 2d 427 (Texas App. 1992), the Texas Court of Appeals interpreted the language of an insurance endorsement which was similar to the endorsement in this case. (Id. at 428.) In Granite Construction, Granite contracted with Joe Brown Company to haul asphalt materials from its construction site. Pursuant to the contract, Brown agreed to, and did carry, liability and property damage insurance which had been issued to Brown by Bituminous in the form of general and excess liability policies. Granite was named as an additional insured under the general liability insurance policy by way of endorsement. (Id. at 428.)

The endorsement stated:

The person insured provision is amended to include as an insured the person or organization named below [Granite Construction Company] but only with respect to liability arising out of operations performed for such insured [Granite] by and on behalf of the named insured [Brown].

Id. at 428.

Mr. Valchar was employed by Brown to drive trucks pursuant to Brown's subcontract with Granite. Valchar alleged that a truck in which he was driving pursuant

to the subcontract agreement was overloaded by Granite causing the truck to overturn and injure Valchar. (Id. at 428-429.)

Granite requested Bituminous defend it against Valchar's lawsuit. Bituminous refused, stating that the acts of Granite were not covered by Brown's policy and therefore there was no duty under the policy provisions to defend Granite against Valchar's pending action. (Id. at 428.) Granite then initiated a lawsuit against Bituminous. Granite and Bituminous filed cross-motions for summary judgment and the trial court granted Bituminous' motion for summary judgment. (Id. at 429.)

In affirming the trial court's grant of summary judgment, the Texas Court of Appeals stated,

As stated in the forepart of this opinion, Valchar's claim against Granite was for its negligent loading of his truck. Under the Granite/Brown contract, the loading operation was the sole obligation of Granite and Brown was not responsible for that operation. Measuring the policy coverage provided Granite by the allegations in Valchar's petition, it is obvious that Valchar's claim of Granite's liability arose out of the loading operations performed by Granite; it was not a claim arising out of the operations performed for Granite by or on behalf of Brown, the only operations for which Granite was insured. (Id. at 430.)

Likewise in this case, the facts, when viewed in the light most favorable to Transcontinental, show that there are two possible causes for flooding in this case: 1) A failure of a ditch which was constructed by some entity other than BT Gallegos; or 2) Meadow Valley's affirmative acts of negligence apart from any negligence on the part of BT Gallegos.

Since BT Gallegos had no responsibility to construct the ditches under the subcontract agreement with Meadow Valley, the ditch failure did not “arise out of” BT Gallegos’ work and Transcontinental has no duty to indemnify or defend Meadow Valley. Likewise, if the flooding was caused by Meadow Valley’s negligence it did not “arise out of” BT Gallegos’ work.

In the case of Northern Insurance Company of New York v. Austin Commercial, Inc., 908 F Supp. 436 (ND Texas 1994), the court held in a case involving policy provisions precisely the same as the provisions in this case that the insurance provision “provides coverage for additional insureds only for claims involving direct negligence on the part of the named insured.” (Id. at 437.)

There, as here, the facts of the case, when viewed in light most favorable to Transcontinental, show that BT Gallegos was free of negligence, and there is no coverage under the blanket additional insured endorsement.

Because there is no coverage under the blanket additional insured endorsement, Transcontinental has no duty to indemnify or defend Meadow Valley.

POINT III

INTERPRETING THE ADDITIONAL INSURED ENDORSEMENT AS AFFORDING COVERAGE FOR TRANSCONTINENTAL’S OWN NEGLIGENCE WOULD BE CONTRARY TO UTAH LAW.

The insurance policy purchased by BT Gallegos from Transcontinental provided that Transcontinental would defend and indemnify BT Gallegos for liability arising out of

BT Gallegos' work. The policy named Meadow Valley as an additional insured which meant that Transcontinental would also defend and indemnify Meadow Valley for claims arising out of BT Gallegos' work. However, the Transcontinental policy does not insure Meadow Valley for liability arising out of Meadow Valley's own actions. In fact, Utah law prevents a general contractor like Meadow Valley from requiring a subcontractor to provide indemnification for damage caused by the general contractor's negligence.

Utah Code Ann. § 13-8-1(2) states, "except as provided in subsection 3, an indemnification provision in a construction contract is against public policy and is void and unenforceable." An earlier, more restrictive version of the statute was interpreted in several Utah cases. In Jacobson Construction Company v. Blaine Construction, 863 P.2d 1329, 1331 (Utah App. 1993) *Appeal dismissed*, 878 P.2d 1151 (Utah 1994), "an indemnity agreement in the construction industry violates public policy if it requires indemnification of the indemnitee for its sole negligence." In Healy v. JB Sheet Metal, Inc., 892 P.2d 1047 (Utah App. 1995), the Court of Appeals relied upon the Jacobson decision and ruled an indemnity provision which purported to cover the indemnitee for liability arising solely from the indemnitee's own actions violated Section 13-8-1.

