

1991

James D. Ericksen v. Salt Lake City Corporation and Salt Lake Airport Authority v. Projects Unlimited, Inc., a Utah corporation : Brief of Appellee

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

IN THE UTAH SUPREME COURT

JAMES D. ERICKSEN,
Plaintiff, Appellee
and Cross-Appellant,

vs.

SALT LAKE CITY CORPORATION
and SALT LAKE AIRPORT
AUTHORITY,

Defendants, Appellants
and Cross-Appellees,

vs.

PROJECTS UNLIMITED, INC., a
Utah corporation,

Third-Party Defendant
and Appellee.

Case No. 910210

Priority No. 16

BRIEF OF APPELLEE PROJECTS UNLIMITED, INC.

APPEAL FROM AN ORDER AND JUDGMENT ENTERED IN
THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE KENNETH RIGTRUP PRESIDING

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CLERK SUPREME COURT
UTAH

IN THE UTAH SUPREME COURT

JAMES D. ERICKSEN,)	
)	
Plaintiff, Appellee)	
and Cross-Appellant,)	
)	
vs.)	
)	
SALT LAKE CITY CORPORATION)	Case No. 910210
and SALT LAKE AIRPORT)	
AUTHORITY,)	
)	Priority No. 16
Defendants, Appellants)	
and Cross-Appellees,)	
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vs.)	
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Utah corporation,)	
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PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT

The caption of the case on appeal contains the names of all parties to the proceedings in the district court.

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JURISDICTION

This court has jurisdiction of this appeal pursuant to section 78-2-2(3)(j) of the Utah Code.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Issue:¹ Does the contract between Salt Lake City Corporation and Projects Unlimited clearly and unequivocally show that Projects Unlimited agreed to indemnify the City for the City's own negligence?

Standard of Review: Where, as here, the trial court interprets a contract as a matter of law, its construction is reviewed for correctness and is accorded no particular weight. See, e.g., Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

There are no determinative constitutional provisions, statutes, ordinances, rules or regulations.

¹ Projects Unlimited takes no position on the other issue raised in the City's appeal, namely, whether the City was immune from suit under the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 through -38.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The plaintiff brought this action to recover for personal injuries he suffered while working on a maintenance building at the Salt Lake City International Airport. Record ("R.") at 2-5. Defendant Salt Lake City Corporation (the "City") filed a third-party complaint against the plaintiff's employer, Projects Unlimited, seeking indemnity under its written contract with Projects Unlimited. Id. at 62-69.

Projects Unlimited moved for summary judgment on the third-party complaint on the grounds that Projects Unlimited had not agreed to indemnify the City for the City's own negligence. Id. at 100-124. The City filed a cross-motion for summary judgment based on its interpretation of the contract. Id. at 131-50. The trial court granted Projects Unlimited's motion for summary judgment and denied the City's cross-motion for summary judgment. Id. at 181.

The case went to trial on the plaintiff's claims against the defendants. The jury found that the plaintiff, the City and Projects Unlimited were all negligent and that their negligence had proximately caused the plaintiff to be injured in the amount of \$186,200. Id. at 195-98. The jury apportioned fault as follows:

Plaintiff James Ericksen	10%
Defendant Salt Lake City	50%
Projects Unlimited	40%

Id. at 197. A judgment on the jury's special verdict was entered against the City and Salt Lake Airport Authority and in favor of the plaintiff in the amount of \$94,892, representing the City's share of the verdict—50 percent of the plaintiff's special damages plus prejudgment interest and 50 percent of the plaintiff's general damages. Id. at 266-72. A separate Order and Judgment was entered against the City and in favor of Projects Unlimited on the City's third-party complaint. Id. at 262-65. The defendants then filed a notice of appeal, id. at 275-76, and the plaintiff cross-appealed, id. at 277-79.

B. Statement of Facts²

1. On or about April 9, 1986, the City entered into an Agreement with Projects Unlimited for the construction of an airport maintenance facility. R. at 119-24.

2. Article 15 of the Agreement provides as follows:

ARTICLE 15. LIABILITY. The Contractor [Projects Unlimited] agrees to at all times protect, indemnify, save ha[r]mless and defend the City, its agents and employees from any and all claims, demands, judgments, expenses, incl[ud]ing reasonable attorney's fees, and all other damages of every kind and nature made, rendered or incurred by or in behalf of

² The statement of facts is taken from Projects Unlimited's memorandum in support of its motion for summary judgment. See R. at 104-05. The City did not dispute any of Projects Unlimited's facts as required by rule 4-501(2)(b) of the Judicial Council Rules of Judicial Administration but expressly accepted them and incorporated them into its memorandum in support of its cross-motion for summary judgment. See R. at 134. The trial court therefore properly deemed the material facts undisputed.

any person or persons whomsoever, including the parties hereto and their employees, which may arise out of any act or failure to act, work or other activity related in any way to the project, by the said Contractor, its agents, subcontractors, materialmen or employees in the performance and execution of this Agreement.

R. at 122 (emphasis added). (A copy of the Agreement is included in the Addendum.)

3. On or about March 5, 1987, the plaintiff, James D. Ericksen, was employed by Projects Unlimited and was working on the maintenance facility at the Salt Lake City Airport. Ericksen was standing on a ladder near an automatically controlled door when an inspector for the City opened the door, dislodging the ladder and causing Ericksen to fall to the cement floor. See id. at 3-4 & 8 ¶ 1; Transcript, Mar. 6, 1991 (R. at 289), pp. 10-11.

4. Pursuant to Utah's workers' compensation statute, Projects Unlimited paid benefits to Ericksen through workers' compensation awards. See Deposition of James Ericksen (R. at 288), pp. 21-22.

5. Ericksen filed this lawsuit against the City and Salt Lake Airport Authority alleging negligence by the City. R. at 3-4 ¶¶ 7-8.

6. The City filed a Third Party Complaint against Projects Unlimited claiming, among other things, that Projects Unlimited was required pursuant to article 15 of the parties'

Agreement to indemnify the City from any judgment in favor of Ericksen. Id. at 62-64.

SUMMARY OF ARGUMENT

Under Utah law, the City can only be liable to the plaintiff for the City's own negligence. (Point I.) Moreover, under Utah law, Projects Unlimited can only be liable to the City to the extent it clearly and unequivocally agreed to indemnify the City. (Point II.) Because Projects Unlimited did not clearly and unequivocally agree to indemnify the City for the City's own negligence--which is the only liability the City can have on the plaintiff's complaint--Projects Unlimited cannot be liable to the City on the City's third-party complaint. (Point III.)

