

2002

# J & C Enterprises Inc., a Utah corporation v. Mid-Continent Casualty Company, an Oklahoma corporation : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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J & C ENTERPRISES, INC., a	)	
Utah corporation	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	Appeal No. 20020421-CA
MID-CONTINENT CASUALTY COMPANY,	)	
an Oklahoma corporation,	)	Priority No. 15
	)	
Defendant/Appellee.	)	

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE JUDGMENTS OF THE EIGHTH  
JUDICIAL DISTRICT COURT, HON. A. LYNN PAYNE PRESIDING**

---

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**FILED**  
Utah Court of Appeals

FEB 18 2003

Paula  
Clerk of the

## **PARTIES TO THIS ACTION**

All parties to this action are listed in the caption

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## STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Order, dated February 23, 2001, and the Final Order and Judgment, dated April 1, 2002, of the Eighth Judicial District Court, Hon. A. Lynn Payne, pursuant to Utah Code Ann. § 78-2-2(3)(j); to wit, appeal from a District Court decision dismissing certain causes of action on summary judgment.

## STATEMENT OF ISSUES, STANDARD OF APPELLATE REVIEW, SUPPORTING AUTHORITY, AND CITATIONS TO THE RECORD

I DID THE TRIAL COURT ERR IN DETERMINING ON SUMMARY JUDGMENT THAT THERE WAS NO BASIS TO SUPPORT PLAINTIFF'S CLAIMS UNDER THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, FOR PUNITIVE DAMAGES AND ATTORNEY FEES WHERE THE COURT ALSO FOUND THAT DEFENDANT DENIED CLAIMS WHICH WERE OWED UNDER THE INSURANCE POLICY?

On an appeal from an order granting summary judgment, the Court of Appeals reviews the facts in the light most favorable to the non-moving party. *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187, 1189 (Utah App. 1993). Whether an insured's claim is fairly debatable under a given set of facts is a question of law. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 (Utah 1996) ("*Billings II*").

The above issue was preserved in the trial court for appeal because it forms one of the bases upon which the Order, dated February 23, 2001, was entered (See Order (T. at 344)), as set forth in the Transcript of the Motion for Summary Judgment hearing held January 30, 2001 (See Transcript (T. at 595)).

**II DID THE TRIAL COURT ERR IN DENYING STORAGE EXPENSES ON SUMMARY JUDGMENT IN LIGHT OF THE RELATIONSHIP BETWEEN THE PLAINTIFF AND THE JULIE LEWIS TRUST, IN LIGHT OF THE FACT THAT U.S.F.&G. PAID STORAGE COSTS, AND IN LIGHT OF THE FACT THAT THE COURT AWARDED CLEANUP, SITE RESTORATION, AND TOWING COSTS WHICH WERE IN-HOUSE SERVICES PERFORMED BY THE PLAINTIFF?**

On an appeal from an order granting summary judgment, the Court of Appeals reviews the facts in the light most favorable to the non-moving party. *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187, 1189 (Utah App. 1993). Summary judgment is only appropriate when there are no issues of genuine fact and the moving party is entitled to a judgment as a matter of law. Utah R.Civ.P. 56(c); *Billings v. Union Bankers Ins. Co.*, 819 P.2d 803, 805 & n.2 (Utah 1991) ("*Billings I*"). Whether the trial court properly granted summary judgment as a matter of law, the Court of Appeals gives no deference to the trial court's view of law, but reviews it for correctness. *Utah State Coal. of Sr. Citizens v. Utah Power and Light Co.*, 776 P.2d 632, 634 (Utah 1989).

The above issue was preserved in the trial court for appeal because it forms the other basis upon which the Order, dated February 23, 2001, was entered (See Order (T. at 344)), as set forth in the Transcript of the Motion for Summary Judgment hearing held January 30, 2001 (See Transcript (T. at 595)).

**DETERMINATIVE PROVISIONS OF LAW**

There are no constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is believed to be determinative of this appeal or of central importance to the appeal.



## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This is an action brought by the Plaintiff to recover damages against Defendant for denying certain insurance claims where Defendant is the insurer and Plaintiff is the insured under an insurance contract. The claims arose following an accident involving Plaintiff's insured crane and other equipment which were a total loss. Defendant paid on a portion of the appraised value of the equipment but did not pay the balance of the appraised value nor on Plaintiff's claims for towing, salvage and cleanup and did not pay for storage. Plaintiff contends that Defendant acted unreasonably in denying these claims and therefore breached the express terms of the contract and breached the implied covenant of good faith and fair dealing.

### **II. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW**

The Plaintiff filed his Complaint in this matter against the Defendant on October 2, 1998, requesting damages under the insurance contract for the balance of the appraised value of the equipment, for towing, salvage and cleanup and for storage fees, and for punitive damages, attorney fees, and interest and requesting a jury trial. (T. at 3-10). After having accepted service of process (T. at 23), Defendant filed a petition for removal to the Federal District Court on the basis of diversity of citizenship (T. at 24-42). The parties conducted discovery, the Defendant filed a motion for summary judgment and supporting memorandum and the Plaintiff filed a memorandum in opposition to motion for summary judgment while

the matter was pending in the Federal Court (T. 49-221). Rather than ruling on the motion for summary judgment, the Federal District Court remanded the matter back to the state court by order dated September 7, 2000, on the basis of not meeting the amount in controversy (T. at 49-221). The Defendant then filed a motion for summary judgment and memorandum in support in the state court on November 21, 2000 (T. at 222-269). Plaintiff filed a memorandum in opposition to the motion for summary judgment and a request for hearing on December 6, 2000 (T. at 270-338). The hearing on the motion for summary judgment was held on January 30, 2001 (T. at 341-342). A transcript of this hearing has been included with the record on appeal (T. at 595). Following the hearing on the motion for summary judgment, the court, in its Order dated February 23, 2001, held that the express terms of the contract allowed for the payment of towing, salvage and cleanup and for storage fees, but determined that whether the Defendant was required to pay for these items was fairly debatable (See Order, T. at 345-348) (See Transcript, T. at 595, pages 26-30 therein). The court, therefore, determined that there was no breach of the implied covenant of good faith and fair dealing and dismissed the Plaintiff's claims for punitive damages and attorney fees (*Id.*). The court further dismissed the claim for storage fees on the basis that the Plaintiff did not incur storage fees (*Id.*). The Court reserved the issue of the calculation of towing, salvage and cleanup, and interest for trial (*Id.*). The matter was scheduled for Jury Trial (T. at 357-358, 376-377, and 379-380). The Plaintiff waived the jury trial on the basis that the only issue remaining were the calculation of the cleanup costs (T. at 514-515, 345-348). The trial on the reserved issues

was held on February 5, 2002 (T. at 514-515). The Final Order and Judgment was entered by the Court on April 1, 2002 (T. at 574-576). Plaintiff's Notice of Appeal was filed on April 30, 2002 (T. at 580-581). Pages 26-30 of the transcript of the summary judgment hearing (T. at 595), the Order on the motion for summary judgment (T. at 345-348), and the Final Order and Judgment (T. at 574-576) are enclosed in the Addendum to this Brief.

### **STATEMENT OF MATERIAL FACTS**

1. On August 27, 1997, a semi truck (a 1982 Ford LT9000), with attached crane, trailer and cargo wrecked on U.S. Highway 191, in Uintah County (T. at 223, 270).
2. The semi truck and crane were insured by the Defendant. The cargo and trailer were insured by U.S.F.&G on a separate policy (T. at 223, 225, and 270).
3. Immediately following the accident, the Plaintiff sent a crew of its employees with another crane, another semi truck and another flat bed trailer to haul the wrecked equipment to a storage yard and to clean and restore the accident site (T. at 224, 271).
4. Plaintiff delivered the wrecked semi and crane to an enclosed storage yard owned by the Julie Lewis Trust. Julie Lewis is mentally handicapped and is the daughter of Junior Lewis. Junior Lewis is an officer, director and shareholder of Plaintiff and is also a trustee of the Julie Lewis Trust. The storage yard is approximately 6 acres in area, and is enclosed with a fence and is gated (T. at 225, 272, 308-318).
5. Within one month of the accident, Plaintiff settled the insurance claim on the cargo and on the trailer with U.S.F&G. U.S.F&G paid storage fees for the time the trailer was held

at the yard owned by the Julie Lewis Trust. In the meantime, Plaintiff and Defendant could not agree on a settlement value on the semi and crane (T. at 225-226, 272-275).

