

2009

# Meadow Valley Contractors, Inc v. State of Utah Department of Transportation : Reply Brief of Cross-Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MEADOW VALLEY CONTRACTORS,  
INC.

Plaintiff, Appellee and Cross-  
Appellant,

vs.

STATE OF UTAH DEPARTMENT OF  
TRANSPORTATION,

Defendant, Appellant and Cross-  
Appellee.

Supreme Court No. 20090025-SC

District Court No. 0509009139

Appeal from Third Judicial District Court,  
Honorable John Paul Kennedy, District  
Court No. 050909139

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UTAH APPELLATE COURTS

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## **ARGUMENT**

### **I. The Trial Court Did Clearly Err in Finding that MVC/Southwest Was Not Entitled to a 3/8 of an Inch Thickness Deficiency on Each Layer of Asphalt.**

Contrary to UDOT's assertions otherwise, the trial court did clearly err finding that MVC/Southwest was not entitled to a 3/8 of an inch thickness deficiency on each layer of asphalt laid by MVC/Southwest.

As to the standard of review applicable on this issue, UDOT claims that the trial court specifically found that the contract specifications relating to allowable thickness deviations are ambiguous and, therefore, all inferences should be viewed in a light most supportive of the trial court's findings. (Resp. Br., at 23). While MVC/Southwest believes that the contract specifications relating to allowable thickness deviations are, in fact, ambiguous, it is unclear whether the trial court conclusively found that said provisions are ambiguous. The trial court never made an explicit finding that the contract specifications relating to allowable thickness deviations were ambiguous; rather, the trial court stated that said specifications were "less than clear" and found that UDOT's interpretation of the contract specifications relating to thickness deviations was more reasonable. (R. 1515-1516, 1525). MVC/Southwest believes that the trial court simply interpreted the contract specifications relating to allowable thickness deviations and determined, in its opinion, that UDOT's interpretation was more reasonable, which means the correct standard of review of this issue is a correctness standard. See, Alpha

Partners, Inc. v. Transamerica Investment Management, L.L.C., 2006 UT App 331, ¶ 14; 153 P.3d 714 (The interpretation of the terms of a contract is a question of law and a trial court's legal conclusions regarding a contract are afforded no deference and will be reviewed for correctness).

Regardless of whether the correct standard of review is one for correctness, as argued by MVC/Southwest, or clear error, as argued by UDOT, the trial court clearly erred in finding that MVC/Southwest was not entitled to 3/8 of an inch thickness deficiency on each of the two layers of asphalt laid by MVC/Southwest. In this matter, the trial court found that UDOT's interpretation of the allowable thickness deviation was "the more reasonable interpretation." (R. 1515-1516). However, because MVC/Southwest's interpretation of the thickness deviation specifications is also reasonable, which interpretation is fully set forth in MVC/Southwest's Brief of Cross-Appellant, consistent with Utah law, the trial court should have construed any ambiguities in the thickness reduction specifications against UDOT, the drafter of the contract, and adopted MVC/Southwest's interpretation as the correct one even if it believed UDOT's interpretation was more reasonable. See, Allstate Enterprises, Inc. v. Heriford et al., 772 P.2d 466, 469 (Utah Ct. App. 1989) (where the Utah Court of Appeals stated that "If a contract is ambiguous, the court will construe it against the drafter only after concluding that extrinsic evidence does not reveal the intent of the parties and uncertainty remains.").



As to determining the parties' intent, evidence of intent of the parties is based on "facts known to the parties at the time they entered the contract. . ." Nielsen v. Gold's Gym, 2003 UT 37, ¶ 7; 78 P.3d 600, 601 (Utah 2003). In this case, no evidence was presented of what UDOT's and MVC's intent was at the time the contract was entered as to what the allowable thickness deviations would be for the asphalt laid by MVC/Southwest. UDOT cites testimony from Brandon Squire relating to thickness issues, but his testimony clearly does not demonstrate what UDOT and MVC intended at the time the contract was entered as to what thickness deviations would be permitted.<sup>1</sup>

Because no extrinsic evidence was offered relating to UDOT's and MVC's intent at the time the contract was entered as it relates to allowable thickness deviations, the Court is left with an ambiguous contract on its face. Therefore, because MVC/Southwest has proffered a reasonable interpretation of UDOT's ambiguous contract specifications relating to allowable thickness deviations, the Court should construe all ambiguities against UDOT, the drafting party, even if it believes that UDOT's interpretation is more