Finally, if Ericksen is successful on his cross-appeal, at best the City would only be entitled to a new trial. The court cannot determine the parties' rights and obligations on the City's third-party complaint from the jury's verdict in this case since Projects Unlimited is not bound by that verdict. (Point IV.)

ARGUMENT

I.

THE CITY CAN ONLY BE LIABLE TO ERICKSEN FOR ITS OWN NEGLIGENCE.

The Utah Liability Reform Act, Utah Code Ann. §§ 78-27-37 through -43 (1987), governs the parties' respective rights and

liabilities in this case.³ The Act expressly limits a defendant's liability to the percentage of fault attributable to that defendant. Section 78-27-38 states that a plaintiff "may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant." (Emphasis added.)

Similarly, section 78-27-40 says that "the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant."

Thus, if the City is ultimately held liable to Ericksen at all, it can only be for the City's own fault.

II.

PROJECTS UNLIMITED CAN BE LIABLE TO THE CITY ONLY TO THE EXTENT IT AGREED TO INDEMNIFY THE CITY.

Under the exclusive remedy provision of the Utah Workers' Compensation Act, Utah Code Ann. § 35-1-60 (1988), the statutory employer of an injured employee has no liability to third persons on account of the employee's injuries, and no action at law can be

³ The Liability Reform Act applies to actions for injuries that occurred after its effective date of April 28, 1986. See Stephens v. Henderson, 741 P.2d 952, 954-55 (Utah 1987). Ericksen was injured on March 5, 1987.

maintained against the employer based upon the employee's injuries.⁴ See Freund v. Utah Power & Light Co., 793 P.2d 362, 370 (Utah 1990). Thus, as a general rule, a third party, such as the City, has no claim for indemnity against a statutory employer, such as Projects Unlimited, for amounts the third party is required to pay in an action by an injured employee, such as Ericksen.

An employer, however, can waive the protections of the Workers' Compensation Act by expressly agreeing to indemnify a third party for amounts paid to its employee. Id. at 368, 370; Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1191 (Utah 1983). In this case, Projects Unlimited expressly

⁴ Section 35-1-60 states:

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee . . . shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee.

agreed, in article 15 of its contract with the City, to indemnify the City for certain claims. Thus, the issue here is whether that agreement to indemnify is broad enough to cover the plaintiff's recovery against the City.

III.

PROJECTS UNLIMITED DID NOT CLEARLY AND UNEQUIVOCALLY AGREE TO INDEMNIFY THE CITY FOR THE CITY'S OWN NEGLIGENCE.

The jury in this case found the City responsible for 50 percent of the negligence that proximately caused the accident, and the trial court accordingly limited the plaintiff's recovery against the City to 50 percent of the plaintiff's damages, as it was required to do under the Liability Reform Act. See R. at 268-69, 271; see also supra pt. I. Since Ericksen was only allowed to recover from the City that proportion of his damages attributable to the City's fault, the only issue on appeal is whether Projects Unlimited agreed to indemnify the City for the City's own negligence, the only liability the City has.

"Agreements by which one person obtains another person's agreement to indemnify him from the results of his own negligence are not favorites of the law . . . and are strictly construed against the indemnitee." Shell, 658 P.2d at 1189 (citations omitted). See also Freund, 793 P.2d at 370 ("In a long line of cases spanning more than fifty years, we have repeatedly held that an indemnity agreement which purports to make a party respond for the negligence of another should be strictly construed") (citations

omitted). A party will be held to have contractually assumed ultimate financial responsibility for another's negligence only when its intention to do so is "clearly and unequivocally expressed" in the contract language. Freund, 793 P.2d at 370; Shell, 658 P.2d at 1189.

The contract language in this case does not clearly and unequivocally show any intent on the part of Projects Unlimited to indemnify the City for the City's own negligence. The relevant provision states:

ARTICLE 15. LIABILITY. The Contractor [Projects Unlimited] agrees to at all times protect, indemnify, save ha[r]mless and defend the City, its agents and employees from any and all claims, demands, judgments, expenses, incl[ud]ing reasonable attorney's fees, and all other damages of every kind and nature made, rendered or incurred by or in behalf of any person or persons whomsoever, including the parties hereto and their employees, which may arise out of any act or failure to act, work or other activity related in any way to the project, by the said Contractor, its agents, subcontractors, materialmen or employees in the performance and execution of this Agreement.

R. at 122 (emphasis added).

The underlined phrase modifies the phrase "any and all claims, demands, judgments, expenses, . . . and all other damages of every kind and nature" and limits the category of claims against which Projects Unlimited will indemnify the City. Projects Unlimited only agreed to indemnify the City for claims arising out of the acts or omissions of Projects Unlimited and its agents,

subcontractors, employees and materialmen related to the project--not the acts or omissions of the City. See Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., 395 Ill. 429, 70 N.E.2d 604, 606-07 (1946) (construing similar language).⁵

The City would have the court read the phrase "by the said Contractor, its agents, subcontractors, materialmen or employees" out of the contract. But the court must give effect to every provision of the contract, insofar as possible, including the quoted language. See, e.g., Larrabee v. Royal Dairy Prods. Co., 614 P.2d 160, 163 (Utah 1980). And the quoted language clearly limits the circumstances under which Projects Unlimited agreed to indemnify the City to claims based on the negligence of Projects Unlimited and those under it.⁶

⁵ The indemnity provision in Westinghouse covered claims "arising out of any acts or omissions by the Contractor, his agents, servants or employees in the course of any work done in connection with any of the matters set out in these specifications." 70 N.E.2d at 606. The court found this language "plain and unambiguous." Id. "[B]y such language the agreement to indemnify . . . was specifically limited to acts or omissions by [the contractor], its agents, servants or employees. Any other construction would require the addition of words not used and add thereto conditions and terms about which the contract is silent." Id. at 607.

