2000

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

Utah Court of Appeals

UTAH COURT OF APPEALS

MEADOW VALLEY CONTRACTORS, INC., Plaintiff/Appellee, v. TRANSCONTINENTAL INSURANCE COMPANY, a New York corporation; and B.T. GALLEGOS CONSTRUCTION COMPANY, a Utah corporation, Defendant/Appellant.	Appellate Court No. 20000262-~~SC~~ CA Priority No. 15

BRIEF OF APPELLEE

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

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are listed in the caption.

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JURISDICTION

Jurisdiction in this Court is founded in Utah Code Ann. §§78-2-2(4), and 78-2a-3(2)(j), as amended.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Did the Trial Court correctly hold that plaintiff Meadow Valley was entitled to summary judgment and that defendant Transcontinental Insurance Company owed a duty to provide insurance coverage, investigate claims, defend and indemnify Meadow Valley for any and all claims made as a result of the damage caused by the flooding identified in Meadow Valley's complaint?

Issues decided upon a motion for summary judgment raise questions of law and are accorded no deference by the Appellate Court. *See*, Crossroads Plaza Assoc. v. Pratt, 912 P.2d 961 (Utah 1996); Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993).

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

On March 25, 1999, Meadow Valley Contractors, Inc. ("Meadow Valley") brought this action against Transcontinental Insurance Company ("Transcontinental") for breach of Transcontinental's duty to defend, investigate, and indemnify Meadow Valley for claims arising out of flood damage to third party property owners which occurred on or about May 24, 1997. (R.1-4). Meadow Valley filed a Motion for Summary Judgment which was heard by the Trial Court on January 31, 2000. (R.224). After reviewing the undisputed facts and applying the appropriate law, the Trial Court granted Meadow Valley's Motion for Summary Judgment and ordered Transcontinental "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." (R.217-218).

STATEMENT OF FACTS

For purposes of Meadow Valley's Motion for Summary Judgment, the Trial Court reviewed the following undisputed facts:

1. On or about May 24, 1997, Meadow Valley, Inc. was the general contractor for the highway construction project from I-15, I-215 to 2600 South in Woods Cross. The owner of the project was the Utah Department of Transportation. (R.54-55, 64, 117-118).

2. Meadow Valley and B.T. Gallegos Construction Company, Inc. ("Gallegos") entered into a subcontract agreement wherein Gallegos agreed to build and/or install certain storm drainage structures and related items for the project. (R.55, 64, 75-76, 163).

3. Prior to May 24, 1997, Gallegos removed a manhole and small pipes in preparation to install larger pipes and related structures to accommodate water drainage. In addition, Gallegos had formed and poured concrete walls and slabs for installation of a concrete outlet box for the project. (R.55, 151).

4. In order to construct the concrete outlet box, Gallegos diverted an on-going stream of water into a previously existing drainage ditch. (R.52, 53, 164, 186, 88, 224 at 10-11).

5. In order to facilitate the diversion of the water into the pre-existing drainage ditch, Gallegos constructed a small channel to take the water flowing into the storm drain system and direct it into the pre-existing ditch. (R.152-153, 164, 186, 188, 224 at 11).

6. On or about May 24, 1997, it began to rain heavily at the construction site. (R.55, 118, 152).

7. As a result of the heavy rain, water normally handled by the storm drain system, which Gallegos channeled around the work site into the existing ditch, flooded the entire area and near-by businesses. (R. 154).

8. Gallegos' employee, Mr. Maughan, made attempts to remove forms from the outlet box so water could flow through the box and back into the storm drain system. (R.56, 154).

9. Meadow Valley employee, Mr. Jessop, attempted to stabilize the ditch to avoid further flood damage. (R.56, 154).

10. Mr. Maughan and Mr. Jessop worked together to obtain a large track hoe to stabilize the ditch. Thereafter, Mr. Maughan and Mr. Jessop agreed to remove an existing metal pipe to allow the water to flow back into the outlet box and the storm drain system. (R.119, 154, 165, 186-187).