6. In December 1997, an appraiser determined the value to be \$55,000.00 which the parties agreed upon. After the appraisal, in January 1998, the Defendant sent a payment which, along with a prior payment, amounted to all but \$10,000.00 of the appraised value of the semi and trailer. Plaintiff accepted this payment. Shortly thereafter, in or about March of 1998, the Defendant sent a \$10,000.00 check to the Plaintiff with a document releasing Defendant of all other claims (T. at 530-531).

7. The court determined at trial that the acceptance of the \$10,000.00 check would have constituted a waiver of all claims by the Plaintiff and ordered that interest on the \$10,000.00 should accrue to the date of judgment (T. at 531, 575).

8. The Plaintiff refused the check and demanded payment of the balance of the appraised value in the amount of \$10,000, plus interest, plus debris removal, towing and site cleanup in the amount of \$2,940.00, plus interest and storage fees in the amount of \$50.00 per day, plus interest. However, Defendant maintained that it did not owe cleanup, towing and salvage, nor storage and refused to offer payment on these demands and refused to pay the balance of the \$10,000 until the other items were settled (T. at 226).

9. Because of Defendant's failure to settle Plaintiff's claims, Plaintiff filed its complaint on October 2, 1998, requesting judgment on the insurance contract for the cleanup, towing and salvage, plus storage, plus the \$10,000 balance on the appraisal, plus interest,

attorney fees and punitive damages (T. at 3-10).

10. The insurance contract at issue in the case set forth in part the following language:

COMMERCIAL INLAND MARINE CONDITIONS  
LOSS CONDITIONS

...

C. DUTIES IN THE EVENT OF LOSS

You must see that the following are done in the event of  
“loss” to Covered Property.

4. Take all reasonable steps to protect the Covered Property from further damage. If feasible, set the damage property aside and in the best possible order for examination. Also keep a record of your expenses for consideration.

(T. at 235-243). The insurance contract is attached hereto in the Addendum.

11. At the hearing on summary judgement, the Court, in the transcript of the proceedings stated, in part, the following, with respect to the claim for cleanup costs, as the basis for the Order on summary judgement (T. at 345-348):

THE COURT NOTES THAT THE DEFENDANT DOES ACKNOWLEDGE THAT THE PROPERTY (SIC.) DOES COVER CLEAN UP EXPENSES BUT MAINTAINS THAT BECAUSE THE PLAINTIFF USED ITS OWN EMPLOYEES AND RESOURCES IT DOES NOT INCUR EXPENSE, AND I THINK THAT THAT IS NOT A SUPPORTABLE POSITION TO TAKE. . . . I'M NOT SAYING THAT THE AMOUNT IS OR IS NOT REASONABLE, BUT I'M SAYING THAT BECAUSE CLEARLY THERE IS AN ISSUE AS TO THIS MATTER WITH RESPECT TO WHAT THE COSTS MAY BE, AND I'LL RULE AS A MATTER OF LAW, THAT THEIR COSTS -- REASONABLE COSTS IN DOING THE WORK IS AS GOOD AS ANYBODY ELSE'S REASONABLE COSTS IN DOING THE WORK FOR THE REASONABLE AMOUNT OF TIME, THE REASONABLE EXPENSE THAT WOULD BE INCURRED. SO

YOUR MOTION IS DENIED AS TO CLEANUP COSTS.

(T. at 595, p. 27).

11. The Court however determined that the claim for storage costs should be dismissed although the contract allowed for storage costs because, as with the cleanup, the Plaintiff, thought the Julie Lewis Trust, provided the storage. The transcript on this issue states the following:

AS TO STORAGE, THE DEFENDANT ARGUES THAT THE CONTRACT EXCLUDED CONSEQUENTIAL DAMAGES AND PLAINTIFF MAINTAINS THAT THIS IS A CONSEQUENTIAL DAMAGE. AND THEN IN THIS CASE THE PLAINTIFF ALSO POINTS TO OTHER CONTRACT PROVISIONS WHICH IMPOSE UPON THE PLAINTIFF AFFIRMATIVE DUTY TO PROTECT THE PROPERTY FROM FURTHER DAMAGE. AND I THINK THE ACTION OF TAKING THIS PLACE (SIC.) TO A PLACE THAT COULD BE PROTECTED IS, AS I'VE INDICATED, REASONABLE AND I THINK IT'S CERTAINLY A CONSEQUENTIAL DAMAGE IN THE SENSE THAT THIS IS SOMETHING THAT HAPPENS IN A LOT OF . . . SITUATIONS. IN THIS CASE IF THERE IS AN AMBIGUITY THE COURT MUST CONSTRUCT THAT AGAIN IN A WAY THAT A REASONABLE PERSON IN THE INSURED WOULD CONSTRUCT THE CONTRACT, AND I CAN'T SAY AS A MATTER OF LAW, THAT THE CONTRACT EXCLUDES STORAGE COSTS. IN FACT, I THINK THAT THAT'S PRETTY CLEAR TO ME THAT THE INSURANCE COMPANY (SIC.) IS ENTITLED TO REASONABLE STORAGE COSTS. THE MOTION IS THEREFORE DENIED WITH RESPECT TO THE ISSUE OF STORAGE COSTS.

(T. at 595, p. 27-28).

12. The court however dismissed Plaintiff's claim for storage costs and stated the following, as set forth in the transcript, as the basis therefore:

I REALLY THINK THE ESSENCE OF THE CONTRACT IS TO INSURE AGAINST LOSS AND EXPENSES WHICH WERE INCURRED AS A RESULT OF THE LOSS. AND I WOULD TAKE A DIFFERENT VIEW OF THIS IF THERE WERE ACTUAL OBLIGATIONS INCURRED. IN THIS CASE IT'S CLEAR TO ME THAT THE PLAINTIFF INCURRED NO ADDITIONAL COSTS OR EXPENSES BY REASON OF THE FACT THAT THE INSURANCE – THAT THE PLAINTIFF HAD A RIGHT UNDER AN EXISTING AGREEMENT THAT THEY HAD WITH THE TRUST TO STORE PROPERTY ON THE PLACE WHERE . . . THE EQUIPMENT WAS TAKEN. AND AS WE HAVE DISCUSSED . . . THERE WERE NO ADDITIONAL EXPENSES. AND UNLIKE THE PREVIOUS ISSUE OF CLEAN UP COSTS WHERE THE PLAINTIFF COULD SAY, LOOK I HAD EMPLOYEES WORKING AND I HAD . . . EQUIPMENT WORKING. IN THIS CASE THERE HAD BEEN NO ACTUAL EXPENSES INCURRED RELATING TO THE STORAGE AND NEITHER IS THE PLAINTIFF LIABLE TO THE THIRD PARTY FOR STORAGE. BECAUSE THE STORAGE OF THE CRANE CLEARLY COMES WITHIN THE PRIOR AGREEMENT TO STORE EQUIPMENT ON THE PROPERTY. THEREFORE UNDER THE FACTS OF THIS CASE NO ADDITIONAL EXPENSES HAVE BEEN INCURRED AND I BELIEVE THAT PLAINTIFF IS NOT ENTITLED TO A WINDFALL HERE. THAT PLAINTIFF IS NOT IN THE BUSINESS OF STORING CRANES. AS I INDICATED, IF HE WOULD'VE BEEN IN THE BUSINESS I SUPPOSE THERE COULD'VE BEEN AN ARGUMENT THAT SINCE I'M IN THE BUSINESS OF STORING CRANES, AND I STORED THIS CRANE, I LOST INCOME AND I'M ENTITLED TO SOME REIMBURSEMENT. . . . ALTHOUGH I THINK THAT THE CONTRACT DOES PROVIDE FOR STORAGE IN THE APPROPRIATE SITUATION I DON'T THINK THIS IS AN APPROPRIATE SITUATION BECAUSE I DON'T THINK THERE'S BEEN ANY DAMAGES INCURRED.