⁶ Even if the contract language could conceivably be construed as an agreement to indemnify the City for the City's own negligence, when strictly construed against the City, as it must be, see Shell, 658 P.2d at 1189, the language clearly limits Projects Unlimited's liability to claims arising out of its own negligence or the fault of its agents, employees, subcontractors and materialmen--not the fault of the City. Moreover, the Agreement was on the City's printed form, see R. at 119-24 & Addendum, so any ambiguity in the Agreement should be construed against the City, the drafter of the Agreement. See, e.g., Sears

Despite the clear language of the agreement, the City argues that, based on the agreements that this court found sufficient in Freund and Shell, article 15 is broad enough to cover any and all liabilities, including the City's liability for its own negligence.

The agreement in this case differs significantly from the agreements that this court has upheld as clear and unequivocal expressions of the indemnitor's intent to indemnify the indemnitee for the indemnitee's own negligence.

In Freund, for example, the court examined a very extensive and exhaustive indemnification provision.⁷ The provision

V. Riemersma, 655 P.2d 1105, 1107 (Utah 1982); Parks Enters., Inc. v. New Century Realty, Inc., 652 P.2d 918, 920 (Utah 1982).

⁷ The relevant provision read as follows:

21. Licensee shall indemnify, protect, and save harmless Licensor from and against any and all claims, demands, causes of action, costs or other liabilities for damages to property and injury or death to persons which may arise out of or be connected with the erection, maintenance, presence, use or removal of Licensee's equipment, or of structures, guys and anchors, used, installed or placed for the principal purpose of supporting Licensee's equipment or by any act of Licensee on or in the vicinity of Licensor's poles, including, but not by way of limitation, payments made under workmen's compensation laws. Except for intentional wrongdoing or willful negligence on the part of Licensor, or any of its agents or employees, Licensee shall also indemnify protect and save harmless Licensor from and against any and all claims, demands, causes of action, costs, or other liabilities arising from any interruption, discontinuance or interference with Licensee's service which may be occasioned or which may be claimed to have been occasioned by any action of Licensor pursuant to or consistent with this agreement. In addition, Licensee

stated that the indemnitee would indemnify, protect and save harmless the indemnitor from and against "any and all claims, demands, causes of action, costs or other liabilities." The provision further stated that it was meant to provide the indemnitee with "full and complete indemnification" from any claims for damages. Given these provisions, the court found that the lack of an express agreement to indemnify the indemnitee for his own negligence was not fatal: "the broad sweep of the language employed by the parties clearly covers those instances in which the [indemnitee] may be negligent." 793 P.2d at 371. In particular, the word "liabilities" was broad enough to cover "those instances where the [indemnitee] is legally liable for damages, including

shall, upon demand and at its own sole risk and expense, defend any and all suits, actions or other legal proceedings which may be brought or instituted by third persons against Licensor or their successors or assigns on any such claim, demand or cause of action; shall pay and satisfy any said suit, action or other legal proceeding; and shall reimburse Licensor for any and all reasonable legal expenses incurred by Licensor in connection herewith.

This indemnification agreement by Licensee in favor of Licensor, shall provide Licensor with full and complete indemnification, including defense of any suits, actions or other legal proceedings resulting from any claims for damages to property and injury or death to persons and shall apply to all claims, demands, suits, and judgments of whatever nature which shall be made or assessed against Licensor in furnishing such poles under the terms of this agreement or for any other thing done or omitted in conjunction with Licensor's dealings with Licensee.

Quoted in Freund v. Utah Power & Light Co., 625 F. Supp. 272, 276-77 (D. Utah 1985).

those where liability arises because of the [indemnitee's] negligence." Id.

Moreover, the indemnity provision in Freund stated that it "shall apply to all claims" against the indemnitee including claims "for any . . . thing done or omitted in conjunction with [the indemnitee's] dealings with [the indemnitor]." The agreement also stated that, "[e]xcept for intentional wrongdoing or willful negligence on the part of" the indemnitee, the indemnitor "shall also indemnify[,] protect and save harmless [the indemnitee] from and against any and all claims . . . arising from any . . . interference with [the indemnitor's] service which may be occasioned or which may be claimed to have been occasioned by any action of [the indemnitee] pursuant to or consistent with this agreement." Thus, the agreement expressly covered at least some actions of the indemnitee and expressly excluded only willful and intentional wrongdoing by the indemnitee.

The court concluded that the provision "as a whole expressed a clear and unequivocal intent by the parties" that the indemnitor would indemnify the indemnitee from any and all liabilities, including any liability for the indemnitee's own negligence. Id.

The provision in this case is much more modest than--and quite different from--the provision in Freund. Unlike the provision in Freund, the provision in this case does not expressly indemnify the City for "any and all . . . liabilities." In fact,

the only reference to liabilities at all is in the heading to article 15--"Liability"--which apparently is a reference to Projects Unlimited's obligation to indemnify the City and not to any liability on the part of the City.

Nor does the indemnification provision in this case expressly cover some conduct by the City while expressly excepting intentional or willful conduct.

Most important, the indemnification provision in Freund covered any and all claims and suits and did not limit the indemnification to acts by the indemnitor or those under him, as article 15 of the agreement in this case does.

Similarly, the indemnification provision in Shell expressly excluded claims resulting from the indemnitee's "sole negligence" but did not expressly exclude other claims based on the indemnitee's negligence.⁸ The court could therefore infer that the

⁸ The provision read, in relevant part:

. . . Contractor agrees to protect, indemnify and save Operator, its employees, and agents harmless from and against all claims, demands and causes of action of every kind and character arising in favor of Contractor's employees, Operator's employees or third parties on account of bodily injuries, death or damage to property arising out of or in connection with the performance of this agreement, except where such injury, death or damage has resulted from the sole negligence of Operator, without negligence or willful act on the part of Contractor, its agents, servants, employees, or subcontractors. Contractor shall defend all suits brought upon such claims and pay all costs and expenses incidental thereto, but Operator shall have the right, at its option, to participate in the defense of any such suit without relieving Contractor of any obligation

parties did not intend to exclude such claims. Here, on the other hand, there is no basis for such an inference because the indemnification provision is silent as to claims based on the indemnitee's negligence.

Moreover, the indemnification provision in Shell did not limit the indemnitor's liability to claims arising out of the indemnitor's acts or omissions, as the agreement in this case does.

Thus, neither Freund nor Shell--the two Utah cases the City relies on--is controlling. The language of the indemnity provisions in each of those cases was substantially different from the language of the indemnity provision in this case.