11. Pursuant to the subcontract agreement, Gallegos was required to purchase a commercial general liability (CGL) insurance policy with an endorsement naming Meadow Valley as an additional insured. (R.71).

12. Gallegos purchased a CGL policy which named Meadow Valley as an additional insured pursuant to a blanket additional insured endorsement. (R.138-139).

13. The insurance policy issued by Transcontinental naming Meadow Valley as an additional insured provides coverage to Meadow Valley 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 contractor 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.

(R.138).

14. The insurance policy defines "your work" as follows:

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 any time 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).

15. As a result of the flooding, several businesses have made claims against Meadow Valley, totaling $420,472.90. (R.142).

16. Meadow Valley has made several tenders of defense to Transcontinental requesting it to honor its duty to defend and indemnify Meadow Valley pursuant to the insurance contract issued by Transcontinental wherein

Meadow Valley was named as an additional insured. Transcontinental has refused these tenders of defense. (R.142).

17. As a result of Transcontinental's rejection of the tenders of defense, Meadow Valley filed an action against Gallegos for breach of its subcontract and against Transcontinental for breach of its duties under the insurance contract. (R.1-4).

18. On May 14, 1999, Transcontinental filed a Motion to Sever the claims Meadow Valley made pursuant to the insurance coverage against Transcontinental from the claims Meadow Valley made against Gallegos pursuant to the subcontract. The Motion to Sever was granted. (R.23, 52).

19. In its Motion to Sever, Transcontinental stated, "The question of whether B.T. Gallegos was negligent in the performance of its subcontract work **is completely separate** from the question of whether the plaintiff was covered as an additional insured under the insurance agreement with Transcontinental." (R.26). (Emphasis added).

20. Transcontinental also asserts that, "In the case at hand, there is no logical relationship between the negligence claim against B.T. Gallegos and the contract claim against Transcontinental, . . . " (R.29).

21. On December 1, 1999, Meadow Valley filed a partial motion for summary judgment against Transcontinental requesting the Court order Transcontinental to honor its duties to indemnify and defend Meadow Valley

under the insurance contract to which Meadow Valley was named as an additional insured. (R146-147).

22. Meadow Valley's motion for partial summary judgment was granted. (R.216-218).

SUMMARY OF THE ARGUMENT

Summary judgment was properly granted in the present circumstances as the undisputed facts clearly indicate that the flooding in question arose from the construction of the drainage system pursuant to the Gallegos subcontract. The insurance contract to which Meadow Valley was named as an additional insured provides coverage to Meadow Valley because the flooding "arose out of" Gallegos' work. Whether Meadow Valley is covered under the Transcontinental policy does not require a determination of negligence or an assessment of fault. Rather, the overwhelming majority of cases dealing with the issue have held that when determining coverage under an insurance policy, the term "arising out of" is considered synonymous with "originating" or "come into being" as opposed to "proximate cause". Thus, the issues of fact asserted by Transcontinental are not genuine or material to the determination of coverage in this case, and the court appropriately applied the law to the relevant facts.

Finally, the provisions of Utah Code Ann. §13-8-1 are inapplicable to the insurance policy in question. Utah Code Ann. §13-8-1 applies to indemnification provisions contained in construction contracts, not contracts for insurance such as that issued by Transcontinental.

In accordance with the foregoing, this Court should affirm the Trial Court's grant of summary judgment.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT.

A. There are no Genuine Issues of Material Fact.

Summary judgment is appropriate where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *See*, Utah Rules of Civil Procedure 56(c). The fact that a party disputes facts "does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted." Heglar Ranch, Inc., v. Stillman, 619 P.2d 1390, 1391 (Utah 1980); *see also,* Atkinson v. IHC Hospitals, 798 P.2d 733 at n.17 (Utah 1990) ("the rule on summary judgment may apply even when some fact remains in dispute; we affirm summary judgment when all material facts are not genuinely controverted.")