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<sup>1</sup> In response to Mr. Squire's testimony, MVC/Southwest was not notified that some areas of the paving were deficient in thickness according to UDOT's interpretation until after a majority of the paving work had been completed. (R. 1421: 38, 64-65; R. 1422: 465-466; R. 1424: 719-720; Trial Ex. 17). Once notified of UDOT's interpretation, MVC/Southwest objected to the same and clarified its interpretation of the ambiguous provision. (Trial Ex. 18; R. 1422: 470-473). Under no circumstances did MVC/Southwest ever agree with UDOT's interpretation of the thickness deficiency provisions or the amount of penalties ultimately assessed by UDOT. (R. 1421: 69; R. 1422: 470-473; R. 1424: 782; R. 1425: 953). Moreover, Brandon Squire did not notify MVC/Southwest of UDOT's interpretation "months" before MVC/Southwest objected to the thickness penalty; rather, Mr. Squire testified he informed MVC/Southwest of UDOT's interpretation on September 18, which was 8 days prior to penalties being assessed by UDOT and MVC/Southwest objected to the same shortly thereafter (Oct. 13). (Trial Ex. 17; R. 1424: 673-675; Trial Ex. 18).

reasonable. The determining factor is not whether UDOT's interpretation is more reasonable, which it is not. Rather, the determining factor is whether MVC/Southwest, the non-drafting party, has offered a reasonable interpretation of UDOT's ambiguous contract language, which it has.

The result urged by MVC/Southwest was reached by the court in Kaczynski v. J. Videira's Paving, LLC, 2008 WL 344655 (Conn. Super. Ct. 2008), which MVC/Southwest has discussed in MVC's/Southwest's Brief of Cross-Appellant. While Kaczynski is not binding on this Court, the facts of that case, as explained more fully in MVC's/Southwest's Brief of Cross-Appellant, are analogous to the facts at issue in the instant case. Specifically, in Kaczynski, both plaintiff and defendant presented reasonable interpretations of what the contract required in terms of asphalt thickness, but the court found that because the contract was ambiguous, **the contract must be construed against the drafter** and in favor of the non-drafting party. Kaczynski v. J. Videira's Paving, LLC, 2008 WL 344655 (Conn. Super. Ct. 2008). (Emphasis added). Accordingly, the court adopted the non-drafting party's interpretation of the contract's thickness provision even though both sides presented reasonable interpretations. Id.

In the instant case, the trial court committed clear error by not construing the ambiguous thickness deviation contract specifications against UDOT, the drafter of the ambiguous provisions. UDOT was responsible for providing MVC/Southwest with clear contract specifications relating to allowable thickness deviations, which it failed to do. UDOT has admitted that the contract specifications relating to allowable thickness

deviations are ambiguous. (Resp. Br., at 24). Accordingly, this Court should construe the ambiguous contract language against UDOT and find that MVC/Southwest's interpretation that the contract allows for a 3/8 of an inch deficiency on both layers of asphalt laid by MVC/Southwest is reasonable and enforceable.

Turning to UDOT's claim that MVC/Southwest's counsel conceded that MVC/Southwest's interpretation of the thickness deviation provisions is not reasonable, such is not true. While counsel for MVC/Southwest stated that a 3/8 of an inch tolerance on each individual lift seemed like a large tolerance, counsel clearly took the position that MVC/Southwest's interpretation of the thickness deviation provisions was reasonable and consistent with the language used by UDOT in crafting the provision. Specifically, during closing arguments, counsel for MVC/Southwest stated that a 3/4 of an inch deviation on the total thickness "sounds like a lot and I think it is a lot but nevertheless, that's the way the specification reads if you read it consistently." (R. 1425: 952).

Counsel for MVC/Southwest also stated:

. . . I would say, this is, I mean we're asking for a very-you know, that is a big tolerance from a practical standpoint from the field. **However, that is the way that we think the specification was written and it is written very unclearly. We feel it is ambiguous.** We feel that Your Honor has the right to go one way or the other because of its ambiguity but we also feel that because of its ambiguity that UDOT should be sent a message to write clear specifications for their contractors and that is in the public interest . . .

