

1993

# Interwest Construction, a Utah corporation v. R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer and Sons : Brief of Appellee

Utah Court of Appeals

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## IN THE UTAH COURT OF APPEALS

INTERWEST CONSTRUCTION,  
a Utah corporation

Plaintiff and  
Appellant

vs.

R. ROY PALMER and VAL W.  
PALMER, dba, A. H. PALMER  
& SONS

Defendants and  
Appellees

R. ROY PALMER and VAL W.  
PALMER, dba, A. H. PALMER  
& SONS

Third Party Plaintiffs

vs.

JOHN RYSGAARD, dba,  
FIBERGLASS STRUCTURES COMPANY  
and FIBERGLASS STRUCTURES  
COMPANY, INC.

Third Party Defendants

FIBERGLASS STRUCTURES AND  
TANK COMPANY, fka, FIBERGLASS  
STRUCTURES COMPANY of ST.  
PAUL INC.

Third Party Plaintiffs

vs.

THIOKOL CORPORATION

Third Party Defendant.

Case No.: 930220-CA

Priority: 15

UTAH COURT OF APPEALS  
BRIEF

UTAH  
COURT OF APPEALS  
BRIEF

LOCKE 930220 CA

FILED

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BRIEF OF APPELLEES

COURT OF APPEALS

## IN THE UTAH COURT OF APPEALS

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INTERWEST CONSTRUCTION, a Utah corporation	*	
Plaintiff and	*	Case No.: 930220-CA
Appellant	*	Priority: 15
vs.	*	
R. ROY PALMER and VAL W. PALMER, dba, A. H. PALMER & SONS	*	
Defendants and	*	
Appellees	*	

---

R. ROY PALMER and VAL W. PALMER, dba, A. H. PALMER & SONS	*	
Third Party Plaintiffs	*	
vs.	*	
JOHN RYSGAARD, dba, FIBERGLASS STRUCTURES COMPANY and FIBERGLASS STRUCTURES COMPANY, INC.	*	
Third Party Defendants	*	

---

FIBERGLASS STRUCTURES AND TANK COMPANY, fka, FIBERGLASS STRUCTURES COMPANY of ST. PAUL INC.	*	
Third Party Plaintiffs	*	
vs.	*	
THIOKOL CORPORATION	*	
Third Party Defendant.	*	

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BRIEF OF APPELLEES

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APPEAL FROM A JUDGMENT IN THE  
FIRST DISTRICT COURT OF CACHE COUNTY  
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE

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## BRIEF OF APPELLEES

(In response to the Brief of Appellant Interwest Construction Co)

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Defendants and Appellees, R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons respectfully submit the following brief in answer to the appeal filed by Interwest Construction Company:

### I. JURISDICTION OF APPELLATE COURT

This Court has jurisdiction over this appeal pursuant to §78-2-2(3)j and §78-2a-3(k) Utah Code Ann. 1953, as amended.

### II. STATEMENT OF ISSUES RAISED ON APPEAL

A. H. Palmer & Sons raises no additional issues upon appeal.

This case involves the interpretation of a construction contract entered into between the parties. The interpretation of a contract is a question of law. If contract is not ambiguous, therefore no extraneous evidence is considered, the Court reviews for correctness. In reviewing indemnity agreements, the Utah Courts apply the rule of strict construction. See David K. Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492 (Ca. 1991).

### III. DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

There are no determinative constitutional provisions or statutes in this case.

### IV. STATEMENT OF THE CASE

#### A. Nature of the case:

Interwest Construction entered into a contract with Thiokol to construct a waste water treatment facility. Interwest entered into a subcontract with A. H. Palmer & Sons to construct the mechanical

portion of the contract. A. H. Palmer & Sons entered into a contract with Fiberglass Structures to build three tanks. One of the tanks burst after completion and acceptance of the contract by Thiokol as a result of modifications by Thiokol. Thiokol owed Interwest \$200,000. Interwest owed A. H. Palmers \$93,000.