As will be shown below, the issues of fault, negligence and proximate causation are not relevant with respect to a determination of insurance coverage in this case. Those are issues which are, instead, relevant in relation to the litigation between Meadow Valley and Gallegos which was previously severed by the Trial Court on motion of Transcontinental.

Transcontinental has admitted all facts necessary for the Trial Court to make the legal determination in favor of coverage in this case. Transcontinental

admitted that Gallegos contracted to construct a concrete outlet drainage box pursuant to the subcontract. Transcontinental admitted that Gallegos diverted an existing stream of water around the concrete box and channeled the water into existing ditches. Transcontinental admits that the water which flooded the businesses in question originated from an existing stream of water which Gallegos channeled into the existing ditches. Finally, Transcontinental admits that a Gallegos employee (Mr. Maughan) worked with a Meadow Valley employee (Mr. Jessop) before and during the flooding incident. These employees were engaged in work specifically related to the construction work being performed pursuant to the Gallegos construction subcontract. These facts, and these facts alone, are sufficient for this Court to affirm the Trial Court's grant of summary judgment.

B. The Flood "Arose out of" Gallegos' Work.

Based upon well-settled precedent, Transcontinental's appeal fails for the same reason as its opposition failed below. The only question presented on appeal (despite Transcontinental's claim that there are facts in dispute) is a purely legal determination of the interpretation of an insurance contract. It is clear that the interpretation of contractual language contained within an insurance policy "is a question of law that may be resolved by the court in the context of a motion for summary judgment." Cypress Plateau Mining Corporation v. Commonwealth Ins. Co., 972 F.Supp. 1379, 1382 (D. Utah 1997). *See also*, West American Ins. Co. v. V&S, 145 F.3d 1224 (10th Cir. 1998).

The Transcontinental policy provides coverage for "an additional insured [Meadow Valley] with respect to liability arising out of: b. "your work" [Gallegos] for that additional insured [Meadow Valley] by or for you." (R.138). The policy defines "your work" as follows:

> 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.

(R.137).

Transcontinental's primary argument on appeal is the assertion that the flooding in this case was caused solely by the negligent actions of Meadow Valley's employee, Richard Jessop, and, therefore, did not "arise out of" Gallegos' work. Contrary to Transcontinental's assertions, the majority of courts have held that the term "arising out of " is not synonymous with the idea of causation or negligence. As such, whether or not Meadow Valley was negligent in part or in whole is not determinative, and does not relieve Transcontinental of its contractual duties to Meadow Valley under the insurance contract.

In Acceptance Ins. Co. v. Syufy Enterprises, 81 Cal. Rptr.2d 557 (Cal.App. 1st 1999), the court noted that the insurance policy to which the additional insured was named included the term "arising out of" rather than specifically limiting coverage for the additional insured to situations where the additional insured faced vicarious liability for negligence on the part of the named insured. In an effort to define "arising out of", the Syufy court stated:

> California courts have consistently given a broad interpretation to the terms "arising out of" or "arising from" in various kinds of insurance provisions. It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability and connotes only a minimal causal connection or incidental relationship. Id. at 562.

In finding coverage for the additional insured, the Syufy court held:

> Insurance companies are free to, and commonly have, issued additional insured endorsements that specifically limit coverage to situations in which the additional insured is faced with vicarious liability for negligent conduct by the named insured. . . when an insurer chooses not to use such clearly limited language in an additional insured clause, but instead grants coverage for liability 'arising out of' the named insured's work, the additional insured is covered without regard to whether the injury was caused by the named insured or the additional insured.