(R. 1425: 1045). (Emphasis added).

As to the language cited by UDOT in its response brief in support of its assertion that counsel for MVC/Southwest conceded MVC's/Southwest's interpretation of the thickness deviation provision was not practical, counsel for MVC/Southwest was asked a hypothetical question by the trial court relating to MVC/Southwest's interpretation of the thickness deviation provisions. Specifically, the trial court asked counsel for MVC/Southwest that had MVC/Southwest performed **three lifts instead of two**, would MVC/Southwest have been entitled to a 3/8 of an inch thickness deviation on each of the three separate lifts. (R. 1425: 1043). Counsel for MVC/Southwest responded as follows:

I think if the parties agreed to that, I would say that is too much of a tolerance, Your Honor, **but I would also say that the way the specification is written is yes it would be if you enforce the specification as written**. But as a practical matter in the field, that does not pass the smell test to me.

(R. 1425: 1043). (Emphasis added). Thus, while counsel said he personally believed a 3/8 of an inch thickness deviation on a three lift project, not a two lift project, would be too much, he also stated that the manner in which UDOT had crafted the thickness deviation provisions would allow for such a deviation.

Turning to UDOT's claim that this Court should affirm the trial court's decision to reject MVC/Southwest's thickness claim on alternate grounds, this Court has stated that:

While we acknowledge the existence and validity of the "affirm on any ground" rule of appellate review, **we caution that it is a tool available only in limited circumstances. This rule does not give appellate courts license to pull from thin air alternate or novel legal theories with which to affirm decisions below.**

Bailey v. Bayles, 52 P.3d 1158, 1162 fn. 3 (Utah 2002). (Emphasis added).

Regardless, UDOT's "alternate grounds" argument is without merit for a couple of reasons. First, UDOT's claim that MVC/Southwest's thickness penalty reduction claim was not assigned by MVC to Southwest is erroneous. MVC/Southwest's thickness penalty reduction claim is clearly part of MVC/Southwest's block paving claim. The thickness penalties assessed by UDOT against MVC/Southwest are the result of UDOT's claim that the asphalt laid by MVC/Southwest was not thick enough in certain areas. (R. 1421: 38, 64-65; R. 1422: 465-466). UDOT issued thickness penalties against MVC/Southwest in the amount of \$166,416.00 and deducted that amount from MVC/Southwest's paving contract. (R. 1425: 953; 1424: 574). The thickness penalties are directly related to MVC/Southwest's scope of work under its paving contract with UDOT, including compensation due to MVC/Southwest for paving work performed (i.e. UDOT has deducted amounts owed to MVC/Southwest under the paving contract because it contends certain areas are not thick enough). Accordingly, as part of its block paving claim, MVC/Southwest is petitioning the Court to order UDOT to redact the penalties and pay MVC/Southwest in full for its paving costs.

In addition, the issue of whether the thickness claim was included in MVC/Southwest's Complaint was already litigated at the trial court below. Specifically, UDOT filed a Motion in Limine asking the trial court to exclude evidence relating to MVC/Southwest's thickness claim, arguing that MVC/Southwest had failed to include it as a claim in the Complaint as a component of MVC/Southwest's breach of contract claim. (R. 873-911). MVC/Southwest opposed UDOT's Motion, arguing that the

thickness claim was contained in the Complaint as a component of MVC/Southwest's breach of contract claim and that the issue had been litigated by the parties throughout the course of discovery. (R. 935-1151). The trial court agreed with MVC/Southwest entered an Order Denying UDOT's Motion in Limine. (R. 1323-1325). UDOT's attempt to argue that MVC/Southwest has no standing to assert the thickness claim has already been addressed and rejected by the trial court.

Second, as to UDOT's claim that MVC has not suffered damages related to the thickness penalties, such is incorrect. As explained more fully in MVC/Southwest's Brief of Appellee, pursuant to the contract between UDOT and MVC, MVC was responsible for performing all paving operations on the I-215 Project, which would include laying asphalt sufficiently thick to comply with the contract requirements. (R. 1496, 1515-1516, 1525; Trial Ex. 2, 6). While MVC subcontracted the paving work to Southwest, MVC remained responsible to UDOT for all paving operations, including thickness of asphalt laid. (R. 1496-1497; Trial Ex. 6, 8, 9 at 5.4, 103). Accordingly, the thickness penalties were assessed by UDOT against MVC. (Trial Ex. 17).