Interwest sued A. H. Palmer & Sons for indemnity. A. H. Palmer & Sons sued Fiberglass Structures for indemnity and negligence. Fiberglass Structures joined Thiokol as a party in the action. Thereafter, Interwest Construction amended its complaint to add a cause of action against Thiokol for payment of the balance due on the contract.

**B. Course of proceedings:**

The case was tried before the Honorable Gordon J. Low without a jury.

**C. Disposition at trial court:**

By reason of the modifications to the tanks, after acceptance by Thiokol, the Trial Court denied all claims by Thiokol against the other parties and granted judgment for Interwest against Thiokol for \$200,000 and A. H. Palmers against Interwest for \$93,000 plus attorney's fees.

**V. RELEVANT FACTS**

In the fall of 1988, Interwest Construction entered into an agreement with Thiokol Corporation in which Interwest agreed to construct a waste water treatment facility known as M705 for Thiokol Corporation. Finding No. 5. No formal agreement was signed. The parties commenced work upon a notice to proceed and

plans & specifications.

On the 1st day of December, 1988, Interwest Corporation, using its pre-printed forms, entered into a subcontract agreement with A. H. Palmer & Sons for the construction of M705 project per plans and specifications which included the construction of three (3) fiberglass waste water storage tanks designated as T32, T33 and T34. (Exhibit No. 37) Addendum "B". Finding No. 6.

The subcontract agreement between A. H. Palmer & Sons and Interwest Construction contains the following provisions:

- (1) 2. Payments. Final payments shall be due when the work described in this subcontract is fully completed and performed in accordance with the contract documents and is satisfactory to the architect.

The reverse side of the subcontract agreement provides as follows, following two paragraphs relating to monthly estimates and release forms:

- (2) Failure to comply with any of the conditions of this agreement constitutes cause for withholding payments until such time as this condition is corrected to the satisfaction of the contractor.
- (3) The subcontractor agrees to make good without the cost to the owner or contractor any and all defects due to faulty workmanship and/or materials which may appear within the period so established in the contract and if no such period is stipulated in the contract documents then such guaranty shall be for a period of one year from the date of completion of the contract.
- (4) In the event it appears to the contractor that the labor and material or other bills incurred in the performance of the work are not being currently paid, the contractor may take such steps as it deems necessary to assure absolutely that the money paid with any

progress payment will be utilized to the fullest extent necessary to pay labor, materials and other bills incurred in the performance of the contract of the subcontractor. The contractor may deduct from any amounts due or to become due to the subcontractor, any sums or sums owing by the subcontractor to the contractor; and in the event of any breach of this subcontract of any of the provisions or obligations of this subcontract or in the event of the assertion by other parties of any claim or lien against the contractor or contractor's surety or the premises arising out of the contractor's performance of this contract, the contractor shall have the right, but is not required, to retain out of any payments due or to become due to the subcontractor, an amount sufficient to completely protect the contractor from any and all loss, damage or expense therefrom, until the situation has been remedied or adjusted by the subcontractor to the satisfaction of contractor. These provisions shall be applicable even though the subcontractor has posted a full payment and performance bond.

With regards to the indemnity provisions of the agreement the contract states as follows:

- (5) The subcontractor shall indemnify the contractor and owner and save him harmless from any and all loss, damage, costs, expenses and attorney's fees incurred on account of any breach of the aforesaid obligation or covenants and any other provision or covenant of the subcontract.
- (6) Some contractors shall indemnify, save harmless and defend the owner and contractor from and against any and all loss, damage, injury, liability and claims thereof for injuries to or death of persons, and all loss of or damage to property, resulting directly or indirectly from subcontractors performance of this contract, regardless of the negligence of owner or contractor or their agents or employees except where such loss, damage, injury, liability or claims are the result of active negligence on the part of owner or contractor, or its agents or employees and is

not caused or contributed to by an admission to perform some duty also imposed on subcontractor, its agents or employees.