Id. at 562-63. *See also*, Container Corp. of America v. Maryland Cas. Co., 707 So.2d 733, 736 (Fla. 1998) (if the insurance company wished to limit coverage to vicarious liability for negligence, it would have done so by clear policy language); Merchant's Ins. Co. of New Hampshire v. United States Fidelity and Guaranty, 143 F.3d 5, 10 (1st Cir. 1998) (if insurance company intends to limit coverage to vicarious liability of a named insured, it is free to draft a policy that expressly implements that intention); Casualty Ins. Co. v. Northbrook Property & Casualty Ins. Co., 501 N.E.2d 812, 814-815 (Ill. App. Ct. 1986) (coverage does not depend on the fault of a named insured).

In McIntosch v. Scottsdale Ins. Co., 992 F.2d 251 (10th Cir. 1993), Wichita Festivals, Inc. ("Festivals") contracted to operate the 1988 Wichita River Festival for the City of Wichita ("Wichita"). Pursuant to the contract, Festivals purchased liability insurance from Scottsdale naming Wichita as an additional insured. The additional insured endorsement provided coverage "with respect to liability arising out of operations performed for such insured by or on behalf of the named insured." Id. at 254. During the Festival, McIntosch was injured as a result of Wichita's sole negligence. Wichita stipulated that it was 100% at fault and a judgment was awarded to McIntosch. Scottsdale denied coverage to Wichita on the theory that coverage was limited to situations where there was vicarious liability for the named insured's negligence. The McIntosch court held that the additional insured endorsement does not limit coverage to cases where the additional insured is held vicariously liable for a named insured's negligence. Id. at 254. The Court further held that Wichita was covered under the additional insured endorsement even though Wichita admitted liability. Id. at 255.

In Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity & Guaranty Co., 143 F.3d 5 (1st Cir. 1998), a subcontractor purchased an insurance policy through USF&G and listed the general contractor as an additional insured. The insurance policy contained language strikingly similar to, if not exactly the same as, the language contained in the policy issued by Transcontinental in the present case. During the course of the construction project, one of the subcontractor's employees was injured due to negligent actions of the general

contractor. The injured employee sued the general contractor, who then tendered the defense to USF&G. USF&G rejected the tender of defense under the theory that the additional insured endorsement did not afford coverage to the general contractor for the general contractor's own negligence. Id. at 7. The general contractor then settled with the injured employee through the general contractor's insurance carrier, Merchant's Insurance Company. Merchant's Insurance Company then sued USF&G in a subrogation cause of action. Id.

In holding that USF&G's policy provided coverage to the general contractor for the general contractor's own negligence, the First Circuit Court of Appeals held:

> The usual meaning ascribed to the phrase "arising out of" is much broader than "caused by"; the former phrase is considered synonymous with "originate" or come into being". . . . the expression "arising out of" indicates a wider range of causation than the concept of proximate causation and tort law.

Id. at 9 (citations omitted).

In some cases, the use of the term "arising out of" has been interpreted in favor of the insurance company. However, these cases use the same definition of the term as the majority view discussed above. In Toll Bridge Authority v. Aetna Ins. Co., 773 P.2d 906 (Wash. Ct. App. 1989), the Toll Bridge Authority ("TBA") purchased insurance for its operation of a ferry system. A passenger of the ferry was injured while disembarking from the ferry to the dock. The passenger sued TBA alleging negligence. TBA sought coverage from Aetna for indemnity. At issue was a policy exclusion for incidents "arising out of the

operations, maintenance, or use of any water craft . . . ." Id. at 908. The Trial Court granted Aetna's motion for summary judgment upholding the exclusion.

In affirming the Trial Court's ruling, the appellate court held that "[t]he phrase 'arising out of' is unambiguous and has a broader meaning than 'caused by' or 'resulted from'. It is ordinarily understood to mean 'originating from', 'having its origin in', 'growing out of', or 'flowing from'." Id. at 908. Based on this definition, the court rejected TBA's claim that there were issues of fact as to proximate cause and negligence which would preclude summary judgment. Id.