(T. at 595, p. 28-29).

13. The Court also dismissed all claims related to the good faith and fair dealing cause of action, including attorney fees and punitive damages. As its reasoning for this dismissal, the

Court stated the following in the transcript of the summary judgment hearing:

WITH RESPECT TO THE ISSUE OF BAD FAITH THAT WILL BE ALSO BE (SIC.) DISMISSED. I THINK THAT THESE MATTERS WERE – AS A MATTER OF LAW I THINK THAT THEY WERE ALL FAIRLY DEBATABLE, AND ESPECIALLY WHEN IT'S CLEAR THAT EVEN AFTER THE AGREEMENT WAS MAINTAINED THE PLAINTIFF CONTINUED TO HOLD TO THE IDEA THAT THEY WERE ENTITLED TO STORAGE COSTS AND REFUSED TO SETTLE. I DON'T THINK THAT THERE'S AN ACTION HERE FOR BAD FAITH AND PUNITIVE DAMAGES, OF COURSE, RELY UPON THE BAD FAITH, AND SO THAT WILL BE DISMISSED.

AS WILL THE ISSUES AS TO ATTORNEYS' FEES AS THEY RELATE TO BAD FAITH OR PUNITIVE DAMAGES.

(T. at 595, p. 29-30)

14. Since the only issues remaining after the Order on summary judgment were the calculation of the cleanup costs and interest, and because the court dismissed the issues of bad faith and punitive damages, the Plaintiff waived the jury trial prior to the trial (T. at 514-515).

#### **SUMMARY OF ARGUMENT**

The express terms of the insurance contract provided for the payment of cleanup, towing, salvage, and storage. However, Defendant refused to pay for these items and additionally withheld on \$10,000 of the appraised value of the equipment unless Plaintiff released Defendant from the other claims. The Court determined in the findings, set forth in the transcript (T. at 595, p. 26-30), that the contract was not vague as to Defendant's obligation to pay cleanup, towing and salvage, and that the contract, by its express terms also allowed for payment of storage fees. Therefore, the court determined that the Defendant should pay for the cleanup



claimed by the Plaintiff; but that the Plaintiff is not entitled to storage on the basis that Plaintiff did not incur storage costs. However, despite the fact that the Defendant breached the express terms of the contract regarding cleanup and the appraised value, and without the Defendant presenting any evidence to support that it had acted reasonably in denying those claims, the court nevertheless determined that there was no issue of fact with respect to the issue of breach of the implied covenant of good faith and fair dealing. The facts presented by the parties in briefing the summary judgment motion if anything, added to the notion that there was an issue to be presented to the jury as to whether the Defendant acted reasonably in denying the claims of the Plaintiff. Therefore, the case should be remanded to the trial court for determination of the issue of whether the Defendant acted reasonably in denying the claims, whether the Defendant should have paid on those claims for which there was no fairly debatable defense and should have not withheld those items as leverage against Plaintiff's other claims, and whether Defendant's actions constitute a breach of its implied warranty of good faith and fair dealing for which attorney fees and punitive damages may be awarded.

### **ARGUMENT**

- I THE TRIAL COURT ERRED IN DETERMINING ON SUMMARY JUDGMENT THAT THERE WAS NO BASIS TO SUPPORT PLAINTIFF'S CLAIMS UNDER THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, FOR PUNITIVE DAMAGES AND ATTORNEY FEES WHERE THE COURT ALSO FOUND THAT DEFENDANT DENIED CLAIMS WHICH WERE OWED UNDER THE INSURANCE POLICY.

As set forth in the Statement of Facts and the Course of the Proceedings above, in this case, the trial court dismissed the actions for attorney fees and punitive damages which applied

to the claim of breach of the implied covenant of good faith and fair dealing on summary judgment. In other words, the court determined that there were no issues of fact on the issue of whether the Defendant acted reasonably in denying the claims of the Plaintiff for cleanup and storage costs. This determination was made despite the fact that the court determined that, as a matter of law, the contract allowed for cleanup and for storage and that the Defendant's denial of cleanup was not a supportable position for the Defendant to take and despite the fact that the Defendant was withholding an additional \$10,000.00 on the appraised value of the equipment until the Plaintiff released all of the claims. In doing so, the Court denied the Plaintiff the opportunity to present the issues related to the implied covenant of good faith and fair dealing, and the associated attorney fees and punitive damages, to the ultimate finder of fact, which would have been the jury.

This case is very similar to other cases presented to the Utah Court of Appeals and the Utah Supreme Court. In the case of *Pugh v. North American Warranty Services*, 1 P.3d 570 (Utah App. 2000), the question was whether a vehicle service contract is a contract of insurance and whether there was a breach of the implied covenant of good faith and fair dealing. The Court of Appeals determined that the service contract was a contract of insurance. In *Pugh*, as in this case, the contract was a first-party insurance contract. In *Pugh*, the trial court determined that there had been a breach of the implied covenant. In upholding the trial court in its award of attorney fees, the Court of Appeals stated as follows:

. . . North American contends the trial court's award [of attorney fees] was improper because the court failed to make a finding that Pugh's claim for payment by North American was not at least

“fairly debatable.”

. . . the question of whether Pugh’s claim was “fairly debatable” is a legal conclusion to be drawn from the trial court’s findings rather than a finding in its own right. The trial court found that the transmission breakdown was “covered by the warranty agreement” and that North American “delayed unreasonably in . . . paying for covered repairs when the need was established.” These findings compel the legal conclusion that North American’s liability was crystal clear under the warranty contract and was in no sense debatable.

*Pugh*, 1 P.3d at 574, n. 4. (Citations omitted). The court in *Pugh* further stated, “Whether the implied covenant of good faith performance was breached by North American is a fact-intensive inquiry, ordinarily left for the fact-finder.” *Pugh*, 1 P.3d at 576.

In this case, the court determined that the Defendant’s denial of the cleanup expenses is “not a supportable position to take.” (T. at 595, p. 27). Also, the court failed to make any finding as to whether the Defendant’s withholding of \$10,000.00 on the appraised value until the other claims were released was also not a supportable position. Following the reasoning in *Pugh*, the obligation of the Defendant to promptly pay to the Plaintiff the \$10,000.00 withheld on the appraised value and the cleanup costs were crystal clear and in no sense “fairly debatable.” These obligations were independent of the storage fees claim asserted by the Plaintiff and should have been promptly paid out despite the non-settlement of the storage fees issue. If such practice were allowed, to withhold claims which are not fairly debatable until all claims are settled, then insureds, such as the Plaintiff, would be under pressure to release the fairly debatable claims, which they are entitled to pursue, independent of the non-fairly debatable claims, in order to get the non-fairly debatable claims paid. Such a practice would

create great difficulty for insureds in most cases. In this case, the Plaintiff needed the money on the crane to purchase another crane which was vital to its business. If the Plaintiff did not otherwise have the capability to purchase another crane before its claims against the insurance company were settled, then Plaintiff's business would have been under extreme pressure to release the fairly debatable claims so it could get the other money due under the policy. If such were allowed, the insurance company would be in a position of unfair advantage over its insured. Such a practice clearly constitutes unfair dealing on the part of the Defendant and a breach of the implied covenant of good faith and fair dealing.

In deed, this reasoning, set forth in the prior paragraph, is consistent with the reasoning of the Utah Supreme Court in the case of *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996) ("*Billings II*"). In *Billings II*, the court, as in this case, was also dealing with a first-party insurance contract. In *Billings II*, court stated as follows:

The terms used to characterize these duties plainly indicate that the overriding requirement imposed by the implied covenant is that insurers act reasonably, as an objective matter, in dealing with their insureds.

*Billings II*, 918 P.2d at 465. The court further stated in a footnote as follows:

We emphasize that whether an insurer has acted reasonably is an objective question to be determined without considering the insurer's objective state of mind. As we said in *Beck v. Farmers Insurance Exchange*, 701 P.2d 795, 800 (Utah 1985), the "state of mind of the insurer is irrelevant; even an inadvertent breach of the covenant of good faith implied in an insurance contract can substantially harm the insured and warrants a remedy."

*Billings II*, 918 P.2d at 465, n.2.