In a lengthy footnote, the City also cites cases from other jurisdictions. But those cases, like Freund and Shell, all involved different contract language and are thus distinguishable. In one of the cases, the contract expressly covered indemnity for injuries due to the negligence of the owner. See Rovnak v. Union Carbide Corp., Linde Div., 64 A.D.2d 839, 407 N.Y.S.2d 323, 323-24 (1978). In another, the contractor had agreed to indemnify the owner from any liability or damages arising out of or resulting from the presence of the contractor's employees on the owner's premises, and an employee of the contractor was injured while he was on the owner's premises. See Reynolds Metals Co. v. J.U.

hereunder.

Quoted in 658 P.2d at 1189 n.1.

Schickli & Bros., Inc., 548 S.W.2d 841, 842 (Ky. 1977). In each of the remaining cases, the contract language covered claims or injuries "incident to," "arising out of" or occurring "in connection with" the work. See Alamo Lumber Co. v. Warren Petroleum Corp., 316 F.2d 287, 288 (5th Cir. 1963) (indemnity provision covered any claim "which arises out of or in connection with the activities of Contractor, Contractor's servants, agents and employees") (applying Texas law); Richmond v. Amoco Prod. Co., 390 F. Supp. 673, 674-75 (E.D. Tex. 1975) (contract made contractor liable for claims for injuries "incident to or arising out of, the performance of this contract") (applying Texas law), aff'd, 532 F.2d 1373 & 1374 (5th Cir. 1976) (table); Buffa v. General Motors Corp., 131 F. Supp. 478, 481 (E.D. Mich. 1955) (contractor assumed risk of injuries "resulting from any action or operation under the contract or in connection with the work") (applying Michigan law); Gust K. Newberg Constr. Co. v. Fischbach, Moore & Morrissey, Inc., 46 Ill. App. 2d 238, 196 N.E.2d 513, 515 (1964) (agreement to indemnify for injuries "caused by, resulting from, arising out of, or occurring in connection with the execution of the Work provided for in this Contract"); St. Paul Mercury Indem. Co. v. Kopp, 121 N.E.2d 23, 24 (Ohio Ct. App. 1954) (agreement to indemnify for injuries "growing out of or in any way connected with the performance of the work awarded to Contractor"); Crews Well Serv. v. Texas Co., 358 S.W.2d 171, 172 (Tex. Civ. App.) (agreement to indemnify for injuries "arising out of or in connection with the

performance of said work"), writ refused, n.r.e., 360 S.W.2d 873 (Tex. 1962). Under such provisions, the only requirement is that the injury have some connection with the contractor's work. Alamo Lumber, 316 F.3d at 290. It does not have to arise out of some act or failure to act "by the . . . Contractor," as in this case. Cf. Buffa, 131 F. Supp. at 482 (expressly distinguishing cases such as this one in which the contract limits indemnity to injuries arising from any action of the contractor). Other courts have also distinguished agreements to indemnify a contractee for injuries arising out of or incidental to performance of the work from agreements to indemnify the contractee for injuries arising out of the acts or omissions of the contractor. See, e.g., Spurr v. Acme Steel Co., 238 F. Supp. 606, 607-08 (N.D. Ill. 1964), aff'd, 385 F.2d 322 (7th Cir. 1967); Daigle v. Lang, 377 So.2d 1384, 1390-91 (La. Ct. App. 1979), cert. denied, 381 So.2d 510 (La. 1980).

In none of the cases the City relies on did the contract limit the contractor's duty to indemnify to claims arising out of acts or omissions by the contractor, its agents, subcontractors, materialmen and employees, as the contract in this case does.⁹

⁹ In Richmond the contractor's duty to indemnify the owner for injuries to the owner's employees or to third parties was so limited. That language would not have been enough to hold the contractor liable had the injured party been a third party, see 390 F. Supp. at 676, but the injured party there, as here, was an employee of the contractor, and the contract provision covering the contractor's duty to indemnify the owner for injuries to the contractor's own employees did not say that the injury must have arisen out of the negligence of the contractor, see id. at 674-75, 676.

And, in fact, the vast majority of the cases that have considered language similar to that of the indemnity provision in this case have concluded that such language does not require the contractor to indemnify an owner for the owner's own active negligence. See, e.g., United States v. Seckinger, 397 U.S. 203, 212-13 (1970) (contract making contractor responsible for all damages "that occur as a result of his fault or negligence" did not require the contractor to indemnify the owner for the owner's negligence) (applying federal law); Smith v. Chevron Oil Co., 517 F.2d 1154, 1156-57 (5th Cir. 1975) (agreement by which contractor agreed to indemnify owner from any claim "in any way arising out of or connected with the performance by Contractor of services hereunder" "unquestionably does not provide for indemnification for the indemnitee's own negligence in the clear and specific language required by Louisiana law") (citations omitted); Cole v. Chevron Chem. Co.—Oronite Div. v. Mechanical Contracting Eng'rs, Inc., 477 F.2d 361, 367-69 (5th Cir.) (accord) (applying Louisiana law), cert. denied, 414 U.S. 978 (1973); Fowler v. Boise Cascade Corp., 739 F. Supp. 671, 673-75 (D. Me. 1990) (agreement to indemnify owner for any claim "resulting from, pertaining to or arising out of performance of this Contract by Contractor, its employees, agents, assigns or subcontractors" did not cover claims for the owner's own negligence) (applying Maine law), aff'd, ____ F.2d ____ (1st Cir. Oct. 29, 1991) (1991 Westlaw 217303); Colombo v. Republic Steel Corp., 448 F. Supp. 833, 835 (W.D. Pa. 1978) (agreement to

indemnify owner for claims "by reason of acts or omissions by [contractor], its agents or employees, in the execution of its contractual obligations" did not cover a loss due to the owner's own negligence) (applying Pennsylvania law); District of Columbia v. C.F.&B., Inc., 442 F. Supp. 251, 254 (D.D.C. 1977) (contractor's agreement to be responsible for injuries "that occur as a result of any act or omission of the contractor in connection with the prosecution of the work" did not cover injuries caused by the owner's negligence); Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., 395 Ill. 429, 70 N.E.2d 604, 606-07 (1946) (agreement to indemnify owner for claims "arising out of any acts or omissions by the Contractor, his agents, servants or employees in the course of any work done in connection with" the contract did not cover claims caused by the negligence of the owner's employee); Kaspar v. Clinton-Jackson Corp., 118 Ill. App. 2d 364, 254 N.E.2d 826, 830 (1969) (contractor's agreement to assume liability for injuries "caused by or resulting from or arriving [sic] out of any act or omission on the part of the Contractor in connection with this Agreement or for the prosecution of the work hereunder" did not provide indemnity for the owner's own negligence); Employers Mut. Liab. Ins. Co. of Wis. v. Griffin Constr. Co., 280 S.W.2d 179, 183 (Ky. 1955) (agreement to indemnify owner for claims for injuries "happening by reason of any negligence on the part of the Contractor or any of Contractor's agents or employees" did not cover damages that occurred by reason of the owner's own