Prior to this litigation, and contrary to UDOT's assertions that MVC did not contest the thickness penalties, MVC made a claim for a reduction in the thickness penalties from UDOT, but UDOT rejected the same. (R. 1421: 146-147; Trial Ex. 29 & 112). Rather than filing suit against UDOT for the thickness damages, MVC passed the thickness penalties, which are part of the block paving claim, down to Southwest. (R. 1424: 521-522; 574). Again, as explained more fully in MVC/Southwest's Brief of

Appellee, while Southwest absorbed these costs, MVC has standing to seek a reduction in thickness penalties because Southwest could have filed suit against MVC for the passed on costs, which would have required MVC to file suit against UDOT for a reduction in the thickness penalties. See, United States v. Blair, 321 U.S. 730, 737-738 (U.S. 1944) (where the Supreme Court of the United States found that where only the general contractor was contractually bound to perform work for an owner, the general contractor had the right to recover from the owner amounts **owed whether the work was performed by the general contractor or through its subcontractor**). (Emphasis added).

Rather than proceeding in that fashion, MVC and Southwest entered into the Claims Prosecution and Tolling Agreement, wherein MVC agreed to allow Southwest to pursue the block paving claim, including thickness penalties associated with such, in MVC's name. (R. 1182-11-87; R. 1424: 533; R. 1497). The Claims Prosecution and Tolling Agreement clearly states that absent the agreement MVC and Southwest "**would further assert and prosecute the Block Paving Claim and Other claims against one another . . .**" (R. 1183). If such had occurred, MVC would have sued UDOT and asserted a claim for a reduction of the thickness penalties.

Pass-through/liquidating agreements similar to the one at between MVC and Southwest have been routinely recognized by courts throughout the country. Following is a small sample of representative cases recognizing such agreements:

See, Barry, Bette & Led Duke, Inc. v. State of New York, 645 N.Y.S.2d 713, 716-717 (N.Y. Ct. Cl. 1996) (where the court stated that “the effect of the typical liquidating agreement, therefore, is to simply shorten the steps required, by permitting a ‘pass through’ cause of action in which the subcontractor is not required to first bring suit against the prime contractor . . . and the prime contractor is not required to actually pay out damages prior to suing the owner . . . The end result is that the subcontractor is compensated for losses caused by the owner and the owner ultimately pays for such damage . . . **admission of liability [on the part of the prime contractor] can be inferred from, for example, contract provisions relating to the commencement of an action against the owner, either by the prime contractor or in its name.**”). (Emphasis added). See, Ardley Construction Co., Inc. v. Port of New York Authority, 61 A.D.2d 953, 954 (N.Y. App. Div. 1978) (where the court found that a liquidating agreement which allowed the subcontractor to sue the owner in the prime contractor’s name **but otherwise absolved the prime contractor of any liability towards the subcontractor did not preclude suit against the owner** was enforceable. The court held that “The agreement between plaintiffs [prime contractor] and the subcontractor is nothing more than an acknowledgment by plaintiffs that suit could be brought in their name in the subcontractor’s behalf. Such agreement between plaintiffs and the subcontractor with respect to any recovery from defendant [owner] affects only the relationship between plaintiffs and the subcontractor **and should not be available to defendant as a shield against liability for breach of contract.**”). (Emphasis added). See, Hubbell Electric, Inc. v. State of New York, 583 N.Y.S.2d 112, 114 (N.Y. Ct. Cl. 1992) (“Where a liquidating agreement exists, **there is no requirement that the contractor must have directly suffered a loss prior to the institution of a suit against the owner.**”). (Emphasis added). See, Roof-Techs International, Inc. v. State of Kansas et al, 57 P.3d 538, 552-553 (Kan. Ct. App. 2002) (where the court stated that the concept of a pass through agreement “begins with the fact the subcontractor can sue the general contractor who can then sue the owner. The agreements are intended to avoid an extra layer of litigation . . . In such agreements, the sub releases the prime from any liability, and the prime promises only that it will press the sub’s claim . . . and pay the sub whatever it recovers.”). See, Interstate Contracting Corp. v. City of Dallas, 135 S.W.3d 605, 607, 610, 619 (Tex. 2004) (where the court held that “if a contractor is liable to the subcontractor for damages sustained by the subcontractor, pursuant to a pass-through agreement the contractor can bring an action against the owner for the subcontractor’s damages.” Under a liquidation agreement, “the subcontractor releases all claims it may have