Since, under Utah R.Civ.P. 56(c), summary judgment should not be granted unless “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law,” the trial court erred in dismissing the attorney fees and punitive damages claims on summary judgment.

**II THE TRIAL COURT ERRED IN DENYING STORAGE EXPENSES ON SUMMARY JUDGMENT IN LIGHT OF THE RELATIONSHIP BETWEEN THE PLAINTIFF AND THE JULIE LEWIS TRUST, IN LIGHT OF THE FACT THAT U.S.F.&G. PAID STORAGE COSTS, AND IN LIGHT OF THE FACT THAT THE COURT AWARDED CLEANUP, SITE RESTORATION, AND TOWING COSTS WHICH WERE IN-HOUSE SERVICES PERFORMED BY THE PLAINTIFF.**

As set forth in the Statement of Facts above, the Plaintiff, after performing its salvage and cleanup operation on the wreck, transported the truck, crane, trailer and equipment to an enclosed and gated yard, approximately 6 acres in area, owned by the Julie Ann Lewis Trust. Julie Ann Lewis is the handicapped daughter of Junior Lewis. Junior Lewis is the controlling shareholder of the Plaintiff and is also the Co-trustee, along with his wife, of the Julie Lewis Trust. Plaintiff is a closely held corporation. Because the close relationship of the Plaintiff and the Julie Ann Lewis Trust, the Plaintiff regularly stores its equipment on the Trust property without charge except that the Plaintiff pays the property taxes of the Trust property as a business expense. (T. at 308-318) Although neither the Plaintiff nor the Julie Ann Lewis Trust, are in the business of providing equipment storage for a fee to others, the property is set as an equipment storage yard and operates as such for the Plaintiff’s purposes.

The trial court held that storage is covered under the insurance contract (T. at 595, p. 27-

28). See Addendum. The Court also held that the in-house salvage operation is also covered under the insurance contract. (T. at 595, p. 27). The same reasoning that the salvage operation should be covered provides the basis of why a reasonable storage fee ought to be allowed to the Plaintiff. Plaintiff could have refused to accept the wrecked equipment and directed that it be taken to a storage yard that it does not control. Likewise, Plaintiff could have refused to clean up the wreck and requested that another company be used. In these cases, the Plaintiff, based on the court's ruling, would have been entitled to the storage fees and the cleanup fees. Indeed, U. S. F. & G., who insured the trailer in this same wreck, paid the storage fee for storage on the Julie Ann Lewis Trust property. Thus, the in-house services performed by the insured should be covered based on their reasonable value the same as if a third party had performed those services; otherwise, the insurance company is receiving a windfall.

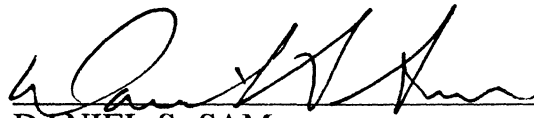
### **CONCLUSION**

Because the Defendant refused to release monies owed under the insurance contract which were not fairly debatable unless the Plaintiff released claims which were fairly debatable, the Defendant has breached its implied covenant of good faith and fair dealing. Thus, the court erred in dismissing the attorney fees and punitive damages as they relate to the unfair actions of the Defendant. Wherefore, the Plaintiff respectfully requests that the Utah Court of Appeals either reverse the trial court's determination that attorney fees and punitive damages be dismissed and remand to the trial court for determination of those amounts, including attorney fees on appeal, or that the that the court remand the matter back

to the trial court for trial on the issue of the whether the Defendant acted reasonably in denying the claims of the Plaintiff within the purview of the standards of the implied covenant of good faith and fair dealing.

Plaintiff also respectfully requests that the Utah Court of Appeals reverse the trial court's determination that the Plaintiff's claims for storage fees on the Julie Lewis Trust property should be dismissed.


Respectfully submitted this 18 day of February, 2003.

  
DANIEL S. SAM  
Attorney for Plaintiff/Appellant

#### CERTIFICATE OF SERVICE

I, <sup>Daniel S. Sam</sup>~~Heather Eskelson~~, do hereby certify that on February 18, 2003, I mailed first class, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANT to:

Roger R. Fairbanks #3792  
**LARSON, TURNER,  
FAIRBANKS & DALBY, L.C.**  
P.O. Box 95821  
South Jordan, Utah 84095-0821

  
~~Heather Eskelson, Legal Secretary~~

## **ADDENDUM**



**TRANSCRIPT OF SUMMARY JUDGMENT HEARING (P. 26-30)**

1 NEWS TO THE INSURANCE COMPANY IF I TELL THEM THEY'RE GOING TO BE  
2 CHARGED WITH WHAT MR. LEWIS' ESTIMATE OF THE CLEAN UP COST WAS.

3 THE COURT: I'M NOT GOING TO MAKE A DECISION ON THAT.  
4 THERE MAY BE SOME ISSUES.

5 MR. FAIRBANKS: THANK YOU.

6 THE COURT: WITH RESPECT TO CLEANUP COSTS AT BEST THIS  
7 CONTRACT IS AMBIGUOUS AS POINTED OUT BY MR. SAM. ON ONE HAND IT  
8 MAY BE ARGUED THAT THEY ARE NOT INCURRED, BUT ON THE OTHER HAND  
9 THERE IS SPECIFIC LANGUAGE IN THE CONTRACT WHICH SAYS THAT THE  
10 PROPERTY--PERSON IS TO TAKE CARE AND KEEP--PROTECT THE PROPERTY  
11 AND TO KEEP RECORDS OF THEIR EXPENSES. AND I THINK IT IS  
12 AMBIGUOUS AND I'M GOING TO FIND AS A MATTER OF LAW WITH RESPECT  
13 TO THIS ISSUE OF CLEAN UP COSTS THAT IT IS AMBIGUOUS. AND THEN  
14 THE COURT'S OBLIGATION IS IS TO GIVE THE CONTRACT AN  
15 INTERPRETATION WHICH WOULD BE REASONABLE AS VIEWED FROM THE  
16 LANGUAGE AND HOW THE INSURED WOULD READ THE LANGUAGE. AND BASED  
17 UPON THAT THE COURT FINDS THAT CLEANUP COSTS ARE COVERED.

18 MR. FAIRBANKS: YOUR HONOR, NOT TO--I DON'T DISAGREE  
19 WITH THAT, AND I APOLOGIZE FOR INTERRUPTING, BUT I THINK VERY  
20 CLEARLY UNDER THE--IF YOU LOOK--IF YOU LOOK AT PAGE 2 OF MY  
21 BRIEF, THE POLICY VERY SPECIFICALLY STATES WE WILL PAY YOUR  
22 EXPENSES TO REMOVE DEBRIS OF THE COVERED PROPERTY CAUSED OR  
23 RESULTING FROM AN INSURED PERIL.

24 THE COURT: YEAH.

25 MR. FAIRBANKS: SO IT'S NOT REALLY EVEN AMBIGUOUS. THE

1 POLICY DOES PROVIDE DEBRIS AND CLEAN UP COVERAGE.

2 THE COURT: THE COURT NOTES THAT THE DEFENDANT DOES  
3 ACKNOWLEDGE THAT THE PROPERTY DOES COVER CLEAN UP EXPENSES BUT  
4 MAINTAINS THAT BECAUSE THE PLAINTIFF USED ITS OWN EMPLOYEES AND  
5 RESOURCES IT DOES NOT INCUR EXPENSE, AND I THINK THAT THAT IS NOT  
6 A SUPPORTABLE POSITION TO TAKE. I'M NOT SAYING HOW MUCH THE  
7 COSTS SHOULD BE. THEY SHOULD BE THE REASONABLE COST TO DO WHAT  
8 WAS DONE, WHICH SEEM TO ME TO BE REASONABLE, AND THAT IS TO TAKE  
9 THE EQUIPMENT FROM ITS PLACE WHERE IT WAS DAMAGED TO A SAFE PLACE  
10 WHERE IT COULD BE PROTECTED. AND IN DOING SO IT'S CLEAR TO ME  
11 THAT THE PLAINTIFF DID INCUR AN EXPENSE IN TERMS OF EMPLOYEES'  
12 WAGES AND EQUIPMENT USED. AND THERE MAY EVEN BE A DECENT  
13 ARGUMENT FOR INDIRECT COSTS AND ALL THOSE KIND OF THINGS. I'M  
14 NOT SAYING THAT THE AMOUNT IS OR IS NOT REASONABLE, BUT I'M  
15 SAYING THAT BECAUSE CLEARLY THERE IS AN ISSUE AS TO THIS MATTER  
16 WITH RESPECT TO WHAT THE COSTS MAY BE, AND I'LL RULE AS A MATTER  
17 OF LAW, THAT THEIR COSTS--REASONABLE COSTS IN DOING THE WORK IS  
18 AS GOOD AS ANYBODY ELSE'S REASONABLE COSTS IN DOING THE WORK FOR  
19 THE REASONABLE AMOUNT OF TIME, THE REASONABLE EXPENSES THAT WOULD  
20 BE INCURRED. SO YOUR MOTION IS DENIED AS TO CLEANUP COSTS.