negligence); Strickland v. Nutt, 264 So.2d 317, 322-23 (La. Ct. App.) (agreement to indemnify owner against any and all liability for injuries "incident to or resulting from any and all operations performed by [contractor] under any of the terms of this contract" did not indemnify the owner for its negligence), writ refused, 262 La. 1124, 266 So.2d 432 (1972); Buford v. Sewerage & Water Bd. of New Orleans, 175 So. 110, 112 (La. Ct. App. 1937) (agreement to protect owner from injuries received "by or from said Contractor, his servants or agents in the construction of said work . . . or by or on account of any act or omission of the said Contractor or his agents" did not indemnify the owner against the consequences of its own negligence); Heat & Power Corp. v. Air Prods. & Chems., Inc., 320 Md. 584, 578 A.2d 1202, 1206-07 (1990) (agreement to indemnify owner for any liability "resulting from or arising out of or in connection with the performance of this contract by Contractor" did not indemnify the owner against its own negligence); Kansas City Power & Light Co. v. Federal Constr. Corp., 351 S.W.2d 741, 745-46 (Mo. 1961) (agreement to indemnify owner for claims "resulting from or arising out of the acts or omissions of the Contractor, or any sub-contractor, their respective servants, agents, and employees" did not indemnify the owner against the results of its own negligence); Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 48 N.E.2d 299, 303 (1943) (agreement to indemnify owner for damages "due to any act or omission of the Contractor, his employees or agents, arising out of the work of the Contractor" did not cover

injuries due to the owner's active negligence); Morton v. Union Traction Co., 20 Pa. Super. 325, 335-37 (1902) (agreement to indemnify owner for claims for injuries received "by or from the said contractor . . . or by or on account of any act or omission of the said contractor or his agents" did not require the contractor to indemnify the owner for its own negligence); Humble Oil & Refining Co. v. Wilson, 339 S.W.2d 954, 955 (Tex. Civ. App. 1960) ("where the indemnity is from loss resulting from the indemnitor's 'negligent acts or omissions,' the dominant weight of authority establishes that the agreement does not cover loss where the indemnitee's negligence concurs in causing the injury") (citation omitted); Aberdeen Constr. Co. v. City of Aberdeen, 84 Wash. 429, 147 P. 2, 3 (1915) (agreement to indemnify owner for losses caused by "any act or omission done or suffered to be done by the said contractor, its agents, servants, employes, or subcontractors in the performance of said contract" did not protect the owner from losses caused by its own negligence).

In short, a strict construction of the indemnification provision in this case does not show a clear and unequivocal intention on the part of Projects Unlimited to indemnify the City from liability for the City's own negligence, and the cases construing similar indemnity agreements do not support the City's claim. The Agreement limits the indemnification to the acts of Projects Unlimited, its agents, employees, subcontractors and materialmen. Because the City has no liability to Ericksen for

claims arising from others' actions, it also has no claim against Projects Unlimited for indemnity.

IV.

THE COURT SHOULD NOT DIRECT ENTRY OF JUDGMENT IN FAVOR
OF THE CITY ON ITS THIRD-PARTY COMPLAINT EVEN IF ERICKSEN IS
SUCCESSFUL ON HIS CROSS-APPEAL.

Ericksen (the plaintiff and Projects Unlimited's employee) has cross-appealed, claiming that Projects Unlimited should not have been listed on the Special Verdict form. Projects Unlimited takes no position on that issue. In the closing paragraph of its brief, however, the City argues that, if the court grants Ericksen judgment on his cross-appeal for damages against Salt Lake City in amounts attributable to the negligence of Projects Unlimited, then Projects Unlimited should be required to indemnify the City for those amounts. Brief of Appellants Salt Lake City Corporation and Salt Lake Airport Authority at 21.

The City's argument is wrong for four reasons.

First, under the Liability Reform Act, the City cannot be liable for Projects Unlimited's negligence. See supra pt. I. Ericksen cannot recover from the City any amount attributable to the negligence of Projects Unlimited. And, because Projects Unlimited did not clearly and unequivocally agree to indemnify the City for the City's own negligence, Projects Unlimited cannot be liable to the City regardless of the court's decision on Ericksen's cross-appeal.

Second, the City assumes that, if Ericksen prevails on his cross-appeal, this court can simply order the entry of a judgment based on the jury's findings as to the parties' respective proportions of fault. However, if Ericksen is right that Projects Unlimited should not have been listed on the verdict form, then the case should be remanded for a new trial on Ericksen's claim against the City, since the court cannot say how the jury would have apportioned fault among Ericksen and the City had Projects Unlimited not been listed on the verdict form.

Third, even if the City could somehow be liable to Ericksen for Projects Unlimited's negligence and this court could simply remand the case for entry of an increased judgment in favor of Ericksen, the jury's apportionment of fault among Ericksen, the City and Projects Unlimited would not be binding on Projects Unlimited since Projects Unlimited did not have an opportunity to defend itself at trial. A party, such as the City, who has litigated an issue cannot assert a judgment against another who did not have the opportunity to litigate the issue. See, e.g., Nielson v. Droubay, 652 P.2d 1293, 1296 (Utah 1982); Ruffinengo v. Miller, 579 P.2d 342, 343-44 (Utah 1978). Projects Unlimited was granted summary judgment before trial and therefore did not participate in the trial. Thus, it cannot be bound by the jury's finding as to its negligence. If it had had an opportunity to defend itself at trial, the jury may not have apportioned any fault to Projects Unlimited.