With regards to attorney's fees, paragraph 3 of the contract provides as follows:

- (7) The subcontractor assumes towards the contractor all obligations and responsibilities that the contractor assumes towards the owner. The subcontractor shall indemnify the contractor and the owner against and save them harmless from any and all loss, damage, expense, costs and attorney's fees suffered on account of any breach of the provisions or covenants of this contract.\*

On or about the 28th day of February, 1989, by purchase order, A. H. Palmer & Sons contracted with Fiberglass Structures Company to provide three (3) 20' X 15' storage tanks designated as T32, T33 and T34. (Exhibit No. 2) Finding No. 9.

During the course of the completion of the contract, T34 manufactured by Fiberglass Structures, failed during a routine fill test. (Findings of Fact No. 10)

After the failure Thiokol undertook a direct contractual relationship with Fiberglass Structures, commencing direct negotiations in the engineering, supervision, and modification of the existing tanks and the replacement of T34. Thiokol required a three year warranty directly from Fiberglass Structures as a condition for acceptance. The tanks were thereafter tested and accepted by Thiokol. (Findings of Fact 11 and 12)

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\* *Emphasis ours.*

On May 2, 1989, Thiokol inspected the treatment plant and notified Interwest Construction Company that it considered the treatment plant to be substantially complete as of that date and accepted the work of Interwest and its subcontractors and suppliers (Exhibit 45) and a letter from Thiokol commending the contractors and subcontractors for their completion of the project. (See trial Exhibit 38). On June 18, 1989, the project was accepted by Thiokol Corporation. (Exhibit 138). Finding No. 16.

The plant was placed in operation by Thiokol at that time with a Gentlemen's Agreement that if any small items were found unfinished they could be completed after June. (Gladys Depo. pg 131 - 137).

The final payment was due from Interwest to A. H. Palmer & Sons on June 18, 1989. Finding No. 16.

Sometime after June 18, 1989, Thiokol Corporation, without knowledge or consent of Interwest or A. H. Palmer & Sons or Fiberglass Structures, modified the waste storage tanks from a gravity fill mode as designed and specified to a pressure fill system. Finding 17.

The pressure fill system lacked an automatic shutoff device or bypasses to prevent overfilling the tanks from the high volume pumps installed by Thiokol Corporation.

The center tank, T33 failed in the latter part of August while being filled from the high volume pumps installed by Thiokol. Findings No. 23, 27.

At the time of failure, Thiokol had not paid Interwest the balance due on the contract of \$200,000. Of this, \$93,000 was owed to Palmers by Interwest. Thiokol refused to pay the balance due to Interwest claiming a set off. Interwest in turn withheld final payment from Palmers. Finding No. 30.

The modifications to the tank were discovered by agents of Interwest, Fiberglass Structures and Val W. Palmer during an inspection of the site following the failure of tank T33. Palmers, Fiberglass Structures and Interwest each denied liability for the rupture of T33 citing the modifications by Thiokol.

At the trial of the matter, Interwest Construction and Palmers were united in their claim that the modifications by Thiokol voided the warranty, indemnity and guarantee provisions of their agreements. A. H. Palmer & Sons conducted the vast majority of the discovery and produced all of the expert witnesses. A. H. Palmer & Sons took the lead in examining and cross-examining the witnesses and expert witnesses produced by Thiokol.

The Trial Court stated in a memorandum decision (Records 1639 - 1648) as follows:

"The reason for the failure (of T33) has not been demonstrated to this court's satisfaction to be a result of noncompliance by the defendants with the terms and provisions of the contract." p. 5.

"The overhead filling method did, however, allow for overfilling of the tank which the Court finds was the most likely cause of the failure, and such overfilling would not have occurred had the gravity feed system remained in place."

In that connection testimony persuasive to this Court was that the most likely cause of the failure was the overfilling of the tank causing uplift which the tank was not designed to withstand.

The Court is unconvinced from the testimony of the technicians from Thiokol that overfilling did not occur. In order to believe that the overfilling did not occur, this Court would have to believe that the pumps were turned off just minutes before the rupture occurred.