21 AS TO STORAGE, THE DEFENDANT ARGUES THAT THE CONTRACT  
22 EXCLUDED CONSEQUENTIAL DAMAGES AND PLAINTIFF MAINTAINS THAT THIS  
23 IS A CONSEQUENTIAL DAMAGE. AND THEN IN THIS CASE THE PLAINTIFF  
24 ALSO POINTS TO OTHER CONTRACT PROVISIONS WHICH IMPOSE UPON THE  
25 PLAINTIFF AFFIRMATIVE DUTY TO PROTECT THE PROPERTY FROM FURTHER

1 DAMAGE. AND I THINK THE ACTION OF TAKING THIS PLACE TO A PLACE  
2 THAT COULD BE PROTECTED IS, AS I'VE INDICATED, REASONABLE AND I  
3 THINK IT'S CERTAINLY A CONSEQUENTIAL DAMAGE IN THE SENSE THAT  
4 THIS IS SOMETHING THAT HAPPENS IN A LOT OF, AS MR. SAM POINTS  
5 OUT, THAT THE PROPERTY IS TAKEN AND RENT IS PAID IN A LOT OF  
6 SITUATIONS. IN THIS CASE IF THERE IS AN AMBIGUITY THE COURT MUST  
7 CONSTRUE THAT AGAIN IN A WAY THAT A REASONABLE PERSON IN THE  
8 INSURED WOULD CONSTRUE THE CONTRACT, AND I CAN'T SAY AS A MATTER  
9 OF LAW, THAT THE CONTRACT EXCLUDES STORAGE COSTS. IN FACT, I  
10 THINK THAT THAT'S PRETTY CLEAR TO ME THAT THE INSURANCE COMPANY  
11 IS ENTITLED TO REASONABLE STORAGE COSTS. THE MOTION IS THEREFORE  
12 DENIED WITH RESPECT TO THE ISSUE OF STORAGE COSTS.

13           HOWEVER, THERE IS AN ADDITIONAL ISSUE AS TO WHETHER OR  
14 NOT THERE HAVE BEEN ANY EXPENSES INCURRED. I REALLY THINK THE  
15 ESSENCE OF THE CONTRACT IS TO INSURE AGAINST LOSS AND EXPENSES  
16 WHICH WERE INCURRED AS A RESULT OF THE LOSS. AND I WOULD TAKE A  
17 DIFFERENT VIEW OF THIS IF THERE WERE ACTUAL OBLIGATIONS INCURRED.  
18 IN THIS CASE IT'S CLEAR TO ME THAT THE PLAINTIFF INCURRED NO  
19 ADDITIONAL COSTS OR EXPENSES BY REASON OF THE FACT THAT THE  
20 INSURANCE--THAT THE PLAINTIFF HAD A RIGHT UNDER AN EXISTING  
21 AGREEMENT THAT THEY HAD WITH THE TRUST TO STORE PROPERTY ON THE  
22 PLACE WHERE THE--WHERE THE EQUIPMENT WAS TAKEN. AND AS WE HAVE  
23 DISCUSSED WITH MR. SAM, THERE WERE NO ADDITIONAL EXPENSES. AND  
24 UNLIKE THE PREVIOUS ISSUE OF CLEAN UP COSTS WHERE THE PLAINTIFF  
25 COULD SAY, LOOK I HAD EMPLOYEES WORKING AND I HAD--YOU KNOW--

1 EQUIPMENT WORKING. IN THIS CASE THERE HAD BEEN NO ACTUAL  
2 EXPENSES INCURRED RELATING TO THE STORAGE AND NEITHER IS THE  
3 PLAINTIFF LIABLE TO A THIRD PARTY FOR STORAGE. BECAUSE THE  
4 STORAGE OF THE CRANE CLEARLY COMES WITHIN THE PRIOR AGREEMENT TO  
5 STORE EQUIPMENT ON THE PROPERTY. THEREFORE UNDER THE FACTS OF  
6 THIS CASE NO ADDITIONAL EXPENSES HAVE BEEN INCURRED AND I BELIEVE  
7 THAT PLAINTIFF IS NOT ENTITLED TO A WINDFALL HERE. THAT  
8 PLAINTIFF IS NOT IN THE BUSINESS OF STORING CRANES. AS I  
9 INDICATED, IF HE WOULD'VE BEEN IN THE BUSINESS I SUPPOSE THERE  
10 COULD'VE BEEN AN ARGUMENT THAT SINCE I'M IN THE BUSINESS OF  
11 STORING CRANES, AND I STORED THIS CRANE, I LOST INCOME AND I'M  
12 ENTITLED TO SOME REIMBURSEMENT. THAT'S NOT AT ALL THE EXPENSE.  
13 IT LOOKS TO ME LIKE HE'S LOOKING FOR A WINDFALL HERE AND I DON'T  
14 THINK HE'S ENTITLED TO IT SO I'M GOING TO--THE LONG AND SHORT OF  
15 IT IS IS THAT ALTHOUGH I THINK THAT THE CONTRACT DOES PROVIDE FOR  
16 STORAGE IN THE APPROPRIATE SITUATION I DON'T THINK THIS IS AN  
17 APPROPRIATE SITUATION BECAUSE I DON'T THINK THERE'S BEEN ANY  
18 DAMAGES INCURRED.

19 WITH RESPECT TO THE ISSUE OF BAD FAITH THAT WILL BE  
20 ALSO BE DISMISSED. I THINK THAT THESE MATTERS WERE--AS A MATTER  
21 OF LAW I THINK THAT THEY WERE ALL FAIRLY DEBATABLE, AND  
22 ESPECIALLY WHEN IT'S CLEAR THAT EVEN AFTER THE AGREEMENT WAS  
23 MAINTAINED THE PLAINTIFF CONTINUED TO HOLD TO THE IDEA THAT THEY  
24 WERE ENTITLED TO STORAGE COSTS AND REFUSED TO SETTLE. I DON'T  
25 THINK THAT THERE'S AN ACTION HERE FOR BAD FAITH AND PUNITIVE

1 DAMAGES, OF COURSE, RELY UPON THE BAD FAITH, AND SO THAT WILL BE  
2 DISMISSED.

3 AS WILL THE ISSUES AS TO ATTORNEYS' FEES AS THEY RELATE  
4 TO BAD FAITH OR PUNITIVE DAMAGES. THERE MAY BE OTHER CONTRACTUAL  
5 BASIS FOR THE ATTORNEYS' FEES, AND IF THERE IS I'LL CONSIDER  
6 THOSE, BUT I'M NOT GOING TO AWARD ATTORNEYS' FEES BASED UPON THE  
7 ISSUE OF STORAGE COSTS; AND I'M NOT GOING TO AWARD ATTORNEYS'  
8 FEES ON THE BASIS OF BAD FAITH; AND I'M NOT GOING TO AWARD  
9 ATTORNEYS' FEES ON THE BASIS OF PUNITIVE DAMAGES. BUT I'LL KEEP  
10 THE ISSUE OF ATTORNEYS' FEES AS TO OTHER ASPECTS OF THIS CASE, IF  
11 THERE IS ANY BASIS FOR ATTORNEYS' FEES BASED UPON (INAUDIBLE)  
12 OPEN.