Finally, the City's argument proceeds from a false premise. The City assumes that, if Projects Unlimited is not included in the verdict form, the jury must assign Projects Unlimited's negligence to one of the other parties. Presumably, the argument goes as follows: The jury must determine 100 percent of the fault that caused the accident. It then must apportion that total fault among those listed on the verdict form. If Projects Unlimited is removed from the form, the only way the jury can reach an apportionment that totals 100 percent is by attributing Projects Unlimited's fault, if any, to either Ericksen or the City. Because Projects Unlimited agreed to indemnify the City for Projects Unlimited's negligence, Projects Unlimited would then have to indemnify the City to the extent its negligence was attributed to the City.

There are two flaws in this argument. First, nothing in the Liability Reform Act requires the jury to determine all of the causes of the plaintiff's injuries and to apportion fault among them all. Rather, the act simply requires the jury to "find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant." Utah Code Ann. § 78-27-39 (emphasis added). In other words, if the jury is properly instructed, it will simply compare the fault of those listed on the verdict form, not the fault of all tortfeasors, absent or otherwise. It will not have to apportion or even

consider any fault of a so-called phantom tortfeasor, that is, one who is not a defendant and thus not listed on the verdict form. So even if the jury's apportionment of fault totals 100 percent, that does not necessarily mean that the jury has apportioned absent tortfeasors' fault to the parties listed on the verdict form. If the court instructs the jury in the language of the Liability Reform Act and the jury returns a verdict finding the plaintiff, for example, 33 percent at fault and the defendant 67 percent at fault, that does not mean that the defendant was responsible for 67 percent of the total fault that caused the plaintiff's injuries. It simply means that the defendant was twice as much at fault as the plaintiff was. Other parties not listed on the verdict form may have been more at fault than either. But that does not mean that the fault of the absent parties must have been attributed to the defendant.

The second flaw in the City's reasoning is that nothing in the Liability Reform Act requires the jury's apportionment of fault to total 100 percent. The court can simply ask the jury: "Of the total fault that proximately caused the plaintiff's injuries, what percentage or proportion is attributable to the plaintiff, and what percentage or proportion is attributable to the City?" To the extent the jury's apportionment does not total 100 percent, the difference will presumably be the fault of third persons.

If the City's premise were correct, it would violate both the letter and the spirit of the Liability Reform Act. If, for

example, the jury were instructed to apportion the total fault that caused the plaintiff's injuries but only among those listed on the verdict form, the jury would have to apportion phantom tortfeasors' fault to one of the parties listed on the form, in violation of the requirement that no defendant be liable for more than his share of fault. See Utah Code Ann. §§ 78-27-38 & -40. In fact, under the City's reasoning, the jury would have to apportion fault twice. First, it would have to apportion fault between Ericksen and the City. Then it would have to apportion fault a second time, between the City and Projects Unlimited. That is, it would have to answer the question, "Of the total fault that you have attributed to the City, what percentage is really attributable to Projects Unlimited and not to the City?" Simply to ask the question is to show the absurdity of such a system. If the City's reasoning were right, then the court would have to assume that, when it instructed the jury to state the percentage of fault attributable to the City, the jury would disregard the instruction and apportion to the City the negligence of third parties.

In short, if the court concludes that Projects Unlimited was improperly listed on the verdict form, it should remand the case for a new trial. But even then the City can only be liable for its own fault. Since Projects Unlimited did not agree to indemnify the City for the City's own fault, Projects Unlimited cannot be liable to the City even if Ericksen is successful on his cross-appeal.

CONCLUSION

For the foregoing reasons, the summary judgment in favor of Projects Unlimited and against the City on the City's third-party complaint should be affirmed.

DATED this 25th day of November, 1991.

SUITTER AXLAND ARMSTRONG & HANSON

/s/

BRUCE T. JONES, ESQ.
CHARLES P. SAMPSON, ESQ.
PAUL M. SIMMONS, ESQ.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY four true and correct copies of the foregoing Brief of Appellee Projects Unlimited, Inc. were mailed, postage prepaid thereon, this 25th day of November, 1991, to:

Roger H. Bullock, Esq.
STRONG & HANNI
9 Exchange Place, #900
Salt Lake City, Utah 84111

Ned P. Siegfried, Esq.
SIEGFRIED & JENSEN
310 East 4500 South, #620
Salt Lake City, Utah 84107

/s/

ADDENDUM

1. Order and Judgment on third-party complaint, March 8, 1991
2. Agreement between Salt Lake City Corporation and Projects Unlimited, April 9, 1986

MAR 08 1991

SALT LAKE COUNTY
Constance George
Deputy Clerk

BRUCE T. JONES, ESQ. (#1732)
CHARLES P. SAMPSON, ESQ. (#4658)
of and for
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Third-Party Defendant
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

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

JAMES D. ERICKSEN,)	
)	
Plaintiff,)	
)	
vs.)	ORDER AND JUDGMENT
)	
SALT LAKE CITY CORPORATION)	
and SALT LAKE AIRPORT)	
AUTHORITY,)	
)	
Defendants.)	

SALT LAKE CITY CORPORATION,)	
)	
Third-Party Plaintiff,)	
)	Civil No. C88-637
vs.)	
)	Judge Kenneth Rigtrup
PROJECTS UNLIMITED, INC.,)	
a Utah corporation,)	
)	
Third-Party Defendant.)	

Third-Party Defendant Projects Unlimited, Inc. ("Projects"), brought a Motion for Summary Judgment on the Third-Party Complaint of Salt Lake City Corporation against Projects, requesting that the Court grant judgment in favor of Projects. Salt

Lake City Corporation brought a Cross-Motion for Summary Judgment against Projects.

Projects moved the Court on the grounds that the express language of the construction Agreement dated April 9, 1986, between the parties, and in particular ARTICLE 15 contained therein respecting indemnification, does not extend to allegations of Salt Lake City's own negligence. Pursuant to Utah's Comparative Negligence provisions, the plaintiff can only recover from Salt Lake City in this action the amount of damages equivalent to the proportion of fault attributable to Salt Lake City.¹ As a consequence of the Utah Workmen's Compensation Act,² where the plaintiff has brought an action alleging negligence by Salt Lake City in a job-related injury, the potential liability of Projects (the former employer of plaintiff at the time of the injury) to Salt Lake City, if any, can only arise from a contract of indemnification wherein Projects clearly and unequivocally agrees to indemnify Salt Lake City from Salt Lake City's own negligence. Salt Lake City, and indirectly the plaintiff, cannot recover from Projects except where Projects has clearly and unequivocally waived the bar afforded Projects by the Workmen's Compensation Act. Salt Lake City cannot here maintain a third-party action against Projects because there is no clear and

¹ Utah Code Ann. § 78-27-40 (1986), as amended.