against the contractor in exchange for the contractor's promise to pursue those claims against the owner and remit any recovery to the subcontractor." To defeat a pass-through claim, "an owner must prove that the contractor would not be liable to the subcontractor if it refused to present the pass-through claim or to remit the recovery to the subcontractor . . . **a claims-presentment arrangement is sufficient to prove liability, even when the agreement provides that the contractor has no obligation to pay the subcontractor unless and until it recovers from the owner.**". (Emphasis added).

In sum, the trial court clearly erred in finding that MVC/Southwest was not entitled to a 3/8 of an inch thickness deficiency on each layer of asphalt. The contract specifications relating to allowable thickness deviations are ambiguous. MVC/Southwest has proffered a reasonable interpretation of such and, therefore, this Court should construe the ambiguous contract language against UDOT, the drafter, even if it believes UDOT has also offered a reasonable interpretation.

Moreover, UDOT's claim that this Court should affirm the trial court's decision to reject MVC/Southwest's thickness claim on alternate grounds fails because the thickness claim is part of MVC/Southwest's block paving claim. The damages resulting from thickness penalties assessed by UDOT against MVC were suffered by MVC as well as Southwest. MVC/Southwest entered into an enforceable pass-through/liquidating agreement allowing MVC/Southwest to pursue the claims, which belong to both MVC and Southwest, in MVC's name.

**II. MVC/Southwest is Entitled to Interest From November 11, 2003, the Date on Which its Damages Were Complete and Calculable With Reasonable Mathematical Accuracy.**

UDOT claims that the applicable standard of review when determining when

damages were incurred is a clearly erroneous standard. In support of its position, UDOT cites Wilcox v. Anchor Wate Co., 2007 UT 39, ¶ 9, 164 P.3d 353. However, Wilcox says nothing about the standard of review being a clearly erroneous standard when determining the date on which damages were incurred, as alleged by UDOT.

The correct standard of review on the interest issue is a correctness standard. See, Iron Head Construction, Inc. v. Gurney, 2008 UT App 1, ¶ 5; 176 P.3d 453 (Utah Ct. App. 2008). In Iron Head Construction, the trial court found that the last day of December 2000 was the appropriate date from which prejudgment interest was to accrue. Id. at ¶ 3. On appeal, the Utah Court of Appeals used a correctness standard in determining whether the trial court's interest award was proper. Id. at ¶ 5. Using the correctness standard, the court agreed with the trial court and found that the last day of December 2000 was when prejudgment interest began. Id. at ¶ 21. See also, Davis County v. Zions First National Bank, 2002 UT 191, ¶¶ 13, 35; 51 P.3d 718 (where the Utah Court of Appeals, using a correctness standard of review, reversed the trial court's decision establishing October 31, 1997 as the date on which prejudgment interest began to accrue).

In the instant case, the trial court erred in determining that prejudgment interest did not begin to accrue until November 1, 2004. Utah case law clearly provides that interest begins accruing when damages become complete and fixed and measurable by facts and figures. See, Encon Utah, LLC v. Fluor Ames Kraemer, LLC, 2009 UT 7, ¶ 51; 210 P.3d 263; Andreason v. Aetna Cas. & Surety Co., 848 P.2d 171, 177 (Utah Ct. App.

1993). Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 20, n.5; 82 P.3d 1064, 1069. UDOT acknowledges such in its response brief. (Resp. Br., at 28). Moreover, “**interest is applied from the date payment is due** to the judgment date.” Davies v. Olson, 746 P.2d 264, 270 (Utah Ct. App. 1987). (Emphasis added).