13 OKAY. DOES THAT TAKE CARE OF THE ISSUES THAT I  
14 SHOULD'VE ADDRESSED?

15 MR. SAM: I THINK SO.

16 THE COURT: MR. FAIRBANKS, WOULD YOU PREPARE THE COURT'S  
17 ORDER AND SUBMIT IT TO MR. SAM FOR HIS APPROVAL AS TO FORM.

18 MR. FAIRBANKS: YES.

19 MR. SAM: THANK YOU, YOUR HONOR.

20 THE COURT: THANK YOU, MR. SAM. MR. FAIRBANKS, THANK  
21 YOU.

22  
23 (WHEREUPON THE FOREGOING PROCEEDINGS WERE CONCLUDED.)  
24  
25

TRANSCRIBER'S CERTIFICATE

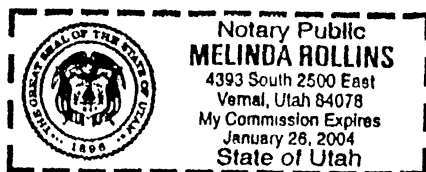
STATE OF UTAH                     )  
   : ss.  
COUNTY OF UINTAH             )

I, MELINDA ROLLINS, CERTIFIED COURT TRANSCRIBER, DO  
HEREBY CERTIFY THAT I RECEIVED THE VIDEO RECORDED TAPE IN THE  
MATTER OF J & C ENTERPRISES, PLAINTIFF, VERSUS MID-CONTINENT  
GROUP, DEFENDANT, AND THAT I HAVE TRANSCRIBED THE SAME INTO  
TYPEWRITING, AND THE FOREGOING PAGES, NUMBERED FROM 1 TO 30,  
INCLUSIVE, TO THE BEST OF MY ABILITY, CONSTITUTE A FULL, TRUE AND  
CORRECT TRANSCRIPTION, EXCEPT WHERE IT IS INDICATED THE VIDEO  
RECORDED COURT PROCEEDINGS WERE INAUDIBLE.

WITNESS MY HAND AND OFFICIAL SEAL AT VERNAL, UINTAH  
COUNTY, UTAH THIS   3   DAY OF SEPTEMBER, 2002.

MY COMMISSION EXPIRES:  
01/26/04

Melinda Rollins  
MELINDA ROLLINS  
CERTIFIED COURT TRANSCRIBER



**ORDER ON SUMMARY JUDGMENT**



Exhibit B

Roger R. Fairbanks 3792  
LARSON, TURNER, FAIRBANKS & DALBY, L.C.  
4516 South 700 East - Suite 100  
Salt Lake City, Utah 84107  
Telephone: (801) 263-2900  
Attorneys for defendant

FILED  
DISTRICT COURT  
UINTAH COUNTY, UTAH  
FEB 23 2001  
BY JOANNE McKEE CLERK  
DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

J & C ENTERPRISES, INC.	)	
a Utah corporation,	)	
	)	ORDER
plaintiff,	)	
	)	
vs.	)	Civil No. 980800541
	)	
	)	
MID-CONTINENT CASUALTY COMPANY,	)	
an Oklahoma Corporation,	)	Judge A. Lynn Payne
	)	
Defendant.	)	

This matter came before the Court on Tuesday, January 30, 2001. Daniel S. Sam appeared on behalf of the plaintiff. Roger R. Fairbanks appeared on behalf of defendant. The Court heard argument on the motion for summary judgment of defendant. The Court, having reviewed and considered the memoranda, authorities cited, and the oral arguments of counsel, enters its findings of fact, conclusions of law, and order as follows:

## **FINDINGS OF FACT CONCLUSIONS OF LAW**

1. Based upon the undisputed evidence submitted, the court finds that plaintiff used its own personnel and equipment for cleanup, debris removal and towing after the accident and is entitled to recover under its policy of insurance with defendant for the reasonable value of said cleanup, debris removal and towing in an amount to be proven.

2. Under the provisions of plaintiff's policy of insurance with defendant, plaintiff would be entitled to coverage for the amount of expenses reasonably incurred for storage of the salvage of its insured vehicle after the accident, however, based upon the undisputed evidence submitted, the court finds that plaintiff did not incur any expense for storage and is therefore not entitled to recover from defendant for any claimed storage expense.

3. Based upon the undisputed evidence submitted, the court finds that there is no factual basis to support plaintiff's claims against defendant for bad faith, punitive damages or attorneys fees.

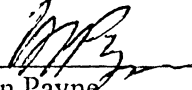
## **ORDER**

Based upon the forgoing findings of fact and conclusions of law, it is hereby

ORDERED ADJUDGED AND DECREED that the motion for summary judgment of defendant is denied in part and granted in part, and that plaintiff's claims for storage expense, bad faith, punitive damages and attorneys fees are hereby dismissed, with prejudice. It is further ordered that plaintiff is entitled to recover under its policy of insurance with defendant for the reasonable value of the use of its own personnel and equipment for cleanup, debris removal and towing in an amount to be proven.

DATED this 23 day of February, 2001.

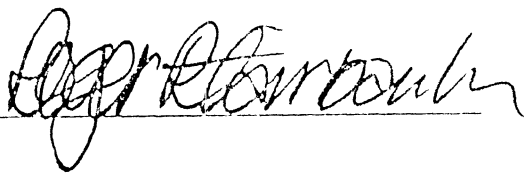
BY THE COURT:

  
\_\_\_\_\_  
A. Lynn Payne  
Eighth District Court Judge

# CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing ORDER was mailed, postage prepaid, this 31<sup>st</sup> day of January 2001, to the following:

Daniel S. Sam  
319 West 100 South, Suite A.  
Vernal, Utah 84078

A handwritten signature in black ink, appearing to read "Daniel S. Sam", is written over a horizontal line.

## **FINAL ORDER AND JUDGMENT**

DANIEL S. SAM, #5865  
DANIEL S. SAM, P.C  
Attorney for Plaintiff  
319 West 100 South, Suite A  
Vernal, Utah 84078  
Telephone (435) 789-1301

FILED  
DISTRICT COURT  
UTAH COUNTY UTAH  
APR 11 2002  
KATHLEEN CLERK  
DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

J & C ENTERPRISES, INC., a Utah corporation,	)	
	)	
Plaintiff,	)	FINAL ORDER AND JUDGMENT
	)	
vs.	)	
	)	
MID-CONTINENT CASUALTY COMPANY, an Oklahoma corporation,	)	Case No. 980800541
	)	
Defendant.	)	Judge A. Lynn Payne

The above captioned matter came before the Court for bench trial on February 5, 2002, wherein, following the presentation of the parties' cases, the Court took the matter under advisement and ordered that the parties present post-trial memoranda as to the issues of interest and attorney fees. Following the receipt of the parties' post-trial memoranda by the Court, this matter again came before the Court for oral argument on the issues presented in the memoranda on March 12, 2002. The Court having reviewed the post-trial memoranda, the arguments of counsel, and after having given full consideration to all of the evidence presented at trial and being fully advise in the premises, stated its findings of fact and conclusions of law from the bench, and based thereon, hereby,

ORDERS, ADJUDGES AND DECREES as follows

1 Plaintiff is awarded judgment against the Defendant on the site restoration, cleanup and towing (J & C Enterprises, Inc , Work Ticket No 4405, received by the Court as Exhibit 11), in the amount of \$2,940 00, plus interest thereon at the rate of 10% per annum accruing from September 26, 1997, until satisfied


2 Plaintiff is awarded judgment against the Defendant on the remaining balance on the appraised value of the truck and crane at issue in this matter in the amount of \$10,000 00, plus interest thereon at the rate of 10% per annum, accruing from December 24, 1997, until satisfied

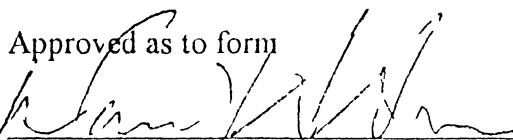
3 Defendant shall receive credit on the Judgment in the amount of \$4,000 00 which constitutes the salvage value of the truck and crane Plaintiff shall be entitled to retain title to and possession of the truck and crane

4 Each party shall pay their own attorney fees and costs

DAIED this 1 day of April, 2002

BY THE COURT

  
\_\_\_\_\_  
District Judge

Approved as to form  
  
\_\_\_\_\_  
DANIEL S. SAM, Attorney for Plaintiff

\_\_\_\_\_  
ROGER R. FAIRBANKS  
LARSON, TURNER, FAIRBANKS & DAILEY, P.C.  
Attorneys for Defendant  
V J&C jmt.wpd

ORDERS, ADJUDGES AND DECREES as follows:

1. Plaintiff is awarded judgment against the Defendant on the site restoration, cleanup and towing (J & C Enterprises, Inc., Work Ticket No. 4405, received by the Court as Exhibit 11), in the amount of \$2,940.00, plus interest thereon at the rate of 10% per annum, accruing from September 26, 1997, until satisfied.