² Utah Code Ann. § 35-1-60 (1953), as amended.

unequivocal indemnification expressed in the Agreement between the parties whereby Projects indemnifies or agrees to defend Salt Lake City from Salt Lake City's own negligence.

The Court having reviewed the Memorandum filed by the parties, considered the admissible evidence proffered by the parties, and heard the oral arguments of counsel at a hearing held on March 4, 1991, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The Motion for Summary Judgment of Third-Party Defendant Projects Unlimited, Inc. is granted, thereby dismissing the Third-Party Complaint of Salt Lake City with prejudice. The causes of action alleged in the Third-Party Complaint are barred by Utah's Workmen's Compensation Act, Utah Code Ann. § 35-1-60 (1953), as amended, there being no clear and unequivocal waiver of the bar expressed in the construction Agreement between the parties requiring Projects to indemnify or defend Salt Lake City from or against allegations of Salt Lake City's own negligence.

2. The Cross-Motion for Summary Judgment of Salt Lake City Corporation is denied.

3. That judgment be, and hereby is, entered in favor of Third-Party Defendant Projects and against Third-Party Plaintiff Salt Lake City Corporation.

DATED this 8th day of March, 1991.

BY THE COURT:


HONORABLE KENNETH RISTRUP

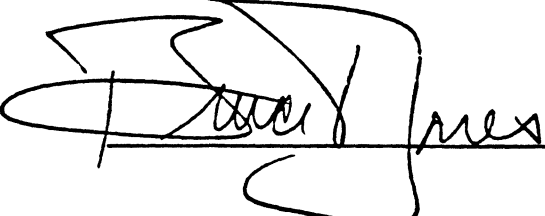
*agreed as to
for defendants*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served a true and correct copy of the foregoing ORDER AND JUDGMENT was mailed, postage prepaid, this 6 day of March, 1991, to:

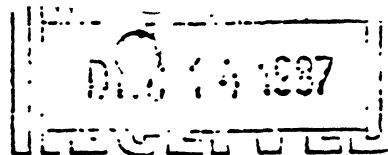
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9 Exchange Place, #600
Salt Lake City, Utah 84111

Ned P. Siegfried, Esq.
SIEGFRIED & JENSEN
310 East 4500 South, #620
Salt Lake City, Utah 84107



BTJ11.10

AGREEMENT



For

AIRPORT MAINTENANCE FACILITIES - PHASE II

PROJECT NO. #19-A-153-3

THIS AGREEMENT is made and entered into as of the 9 day of APRIL, 1986 by and between SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah, (hereinafter "CITY") and

PROJECTS UNLIMITED

(hereinafter "CONTRACTOR") whose address is: 302 WEST 5400 SOUTH
#206A MURRAY, UTAH 84107.

WITNESSETH:

WHEREAS, the City intends to have completed and Contractor agrees to perform the work as set forth in the contract documents (hereinafter the work or the project) for Project No. 19-A-153-3, Airport Maintenance Facilities, Phase II; and

WHEREAS, the contractor for the sum and under terms and conditions herein stated agrees to perform the work.

NOW, THEREFORE, the City and the Contractor for the consideration hereinafter provided, agree as follows:

ARTICLE 1. SCOPE OF WORK. The Contractor agrees to furnish all labor, materials and equipment to complete the said work as required in the drawings and specifications which are hereby made a part of this contract by reference. It is understood and agreed by the parties hereto that all work shall be performed as required in the drawings and specifications and shall be subject to inspection and approval of the City or its authorized representative. The relationship of the Contractor to the City hereunder is that of an independent contractor.

ARTICLE 2. TIME OF COMPLETION. The work under this Contract shall be commenced upon Notice to Proceed and shall be completed in accordance with the Contract Schedule and Liquidated Damages, page P-3.

ARTICLE 3. LIQUIDATED DAMAGES. Time is the essence of this Contract. The Contractor agrees that for each and every day any portion of the work remains incomplete after the time herein fixed by the City or within such additional time as may have been allowed by written extension, the City shall deduct and retain out of the money which may be due or become due said Contractor, or Contractor shall pay to the City, the sum or sums indicated in the Contract Schedule and Liquidated Damages, page P-3, for each and every calendar day the work remains incomplete after the date fixed therein for completion. Said sum is, in view of the difficulty of determining City's damages, hereby agreed upon, fixed and determined by the parties hereto as liquidated compensatory damages that the City will suffer by reason of the failure of the Contractor

to complete the work within the time agreed upon, and such daily compensation shall apply to each portion of said work after the time herein agreed upon for its completion.

Permitting the Contractor to continue and finish the work or any part of it after the time fixed for its completion or after the date to which the time for completion may have been extended, shall in no way operate as a waiver on the part of the City of any of its rights under this Agreement.

ARTICLE 4. CONTRACT SUM. The City agrees to pay and the Contractor agrees to accept for full performance of this Contract, the sum bid by the Contractor in his Proposal (page P-1). The contract sum also includes the cost of all bonds, insurance, permits and fees required herein and all charges, expenses or assessments of whatever kind or character. No claim for services furnished by the Contractor not specifically provided for herein shall be honored by City.

ARTICLE 5. PAYMENT. The City agrees to pay the Contractor from time to time as the work progresses, but not more than once each month after date of Notice to Proceed, and only upon written certification by the Engineer. Within 30 calendar days of the time the Deputy Director approves any partial payment, the City will prepare a check for payment.

ARTICLE 6. PAYMENT FOR MATERIALS ON HAND. There shall be no payment for stored materials. Payment for materials shall be made only after the materials are incorporated into the project.

ARTICLE 7. SALES TAXES. The City is exempt from sales taxes on property sold directly to it. Therefore, the City reserves the right for any equipment or materials (exceeding \$500 in value) to be ordered by the Contractor for use hereunder, to require that the City be billed directly by the supplier, after issuance of a City purchase order, at the Contractor's net cost less any applicable discounts. The City cost for such equipment or material less an amount equal to the sales tax which would otherwise be applicable, if any, shall be deducted from sums due the Contractor hereunder.

ARTICLE 8. INDEBTEDNESS. Before final payment is made, the Contractor must submit evidence satisfactory to the City that all payrolls, material bills, subcontracts and all outstanding indebtedness in connection with the work have been paid or that arrangements have been made for their payment. Payment will be made without unnecessary delay after receipt of such evidence as mentioned above and final acceptance of the work by the City.