It is clear that whether Meadow Valley or Gallegos were negligent in whole or in part has no effect in the determination of coverage in this case. The issue before the court is whether the flooding in this case "arose out of", "originated", "came into being", "grew out of" or "flowed from" work or operations being performed by Gallegos or on Gallegos' behalf pursuant to the subcontract. Given the undisputed facts considered by the Trial Court, it is clear that the water which eventually flooded the businesses in question originated and "flowed from" work and operations which had been performed by or for Gallegos, pursuant to the subcontract. There is no question that the water originated from the existing stream of water for which the concrete outlet box was being constructed. (R.153, 154, 164, 186, and 188). In fact, Gallegos constructed a channel to divert this stream of water out of the storm drain into the existing ditch. (R.224 at 11). Accordingly, this Court should affirm the Trial Court's order granting Meadow Valley's motion for summary judgment.

C. The Cases Cited by Transcontinental Have Been Distinguished and/or Overruled.

Transcontinental relies on two Texas cases for the proposition that the flooding in this case did not "arise out of" Gallegos' work or work performed on Gallegos' behalf. These cases have been distinguished/overruled by subsequent Texas cases.

In Granite Const, Co. v. Bituminous Ins. Co., 832 S.W.2d 427 (Tex. App. 1992), a trucking company (Brown) subcontracted with Granite to haul asphalt from a site owned by Granite. The subcontract provided that "'[a]ll material shall be F.O.B. [Brown's] truck at the source,' and that '[l]oading will be done at no cost to [Brown]'." Id. at 428. After being loaded by Granite, a Brown truck driver was injured when the truck he was driving overturned. Id. The truck driver sued Granite for negligently loading the truck. Id. Granite tendered the defense of the lawsuit to Bituminous, Brown's insurer, based upon Granite's status as an additional insured. Id. Bituminous refused the tender of defense and Granite filed an action for declaratory relief. Id. at 428-429. The Trial Court granted Bituminous' motion for summary judgment and ruled that the Bituminous policy did not provide coverage for Granite. Id.

The Appellate Court affirmed the lower court's ruling in favor of Bituminous by interpreting the policy language as providing insurance coverage for Granite only for "operations performed for Granite by or on behalf of Brown." Id. at 430. Looking beyond the insurance policy, the Granite court held that Granite was

being sued for negligent loading of the Brown truck, operations which were expressly the duty of Granite under the contract between Granite and Brown. Thus, the court interpreted the policy as unambiguously excluding coverage. Id.

In 1994, two years after the Granite decision, the United States District Court for the District of Texas followed the Granite decision as representative of Texas law. *See*, Northern Insurance Co. of New York v. Austin Commercial Inc., 908 F.Supp. 436 (D. Tex. N.D. 1994). The Northern Insurance Company of New York court held that additional insureds are covered "only for claims involving direct negligence on the part of the named insured." Id. at 437.

Transcontinental's reliance on the Granite and Northern Insurance Company of New York cases is wholly without merit as subsequent Texas cases have accepted the majority view relating to interpretation of the term "arising out of." Texas law began to change in 1999 when the Texas Court of Appeals dealt with an additional insurance endorsement contained in a commercial general liability policy which provided coverage to the additional insured for "liability **arising out of** the named insured's operations." Admiral Insurance Co. v. Trident Ngl Inc., 988 S.W.2d 451, 454 (Tex. App. 1999) (emphasis added). In Admiral, a subcontractor (K.D.) entered into a service agreement with Trident to service an oil and gas facility owned by Trident. Id. at 452. Pursuant to the employment contract, Trident was named as an additional insured to a CGL policy issued to K.D. by Admiral. Id. While in the process of unloading Trident's tools from a Trident truck, a K.D. employee was seriously injured when a compressor

exploded. Id. at 453. Neither the K.D. employee "nor anyone employed by K.D. performed any act or failed to perform any act that caused the compressor to explode." Id. The K.D. employee sued Trident for tort damages. Trident tendered the defense of the case to Admiral as an additional insured under the K.D. policy. Admiral rejected the tender of defense.