2. Plaintiff is awarded judgment against the Defendant on the remaining balance on the appraised value of the truck and crane at issue in this matter in the amount of \$10,000.00, plus interest thereon at the rate of 10% per annum, accruing from December 24, 1997, until satisfied.

3. Defendant shall receive credit on the Judgment in the amount of \$4,000.00 which constitutes the salvage value of the truck and crane. Plaintiff shall be entitled to retain title to and possession of the truck and crane.

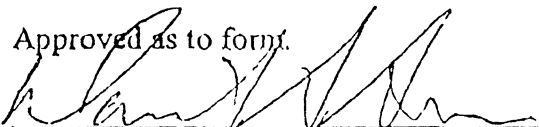
4. Each party shall pay their own attorney fees and costs.

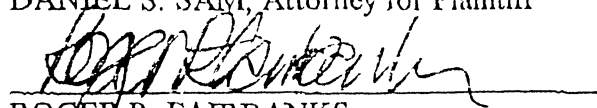
DATED this \_\_\_\_\_ day of April, 2002.

BY THE COURT

\_\_\_\_\_  
District Judge

Approved as to form.

  
\_\_\_\_\_  
DANIEL S. SAM, Attorney for Plaintiff

  
\_\_\_\_\_  
ROGER R. FAIRBANKS  
LARSON, TURNER, FAIRBANKS & DALBY, L.C.  
Attorneys for Defendant  
V J&C jnl:wpd



## **INSURANCE CONTRACT**

# INLAND MARINE SCHEDULE

ATTACHED TO AND FORMING PART OF POLICY NUMBER SP 51940  
 ISSUED TO J & C ENTERPRISES INC  
 BY MID-CONTINENT CASUALTY COMPANY EFFECTIVE DATE 2/16/97

<u>ITEM#</u>	<u>SUB#</u>	<u>DESCRIPTION</u>	<u>LIMIT OF INSURANCE</u>
1		1982 FORD LT9000 WITH CRANE	75,000
2		1982 GROVE 50 TON CRANE, S#49271	205,000
3		1988 CAT BACKHOE, MODEL 416, S#5PC4531	30,000
4		1979 LINKBELT CRANE, S#37G9171A	100,000
5		1980 CHAMP FORKLIFT, S#CCN10600	20,000
6		1981 CHAMP 15 TON FORKLIFT, S#10931	30,000

DEDUCTIBLE: \$ 500. FOR ALL PERILS EXCEPT  
 \$1,500. APPLIES TO BOOM COLLAPSE  
 AS RESPECTS ITEMS #2 AND #4

460,000

AUTHORIZED REPRESENTATIVE



## MID-CONTINENT CASUALTY COMPANY

### CONTRACTOR'S EQUIPMENT SCHEDULED COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is or is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to paragraphs headed DEFINITIONS.

#### A. COVERAGE

We will pay for "loss" to covered Property from any of the Covered Causes of Loss.

1 Covered Property, as Used in this Coverage Form means:

- a your contractor's equipment and tools;
- b similar property of others in your care, custody or control, described in the schedule.

2 Property Not Covered

Covered Property does not mean:

- a property while loaned, leased or rented to others, unless you provide the operator;
- b blue prints, mechanical drawings, plans or specifications;
- c tires and tubes, unless "loss" is coincidental with other covered "loss";
- d aircraft, watercraft, motor vehicles designed for transporting passengers or freight over the highway;
- e equipment or tools while waterborne, unless Covered Property is on regular ferries or railroad carfloats;
- f property while underground or underwater;
- g contraband, or property in the course of illegal transportation or trade.

3 Covered Causes of Loss

Covered Causes of Loss means Risks of Direct Physical "loss" to the Covered Property except those causes of "loss" listed in the Exclusions.

4 Coverage Extension

a Debris Removal

- (1) We will pay your expenses to remove debris of Covered Property caused by, or resulting from an insured peril that occurs during the policy period. The expenses will be paid only if they are reported to us within 180 days of the earlier of

- (2) The date of direct physical loss or damage, or

(b) The end of the policy period.

(2) The most we will pay under this coverage is the lesser of:

- (a) 25% of the applicable Limit of Insurance for direct physical loss to Covered Property; or
- (b) \$25,000.

The limit of Debris Removal is separate from the Limit of Insurance stated elsewhere in the policy.

The Coinsurance provision, if any, in this policy does not apply to this additional coverage.

(3) The additional coverage does not apply to cost to:

- (a) Extract "pollutants" from land or water; or
- (b) Remove, restore or replace polluted land or water.

**b. Additionally Acquired Property**

We will insure additional items similar to those scheduled, including equipment which you buy or lease "long term," but not beyond:

- (1) 30 days; or
- (2) the end of the policy period

whichever occurs first.

The most we will pay in a "loss" under this Coverage Extension is the lesser of:

- (1) 25% of the policy loss limits; or
- (2) \$100,000.

You must report these items to us within thirty (30) days after you obtain them. Premium will be charged from the date of acquisition. If you fail to report new items within the thirty (30) day period coverage will end automatically at the earlier of:

- (1) 30 days after the date you acquire the property; or
- (2) the end of the policy period.

The Coinsurance Additional Condition does not apply to this Coverage Extension.

**B. EXCLUSIONS**

1. We will not pay for a "loss" caused directly or indirectly by any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."

**a. Governmental Action**

Seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread if the fire would be covered under this Coverage Form.

**b. Nuclear Hazard**

- (1) any weapon employing atomic fission or fusion, or
- (2) nuclear reaction or radiation, or radioactive contamination from any other cause. But we will pay for direct "loss" caused by resulting fire if the fire would be covered under this Coverage Form.

**c. War and Military Action**

- (1) war, including undeclared or civil war;
- (2) warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

**2. We will not pay for a "loss" caused by or resulting from any of the following:**

- a. Delay, loss of use, loss of market or any other consequential loss
- b. Dishonest acts by:
  - (1) You, your employees or authorized representatives;
  - (2) Anyone else with an interest in the property, or their employees or authorized representatives;
  - (3) Anyone else (other than a "carrier" for hire) to whom you entrust the property.

This exclusion applies whether or not such persons are acting alone or in collusion with other persons or such acts occur during the hours of employment.

- c. Unexplained disappearance or shortage found upon taking inventory.
- d. Artificially generated current creating a short circuit or other electric disturbance within Covered Property.  
But, we will pay for "loss" caused by resulting fire or explosion.
- e. Processing or any work upon property covered.  
But, we will pay for "loss" caused by resulting fire or explosion.
- f. The weight of the load exceeding the lifting capacity of any equipment. Such lifting capacity shall be stated in the manufacturer's operating specifications for the operating conditions existing at the time of "loss."

**3. We will not pay for a "loss" caused by or resulting from any of the following. But if "loss" by a Covered Cause of Loss results, we will pay for that resulting "loss."**

- a. Gradual deterioration, hidden or latent defects, any quality in the property that causes it to damage or destroy itself, wear and tear, depreciation, corrosion, rust, dampness, cold or heat.
- b. Mechanical breakdown or failure of Covered Property.

**C. DEDUCTIBLE**

We will pay the amount of the adjusted "loss" in any one occurrence in excess of the deductible amount shown in the Declarations, up to the applicable limit of insurance.

#### D. ADDITIONAL CONDITIONS

The following conditions apply in addition to the Commercial Inland Marine Conditions and Common Policy Conditions:

##### 1. Coverage Territory

We cover property within:

- a. the states of the United States (excluding Alaska);
- b. Canada.