The testimony with respect to the same was unconvincing and in this court's mind incredible. Most likely the facts were that the tank was overfilled and had been overfilling for some time prior to its discovery, causing an uplift, rupturing the bottom of the tank which went up the side of the tank causing the entire failure.

## VI. SUMMARY OF THE ARGUMENT

A. Interwest Construction breached its subcontract agreement with Palmers by failing to pay Palmers the balance due under their subcontract agreement, as provided in the agreement upon the subcontract being fully completed and performed in accordance with the contract documents which occurred on June 18th, some two months prior to the rupture of T33 in August after modifications were made by Thiokol.

B. Section 78-22-56.5 provides for reciprocal rights to recover attorney's fees. By reason thereof A. H. Palmer & Sons is entitled to recover costs and attorney's fees in defending an action instituted by Interwest.

C. A. H. Palmer & Sons' obligations to indemnify extended only to events which occurred in a performance of the agreement between Interwest and Palmers. The agreement specifically excepts

losses, damages or injuries resulting from the active negligence on the part of owner where the negligence of the owner was not caused or contributed to by an omission to perform some duty on the part of the subcontractor. (Contract (6)) In short, Palmers' obligation to indemnify extends only to the construction of M705 per plans and specifications and does not include modifications by Thiokol which were unknown to A. H. Palmers and not contemplated by the terms of the agreement.

D. Interwest is not entitled to recover attorney's fees Interwest incurred in enforcing the subcontract as there was no breach of the subcontract by A. H. Palmer & Sons.

## VII. ARGUMENT

### POINT I:

#### INTERWEST CLAIMS THAT IT DID NOT BREACH THE SUBCONTRACT AGREEMENT AND WAS JUSTIFIED IN WITHHOLDING PAYMENTS TO PALMERS.

The agreement between Interwest and Palmers is not ambiguous in expressing the parties' agreement regarding final payment and periodic payments.

The contract is obviously drafted and drawn by Interwest Construction. On review of a Trial Court's interpretation of a contract, if unambiguous, its interpretation is a question of law. Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah App. 1989).

Palmers claim, and the Trial Court found that Interwest had breached the subcontract agreement by not making final payment to Palmers.

The criteria established by the subcontract agreement for final payment is situated at the bottom of the first page where it says as follows:

- (1) Final payment shall be due when the work described in this subcontract is fully completed and performed in accordance with the contract documents and is satisfactory to the architect.

The facts indicate that Thiokol acknowledged substantial completion on May 2nd and took possession of the property on June 18, 1988. Therefore, on June 18th the contract was completed and performed in accordance with the contract documents. The paragraph contains no condition for payment by Thiokol to Interwest as a precondition for the final payment by Interwest to Palmers.

Page 2 of the agreement referred to as Attachment "A", "payments (con'd)" is a continuation of the payment provisions. The first paragraph of Attachment "A" relates to the subcontractor failing to submit monthly estimates. The second paragraph relates to the subcontractor completing monthly lien release and supplier affidavit forms. The third paragraph contains the following language:

Failure to comply with any of the conditions of this agreement constituting cause for withholding payments until such time as a condition is corrected\* to the satisfaction of contractor.

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\* *Emphasis ours.*

\* *Emphasis ours.*

The conditions to be corrected are the conditions set forth in Attachment "A" paragraphs 1 and 2 relating to liens and releases. They have no relevancy to final payment. There is no condition established for final payment other than as set forth on page 1 of the subcontract agreement.

Paragraph 4 of Attachment "A" is an agreement to make good defects in faulty workmanship and materials. Paragraph 5 is a paragraph relating to payment of labor and material bills by the contractor in the event the subcontractor fails to meet his obligations. These paragraphs contain the provision that relate to the performance of the contract prior to completion.