Admiral's argument for rejecting Trident's tender of defense was that "absent an affirmative act by K.D. that caused or contributed to the explosion, the additional insured endorsement in the policy . . . did not provide coverage." Id. at 454. The Texas Appellate Court rejected Admiral's argument as well as the holdings in the Granite and Northern Insurance Company of New York cases. Id at fn.4. The Admiral court adopted "the rule followed by the majority of courts around the country." Id. at 455. The Court specifically cited to and followed the holdings of Merchant's v. USF&G and McIntosch v. Scottsdale previously discussed in this brief. In so doing, the Admiral court stated:

> [f]or liability to "arise out of operations" of a named insured it is not necessary for the named insured's acts to have "caused" the accident; rather, it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, **even if the cause of the injury was the negligence of the additional insured.**

Id. at 454 (emphasis added).

Subsequent to the Admiral decision, the Texas Court of Appeals revisited the issue of the construction/interpretation of additional-insured endorsements. In McCarthy Bros. Co. v. Continental Lloyd's Ins. Co., 7 S.W.3d 725 (Tex. App.

1999), the Court of Appeals reaffirmed that Texas followed the majority view in the interpretation of the phrase "arising out of." Id. at 729. McCarthy was a general contractor who hired Crouch Electric to provide electrical services for a construction project. Id. at 727. McCarthy was named as an additional insured to the CGL policy issued to Crouch Electric by Continental Lloyd's Insurance Company (Continental). An employee of Crouch Electric was injured when he slipped and fell at the construction site. Id. The Crouch Electric employee sued McCarthy who then tendered the defense to Continental pursuant to McCarthy's status as an additional insured. Continental rejected the tender of defense because the allegations in the suit by the Crouch Electric employee alleged "negligence" only on the part of McCarthy, not on the part of Crouch, and thus the liability . . . did not arise out of Crouch's work for McCarthy." Id.

The McCarthy court specifically followed the holding of the Admiral Court and rejected the previous holding in Granite. The McCarthy court made reference to the definition of "arising out of" used in the Merchant's Insurance Co. v. USF&G case by stating, "'arising out of' is broader than the concept of proximate causation and tort law. . . ." Id. at 730. In support of its acceptance of the majority view, the court also made reference to the definition of "arising out of" found in the McIntosch v. Scottsdale case. Id. at fn.7.

In finding that McCarthy was covered as an additional insured under the policy issued to Crouch Electric by Continental, the Texas Court of Appeals held:

> The Insurance companies offer a competing interpretation for the phrase "arising out of" that they claim is equally reasonable and thus creates an ambiguity. Their interpretation would limit the interpretation of "arising out of" to mean coming directly from; i.e., for liability to arise out of Crouch's work for McCarthy, the liability must stem directly from Crouch's negligence and cannot extend to negligence caused solely by McCarthy. Post-Lindsay, however, such a restrictive interpretation no longer appears reasonable in Texas and cannot be used to create ambiguity. However, were we to consider the phrase "arising out of" ambiguous, we would apply the familiar rules that construe the policy against the insurer and reach the same result.

Id. at 730-731 (emphasis added).

It is clear that the majority of cases and jurisdictions who have dealt with the interpretation of additional insured endorsements and the meaning of "arising out of" support the Trial Court's finding that Meadow Valley is entitled to a defense and indemnification for damages caused by the flooding on May 24, 1997.

II. UTAH CODE ANN. §13-8-1 APPLIES ONLY TO CONSTRUCTION CONTRACTS NOT LIABILITY INSURANCE CONTRACTS.

Transcontinental attempts to apply Utah Code Ann. §13-8-1(2) in an effort to show that the insurance policy to which Meadow Valley is named as an additional insured cannot provide coverage for Meadow Valley's "negligent" actions. The statute states, "Except as provided in subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable." Transcontinental's theory is unwarranted as the statute

specifically applies only to indemnification provisions in construction contracts. By its terms, the statute does not apply to contractual obligations to provide or carry insurance. Further, the statute does not apply to the interpretation of insurance contracts. Finally, neither of the cases cited by Transcontinental address a subcontractor's contractual obligation to procure and maintain insurance for a general contractor or the interpretation of an insurance contract. As such they are easily distinguished.