The policy purchased by BT Gallegos from Transcontinental, in accordance with the terms in the subcontract, only indemnified Meadow Valley for claims arising from work performed by BT Gallegos. Meadow Valley could not have required BT Gallegos to provide indemnification for claims arising from Meadow Valley's own negligence

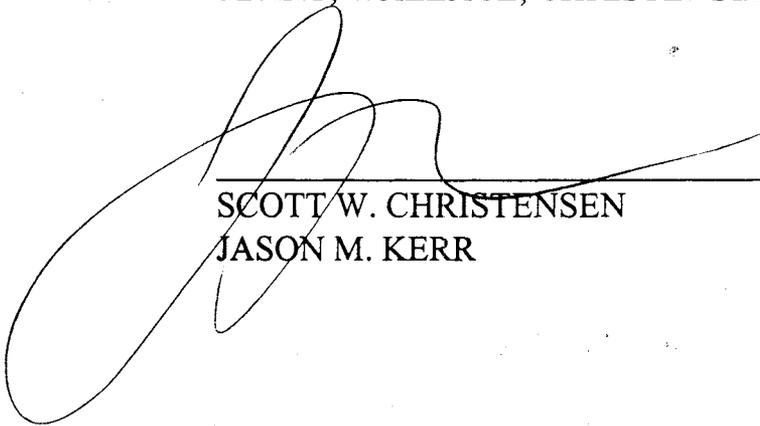
without violating Utah law. Because the flood damage was caused by the actions of a Meadow Valley employee, Transcontinental does not have a duty to indemnify Meadow Valley.

CONCLUSION

For the reasons and arguments stated above, defendant Transcontinental Insurance Company respectfully requests that this Court overrule the trial court's grant of summary judgment and remand this case for trial.

Respectfully submitted this 15th day of September, 2000.

PLANT, WALLACE, CHRISTENSEN & KANELL



SCOTT W. CHRISTENSEN
JASON M. KERR

MAILING CERTIFICATE

I hereby certify that on the 15 day of September, 2000, a true and correct copy of the above mentioned pleading was mailed, postage prepaid, to the following:

Attorney for Plaintiff

Jay E. Jensen, Esq
Scott Evans
CHRISTENSEN & JENSEN
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144

A handwritten signature in cursive script, appearing to read "Charles Bryan", is written over a solid horizontal line.

ADDENDUM

The following evidence is undisputed:

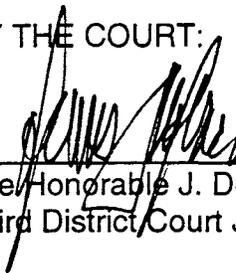
1. On or about May 24, 1997 plaintiff, Meadow Valley Contractors, Inc. (Meadow Valley) was the general contractor for the highway construction project from I-15, I-215 to 2600 South in Woods Cross.
2. Defendant, B.T. Gallegos Construction Company, Inc. (Gallegos) entered into a subcontract agreement with Meadow Valley wherein Gallegos agreed to build and/or install two concrete drainage outlet boxes for the highway construction project.
3. Transcontinental Insurance Company issued to Gallegos a commercial general liability insurance policy which named Meadow Valley as an additional insured.
4. The insurance policy issued by Transcontinental Insurance Company provided insurance coverage to Meadow Valley for liability arising out of work or operations performed by Gallegos or on Gallegos behalf as well as materials, parts or equipment furnished in connection with such work or operations.
5. The flooding onto adjacent property on May 24, 1997 as identified in plaintiff's complaint and described in plaintiff's supporting memoranda arose out of work performed by Gallegos or on Gallegos' behalf pursuant to the subcontract between Meadow Valley and Gallegos.

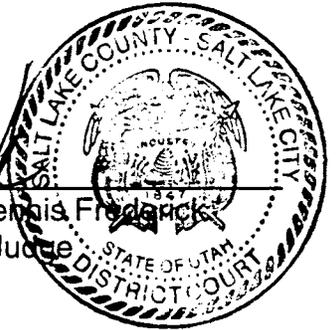
Based on the foregoing facts as well as the reasons specified in the supporting memoranda and as articulated at oral argument during the hearing of this matter, it is **ORDERED, ADJUDGED** and **DECREED** that Meadow Valley Contractors Inc.'s motion for summary judgment is hereby granted. Transcontinental Insurance Company is hereby ordered to provide insurance coverage, investigate, defend and indemnify

Meadow Valley Contractors, Inc. for any and all claims made as a result of the damage caused by the flooding identified in plaintiff's complaint.

DATED this 2nd day of Feb. 2000.

BY THE COURT:


The Honorable J. Dennis Fredrick
Third District Court Judge



Approved as to form this _____ day of February, 2000.

Scott W. Christensen, attorney for defendants

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of February, 2000, a copy of the foregoing **ORDER AND JUDGMENT OF MEADOW VALLEY CONTRACTORS, INC.'S MOTION FOR SUMMARY JUDGMENT** was mailed, postage prepaid, to the following:

Scott W. Christensen
PLANT, WALLACE, CHRISTENSEN
& KANELL, P.C.
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

X:\AWEJ\Meadow Valley\order and judgment on summary judgment february 0000.doc