Interwest Construction would have this Court read bits and pieces of the subcontract out of context to support their contention that Interwest was entitled to withhold final payment to Palmers pending payment by Thiokol Corporation. Palmers' reply is that if Interwest intended to condition its final payment to a subcontractor upon final payment by the owner then it should have stated that fact in the paragraph (1). Such an inclusion would have caused the paragraph to read as follows:

Final payment shall be due when the work described in this contract is fully completed and performed in accordance with the contract documents and satisfactory to the architect and *upon final payment by the owner.*

The contract as written does not contain the provision and Interwest now asks this Court to rewrite the contract by interpreting provisions relating to the periodic payments as being applicable to final payment.

The Trial Court found that Interwest breached the agreement by failing to pay Palmers upon completion of the contract. (Finding of Fact No. 30) To mount a successful challenge to the correctness of a Trial Court's Findings of Fact an appellant must first marshall all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the finding. Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896 (Utah 1989). Interwest has failed to marshall the evidence supporting the finding and Interwest has failed to demonstrate that the evidence is legally insufficient to support the finding. Having failed to successfully challenge the court's finding the clear import of the final payment provision is clear.

Interwest seeks to incorporate provisions that relate to periodic payments into the provision that relates to final payments. The provisions in Attachment "A" relating to periodic payment, lien releases and monthly estimates must be interpreted within their context. See United California Bank v. Prudential, 681 P.2d 390 (Az. 1983) and the Restatement of Contracts Section 203C comments D, E and F on the proposition that where a contract contains both general and specific terms relating to the same manners, i.e, (payments) the specific and more exact terms will be given greater weight than the general language.

The sections relating to liens, withholding of payment, supplying lien releases and failure to pay materialmen are only specific as to the ability of Interwest to withhold funds during construction. They have no application to final payment.

The clear import of the contract, read as a whole, is that final payment is due upon completion of the contract and approval.

## POINT II

### INTERWEST CLAIMS THAT PALMER IS ONLY ENTITLED TO THE FEES NECESSARY TO ENFORCE THE AGREEMENT ASSUMING INTERWEST BREACHED THE CONTRACT.

Interwest claims that notwithstanding the determination by the Court that Interwest has breached its contract, Palmers are only entitled to those fees attributable to their counterclaim for payment claiming this to be the successful vindication of the contract rights within the terms of their agreement. Interwest cites Trayner v. Cushing, 688 P.2d 856 at pg. 858 (Utah 1984). However, see also Schuhman v. Green River Motel, 835 P.2d 992 (Utah App. 1992).

The key language in the cited cases is "the successful vindication of the contractual rights within the terms of their agreement."

This rule of law modified Utah Farm Products Credit Association v. Cox, 627 P.2d 62 (Utah 1981) where the Court held: "that a party is therefore entitled only to those fees resulting from its principle cause of action for which there is a contractual obligation for attorney's fees".

This case is particularly unusual in that Interwest didn't sue Thiokol for the amount due and owing under the contract nor did Thiokol institute the action for breach of warranty, negligence or breach of contract as a result of the failure of the tank.

This action was commenced by Interwest against A. H. Palmer & Sons after the tank failed and after negotiations to determine responsibility failed and after Thiokol announced that it would apply the balance due on the Interwest Contract to refitting the tanks. Interwest brought this suit backwards against Palmers seeking indemnity. See Complaint. Record pg. 001 - 009. The first cause of action claims breach of express warranty. The second cause of action asserts a claim for indemnity. The third cause of action states a claim in implied warranty and the fourth cause of action is a negligence claim.

By reason of the warranty and indemnity claims alleged by the defendant in the action the attorney's fees incurred in this action were incurred in the successful vindication of the contractual rights within the terms of the agreement.

A. H. Palmers, in its counterclaim against Interwest, record pg. 011 - 022, alleged a cause of action claiming the balance due under the contract which also is a claim attributable to the successful vindication of the contract rights between the parties.

Interwest claims that Palmers are not entitled to recover attorney's fees incurred by Palmers in defending claims by Thiokol and others, however, Interwest insists on indemnification against Thiokol's claims, the defense of claims against Palmers resulted in defending claims by Thiokol against Interwest.