Transcontinental's theory has been addressed in other jurisdictions. A case which is directly on point is Shell Oil Co. v. National Union Fire Ins. Co. of PA, 52 Cal. Rptr. 2d 580 (Cal. App. 2nd 1996). In Shell Oil, as in the present case, the construction contract in question contained an indemnity clause. The court found the indemnity clause to comply with the state statute which prohibited indemnification for the sole negligence of the indemnitee. The indemnity clause clearly stated that claims for injuries caused by Shell Oil's sole negligence were excluded and was, therefore, enforceable. The indemnity clause in the present case is similar to that contained in Shell Oil and complies with Utah law.[1] As in the present case, the subcontract in Shell Oil contained a separate clause wherein the subcontractor was required to obtain liability insurance and name Shell Oil as an additional insured. Id. at 582. *See also*, R.71.

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[1] *See*, R.72, "the subcontractor's obligation under this provision shall not extend to any liability caused by the sole negligence of the indemnitee."

In Shell Oil, the insurance company, National, argued that a requirement within a construction contract to procure liability insurance was against public policy and barred by a state statute which invalidated construction contract indemnity agreements for an indemnitees' own negligence. The Shell Oil court held, "this doctrine in terms does not apply here because the obligation to be construed is not an indemnity clause . . . but rather an agreement to provide and carry insurance. **Insurance, of course, is commonly provided to protect from liability for solitary negligence**." Id. at 585 (emphasis added).

Transcontinental's theory that Utah law and public policy prohibit coverage for Meadow Valley under the insurance policy as an additional insured is a "red herring." By its terms, Utah Code Ann. §13-8-1(2) is applicable only to indemnification clauses contained within a construction contract. The indemnification clause within the Gallegos subcontract is not relevant to the interpretation of Gallegos' duties to procure and maintain insurance. Further, neither the indemnification clause within the subcontract nor Utah Code Ann. § 13-8-1(2) are relevant for the purpose of interpreting the contract of insurance issued by Transcontinental. Accordingly, this Court should hold that Gallegos' duties to procure and maintain insurance under the subcontract do not contravene public policy. This Court should further hold that the insurance policy issued by Transcontinental provides coverage to Meadow Valley for the flooding which is at issue in this case.

CONCLUSION

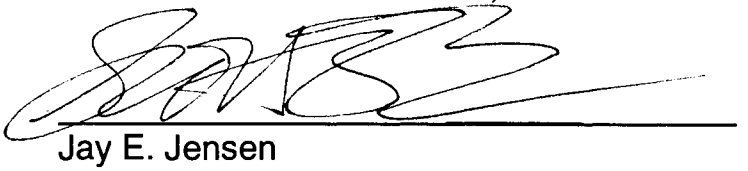
This appeal involves the interpretation of the insurance contract issued by Transcontinental to which Meadow Valley was named as an additional insured. It does not involve a determination of negligence or proximate cause. Transcontinental recognized this distinction early in the case when its request to sever the two issues was granted.

The evidence is clear that the flooding in question arose from work being performed pursuant to the Gallegos' subcontract. Further, it is clear that Utah Code Ann. § 13-8-1(2) does not apply to a requirement in a construction contract to procure and maintain insurance or the interpretation of an insurance contract.

For the foregoing reasons, this Court should affirm the Trial Court's grant of summary judgment.

Respectfully submitted this 10 day of November, 2000.

CHRISTENSEN & JENSEN, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of November, 2000, two (2) copies of the foregoing **BRIEF OF APPELLEE** was mailed, postage prepaid, to the following:

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