##### 2. Coinsurance

You must carry sufficient insurance in order to avoid a penalty at the time of "loss." We will pay only the proportion of any "loss" that the applicable limits of insurance in the Schedule bears to 100% of the actual cash value of the item(s) involved at the time of "loss." Our payments won't exceed the limit of insurance shown in the Schedule for the item.

##### 3. Impairment of Rights of Recovery

If you agree after a "loss" to waive your rights of recovery against any person or organization responsible for the "loss," we shall not cover your "loss." Nor shall we cover loss or compromise when you settle with others without our consent.

#### DEFINITIONS

"Loss" means accidental loss or damage.

"Carrier" means a person or organization who provides motor, rail or air transportation for compensation.

"Long-term" means twelve (12) consecutive months or more.

"Pollutant" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

## COMMERCIAL INLAND MARINE CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and applicable Additional Conditions in Commercial Inland Marine Coverage Forms:

## LOSS CONDITIONS

## A. ABANDONMENT

There can be no abandonment of any property to us.

## B. APPRAISAL

If we and you disagree on the value of the property or the amount of "loss," either may make written demand for an appraisal of the "loss." In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of "loss," if they fail to agree, they will submit their difference to the umpire. A decision agreed to by any two will be binding. Each party will:

1. Pay its chosen appraiser, and
2. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

## C. DUTIES IN THE EVENT OF LOSS

You must see that the following are done in the event of "loss" to Covered Property:

1. Notify the police if a law may have been broken.
2. Give us prompt notice of the "loss," Include a description of how, when and where the "loss" occurred.
3. As soon as possible, give us a description of how, when and where the "loss" occurred.
4. Take all reasonable steps to protect the Covered Property from further damage. If feasible, set the damaged property aside and in the best possible order for examination. Also keep a record of your expenses for consideration in the settlement of the claim.
5. Make no statement that will assume any obligation or admit any liability, for any "loss" for which we may be liable, without our consent.
6. Permit us to inspect the property and records proving "loss."
7. If requested, permit us to question you under oath, at such times as may be reasonably required, about any matter relating to this insurance or your claim, including your books and records. In such event, your answers must be signed.
8. Send us a signed, sworn statement of "loss" containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
9. Promptly send us any legal papers or notices received concerning the "loss."
10. Cooperate with us in the investigation or settlement of the claim.

## D. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same "loss," we will not pay more than the actual amount of the "loss."

## E. LOSS PAYMENT

We will pay or make good any "loss" covered under this Coverage Part within 30 days after:

1. We reach agreement with you;
2. The entry of final judgment;
3. The filing of an appraisal award.

We will not be liable for any part of a "loss" that has been paid or made good by others.

## F. OTHER INSURANCE

If you have other insurance covering the same "loss" as the insurance under this Coverage Part, we will pay only the excess over what you should have received from the other insurance. We will pay the excess, whether or not you claim it, on the other insurance or not.

#### G. PAIR, SETS OR PARTS

1. Pair or Set, in case of "loss" to any part of a pair or set we may:
  - a. Repair or replace any part to restore the pair or set to its value before the "loss" or
  - b. Pay the difference between the value of the pair or set before and after the "loss;"
2. Parts, in case of "loss" to any part of Covered Property consisting of several parts when complete, we will only pay for the value of the lost or damaged part.

#### H. PRIVILEGE TO ADJUST WITH OWNER

In the event of "loss" involving property of others in your care custody or control, we have the right to:

1. Settle the "loss" with the owners of the property. A receipt for payment from the owners of that property will satisfy any claim of yours.
2. Provide a defense for legal proceedings brought against you. If provided, the expense of this defense will be at our cost and will not reduce the applicable Limit of Insurance under this Insurance

#### I. RECOVERIES

Any recovery or salvage on a "loss" will accrue entirely to our benefit until the sum paid by us has been made up.

#### J. REINSTATEMENT OF LIMIT AFTER LOSS

The Limit of Insurance will not be reduced by the payment of any claim, except for total "loss" of a scheduled item, in which event we will refund the unearned premium on that item.

#### K. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this insurance has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "loss" to impair them.

### GENERAL CONDITIONS

#### A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage Part is void in any case of fraud by you relating to it. It is also void if you intentionally conceal or misrepresent a material fact concerning:

1. This Coverage Part;
2. The Covered Property; or
3. Your interest in the Covered Property.

#### B. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part and
2. The action is brought within 2 years after you first have knowledge of the "loss."

#### C. NO BENEFIT TO BAILEE

No person or organization, other than you, having custody of Covered Property, will benefit from this insurance.

#### D. POLICY PERIOD

We cover "loss" commencing during the policy period shown in the Declarations.

#### E. VALUATION

The value of property will be the least of the following amounts:

1. The actual cash value of that property;
2. The cost of reasonably restoring that property to its condition immediately before "loss;" or
3. The cost of replacing that property with substantially identical property.

In the event of "loss," the value of property will be determined as of the time of "loss."





Mid-Continent Group

FEB 27 1997

MID-CONTINENT CASUALTY • MID-CONTINENT INSURANCE • OKLAHOMA SURETY  
1646 South Boulder Avenue, Tulsa, Oklahoma

INLAND MARINE DECLARATIONS

POLICY NO. SP 51940

RENEWAL OF NO. NEW

NAMED INSURED J & C ENTERPRISES, INC.

MAILING ADDRESS P. O. BOX 1096  
VERNAL, UTAH 84078-1096

POLICY PERIOD FROM FEBRUARY 16, 1997 TO FEBRUARY 16, 1998  
12.01 A.M. Standard Time at your mailing address shown above

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THE MOST WE WILL PAY IN ANY ONE LOSS IS THE APPLICABLE LIMIT OF INSURANCE SHOWN OPPOSITE EACH COVERAGE FORM DESCRIBED BELOW OR INDICATED WITHIN SCHEDULES OR ENDORSEMENTS ATTACHED TO AND MADE A PART OF THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

COVERAGE FORM	COVERAGE DESCRIPTION	LIMIT OF INS.	RATE	PREMIUM
CM 7645	CONTRACTOR'S EQUIPMENT	\$450,000	1.20	\$5,520
IM 2150	MOTOR TRUCK CARGO	\$ 25,000	1.50	\$ 375
IM 3000	RIGGING ENDORSEMENT	\$ 50,000	1.00	\$ 500
TOTAL				\$6,395

THE DEDUCTIBLE AMOUNT IS INDICATED BY ☒

☐ \_\_\_\_\_ % of the amount of insurance on all insured item(s) lost or damaged  
but not less than \$ \_\_\_\_\_

☒ \$SEE FORMS

☐ \$ \_\_\_\_\_

COUNTERSIGNED FEBRUARY 16, 1997  
DATE

GDT  
2/24/97

BY SCHAEFERMEYER-SPEEDY-LEAVITT 43001  
VERNAL, UTAH



Mid-Continent Group

FEB 27

MID-CONTINENT CASUALTY • MID-CONTINENT INSURANCE • OKLAHOMA SURETY  
1646 South Boulder Avenue, Tulsa, Oklahoma

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COVERAGE FORM	COVERAGE DESCRIPTION	LIMIT OF INS.	RATE	PREMIUM
CM 7645	CONTRACTOR'S EQUIPMENT	\$460,000.	1.20	\$5,520.
IM 2100	MOTOR TRUCK CARGO	\$ 25,000.	1.50	\$ 375.
IM 3000	RIGGING ENDORSEMENT	\$ 50,000.	1.00	\$ 500.
			TOTAL	\$5,395.

THE DEDUCTIBLE AMOUNT IS INDICATED BY ☒

☐ \_\_\_\_\_ % of the amount of Insurance on all insured item(s) lost or damaged  
but not less than \$\_\_\_\_\_.

☒ \$SEE FORMS

☐ \$\_\_\_\_\_.

COUNTERSIGNED: FEBRUARY 16 1997  
DATE

GDT  
2/24/97

BY \_\_\_\_\_  
SCHAEFERMEYER-SHEEDY-LEAVITT 43-201  
VERNAL, UTAH