The evidence clearly reflects that the paving portion of the I-215 Project was completed by October 3, 2003 and that by November 11, 2003, MVC/Southwest had compiled a detailed analysis of increased costs suffered by MVC/Southwest due to UDOT’s directive that ribbon paving not be used by MVC/Southwest on certain areas of the I-215 Project. (R. 1421: 113-150; R. 1424: 718; Trial Ex. 24). Those costs were complete, fixed, measurable and due by November 11, 2003. The trial court found that MVC/Southwest’s costs were reliable, credible, accurate and reasonable. (R. 1513, 1524).

On appeal, UDOT does not dispute the legitimacy of MVC/Southwest’s costs or the means and methods utilized by MVC/Southwest in compiling the costs. Rather, UDOT argues that MVC did not incur the damages and, therefore, is not entitled to prejudgment interest. For the reasons set forth above and in MVC/Southwest’s Brief of Appellee, the damages clearly are MVC’s damages, as well as Southwest’s, and Southwest, pursuant to the pass-through/liquidating agreement, is pursuing those damages on behalf of both MVC and Southwest.

As it relates to UDOT’s argument that, even if MVC did incur damages, it did not incur them until UDOT either rejected MVC’s claim for additional compensation or

made its final payment to MVC on July 21, 2005, this argument makes no sense.<sup>2</sup> (Resp. Br., at 29). The case law cited above clearly establishes that interest begins to run on the date payment is due, not when a claim is rejected or final payment is made. See, Davies v. Olson, 746 P.2d 264, 270 (Utah Ct. App. 1987). (Emphasis added). As discussed above, the paving portion of the I-215 Project was completed by October 3, 2003. (R. 1424: 718). Pursuant to accepted billing practices, final payment to MVC/Southwest was due approximately 30 days after the paving portion was completed, which would have been November 3, 2003. MVC/Southwest finished compiling the costs associated with UDOT's changes to the paving work by November 11, 2003. (Trial Ex. 24). Accordingly, interest began to run as no later than November 11, 2003. To find otherwise would allow non-paying parties, such as UDOT, to avoid the paying of interest by simply not responding to a contractor's claim for compensation until months or years after the work was performed. This, in substance, is what UDOT is urging the Court to accept.

### CONCLUSION

For the reasons set forth above, and in MVC/Southwest's Brief of Cross-Appellant, this Court should reverse the trial court's ruling that MVC/Southwest was only entitled to a 3/8 of an inch thickness deficiency on the total thickness of the asphalt

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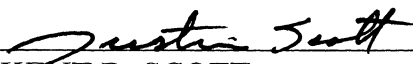
<sup>2</sup> The "Final Estimate" referred to by UDOT reflects payment from UDOT to MVC relating to final undisputed amounts between UDOT and MVC. It clearly did not include amounts claimed by MVC/Southwest relating to the block paving claim as evidenced by the fact that MVC/Southwest's Complaint for extra paving costs had already been filed and discovery between UDOT and MVC/Southwest was ongoing at that time.

installed by MVC/Southwest and find that MVC/Southwest was entitled to 3/8 of an inch deficiency on each of the two layers installed by MVC/Southwest, for a total 3/4 of an inch deficiency on the total asphalt thickness. The contract specifications relating to allowable thickness deviations in the asphalt thickness are ambiguous and should be construed against UDOT, the drafter, even if this Court believes UDOT's interpretation is reasonable. MVC/Southwest's interpretation is clearly reasonable and this Court should remand this matter back to the trial court and instruct the trial court to enter judgment in favor of MVC/Southwest on the thickness reduction claim.

In addition, this Court should find that the trial court erred in establishing November 1, 2004 as the date interest on MVC/Southwest's damages began to accrue and rule that interest on MVC/Southwest's damages should have accrued beginning on November 11, 2003 because MVC/Southwest's damages were fixed, complete and measureable as of November 11, 2003.

DATED this 20 day of November, 2009.

**BABCOCK SCOTT & BABCOCK**

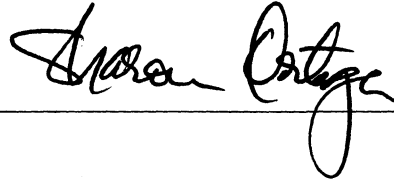
  
KENT B. SCOTT  
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Attorneys for Meadow Valley  
Contractors, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed, postage prepaid, two (2) copies of the <sup>DEPLY</sup> BRIEF OF ~~APPELLEE AND~~ CROSS-APPELLANT on this 23 day of November, 2009, to the following:

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