ARTICLE 9. SCHEDULE OF WAGES. Deleted.

ARTICLE 10. ADDITIONAL WORK. It is understood and agreed by the parties hereto that no money will be paid to the Contractor for any new or additional labor or materials furnished, as defined in Section GP 6.02, unless a new contract or a modification hereof for such additional materials or labor has been made in writing and executed by the City and Contractor.

The City specifically reserves the right to modify or amend this Contract and the total sum due hereunder, either by enlarging or restricting the scope of the work.

ARTICLE 11. ACCEPTANCE. The work will be inspected for acceptance by the Engineer within a reasonable time upon receipt of notice from the Contractor that the work is complete and ready for inspection.

ARTICLE 12. DISPUTES.

- a. Except as otherwise provided in this Contract, any dispute concerning a question of fact arising under this Contract, which is not disposed of by written agreement shall be decided by the Director of Airports, who shall reduce his decision to writing, and mail or otherwise furnish a copy thereof to the Contractor. The decision of said Director shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to said Director a written appeal. The decision of the Director or his duly authorized representative for the determination of such appeals, shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this Contract as limiting judicial review of any such decision to cases where fraud by such official or his representative is alleged. Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of the appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the Contract and in accordance with the Director's decision.
- b. This dispute clause does not preclude consideration of questions of law in connection with decisions provided for in Paragraph (a) above. However, nothing in this Contract shall be construed as making final the decision of the Director or his representative on a question of law.

ARTICLE 13. DEFAULT AND REMEDY.

- a. If the Contractor shall be adjudged bankrupt or make a general assignment for the benefits of creditors or if a receiver should be appointed on account of insolvency, or if the Contractor or any of his Subcontractors should violate any of the provisions of this Contract, the City may serve written notice upon the Contractor and the bonding company of its intention to terminate all or any part of the Contract; and unless within 10 days after the serving of such notice, such violation shall be corrected or cease, to the City's satisfaction, the City then may take over the work and prosecute it to completion by Contract or by any

other method it may deem advisable and at the expense of the Contractor. The Contractor and the bonding company shall be liable to the City for any excess cost occasioned the City thereby.

- b. Waiver of any default shall not be deemed to be a waiver of any subsequent default. Waiver of breach of any provision of this Agreement shall not be construed to be modification of the terms of this Agreement, unless stated to be such in writing, signed by the City.
- c. The Contractor shall continue the performance of this Agreement to the extent not cancelled under the provisions of this clause.
- d. The rights and remedies of the City provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

ARTICLE 14. CITY'S RIGHT TO WITHHOLD CERTAIN AMOUNTS AND MAKE APPLICATION THEREOF. The City may withhold from payment to the Contractor such an amount or amounts as, in its judgment, may be necessary to pay just claims against the Contractor or any Subcontractor for damages, labor and services rendered and materials furnished in and about the work. The City may apply any such withheld amounts on the payment of such claims in its discretion. In so doing, the City shall be deemed the agent of the Contractor and payments so made by the City shall be considered as a payment made under the Contract by the City to the Contractor and the City shall not be liable to the Contractor for any such payments made in good faith.

ARTICLE 15. LIABILITY. The Contractor agrees to at all times protect, indemnify, save harmless and defend the City, its agents and employees from any and all claims, demands, judgments, expenses, including reasonable attorney's fees, and all other damages of every kind and nature made, rendered or incurred by or in behalf of any person or persons whomsoever, including the parties hereto and their employees, which may arise out of any act or failure to act, work or other activity related in any way to the project, by the said Contractor, its agents, subcontractors, materialmen or employees in the performance and execution of this Agreement.

ARTICLE 16. SUBCONTRACTOR OR SUPPLIER. No part of this Contract shall be sublet by the Contractor without the prior written approval of the City.

The Contractor and the City for themselves, their heirs, successors, executors, and administrators, hereby agree to the full performance of the covenants herein contained. The Contractor also agrees to require in any subcontract it makes in connection herewith that the subcontractor shall be subject to all of the provisions and requirements of this Contract.

ARTICLE 17. CONTRACT DOCUMENTS. This Agreement consists of the documents listed under Section 1.06 of the General Provisions attached, all of which are made a part hereof and none of which can be altered, except in writing signed by both parties.

ARTICLE 18. RIGHTS OF PUBLIC UTILITIES. The right is reserved to the owners of public utilities and franchises to enter upon the street or worksite for the purpose of making repairs or changes of their property that may become necessary by the work. The City shall also have the privilege of entering upon the street or worksite for the purpose of repairing sewers, or making house-drain connections therewith, or repairing culverts, storm drains, water system repairs or adjustments and any and all other necessary city work.

ARTICLE 19. CONTROLLING LAW. This Agreement shall be construed in accordance with and enforced under the laws of the State of Utah.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

SALT LAKE CITY CORPORATION

By Palmer DePaul
MAYOR

ATTEST:

Hathryn Marshall
CITY RECORDER

Paul Wall (Seal)
PROFESS WILLIAMS (Seal)
Contractor
VICE PRESIDENT (Seal)

APPROVED

APR 15 1986

CITY RECORDER

CITY ACKNOWLEDGMENT

STATE OF UTAH)
 : ss.
County of Salt Lake)

On the _____ day of _____, 19__, personally appeared
before me _____ and _____,
who being by me duly sworn, did say that they are the MAYOR and CITY
RECORDER, respectively, of SALT LAKE CITY CORPORATION, and said persons
acknowledged to me that said corporation executed the same.

NOTARY PUBLIC, residing in
Salt Lake County, Utah

My Commission Expires:

ACKNOWLEDGMENT FOR CORPORATION

STATE OF UTAH)
 : ss.
County of Salt Lake)

On the 9 day of APRIL, 1984, personally appeared
before me PHIL HOESTETTER, who being by me duly sworn,
did say that he is the VICE PRESIDENT of PROJECTS UNLIMITED
_____, and that the foregoing instrument was
signed in behalf of said corporation by authority of CORPORATE
RESOLUTIONS; and said PHIL HOESTETTER
acknowledged to me that said corporation executed the same.

Pick O. Francisco
NOTARY PUBLIC, residing in
SLC, Ut.

My Commission Expires:

10-23-89