By reason of the unusual means used by Interwest in bringing this litigation before the Court, i.e., filing a claim against a subcontractor for indemnification as distinguished from Interwest

suing Thiokol on a debt or an obligation, Interwest has demanded indemnity. Indemnity, because of the nature of the action, is the principle cause of action. All of the surrounding claims by all of the parties create the contract rights which were defended successfully by Palmers. See Affidavits for attorney's fees by Palmers' attorneys. Record pages 1731 - 1734; 1754 - 1775; 1940 - 1948.

In addition to fees incurred at the Trial, Palmers is entitled to attorney's fees incurred in this appeal for several reasons.

(1) The appeal by Interwest deals with the vindication of contract rights. Interwest demands indemnification while claiming to be entitled to withhold payment. Interwest doesn't challenge the findings of fact that it breached the contract but claims it is entitled to withhold final payment under the contract terms. In making this contention Interwest fails to cite and reconcile in its Brief the provision for final payment. The clear import of the final payment provision is that final payment is due upon completion of the contract not conditioned upon the owners' final payment to Interwest.

(2) Interwest benefitted greatly by the defense of this case by Palmers. No breach of contract by Palmers or Interwest has been shown. Palmers certainly prevailed against Interwest's claims for indemnification from Thiokol. Palmers certainly prevailed against Interwest on its counterclaim for final payment. UCA 78-27-56.5 enacted in 1986 allows courts, one of which is the Court of Appeals, to grant fees to the prevailing party.

### POINT III

#### INTERWEST CLAIMS IT IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES DUE TO PALMER'S BREACH OF THE SUBCONTRACT.

During the entire course of the proceedings Interwest claimed as did Palmers that there was no breach of contract, breach of warranty, or negligence. The tank failure was as a result of modifications to the tanks by Thiokol, which the Court found was the cause of the tanks' failure. Interwest now takes the position that there was a breach of the subcontract by Palmers which assertion is clearly contrary to the entire Findings of Fact, Conclusions of Law and Decree. As cited before in the case of Reid v. Mutual of Omaha Insurance Company, supra, Interwest, in order to mount a successful challenge to the Findings, must marshall all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the finding. Interwest has failed to do this. Secondly, Interwest must show that the Trial Court was clearly erroneous in making the finding that there was no breach of contract by A. H. Palmer & Sons in the construction of the tanks.

In order to determine whether there was a breach of contract the court must first look to the four corners of the contract to determine the intention of the parties. Ron Case Roofing & Asphalt v. Blomquist, supra.

In interpreting a contract of indemnity Utah Courts apply the rule of strict construction. Pickhover v. Smith's Management Corporation, 771 P.2d 664 (Utah App. 1989); David K. Gordon v. CRS Consulting Engineers, Inc., supra.

Under the strict construction rule there is a presumption against the intent to indemnify unless "that intention is clearly and unequivocally expressed". See also Freund v. Utah Power & Light, 793 P.2d 362 (Utah 1990) where the Utah Supreme Court stated as follows:

We agree that in strictly construing the contractual language evaluating the indemnification agreement according to the objectives of the parties and the surrounding facts and circumstances is entirely appropriate.

See also Union Pacific Railroad Company v. El Paso Natural Gas Company, 408 P.2d 910 (Utah 1965).

Defendant cites the paragraph in Attachment "A" to the subcontract which states as follows:

The subcontractor agrees to make good without cost to the owner any and all defects due to faulty workmanship and/or materials which may appear within the period so established in the contract documents.

First, this paragraph refers to defects due to faulty workmanship and materials during the course of construction as a predicate to receiving periodic payments. Secondly, the Court's findings clearly indicate that the cause of the rupture of the tank was not due to poor workmanship or faulty materials but was modifications by Thiokol which enabled Thiokol to overfill the tank causing a lifting force which the tanks were not designed to accommodate. Therefore, what Interwest has done is select a paragraph from Attachment "A" of the subcontract and applied that rule to a series of events not contemplated within the scope of the subcontract agreement. See paragraph 1 for "scope of work".

Next, Interwest asked this Court to indemnify Interwest against "claims" under the following language found in paragraph 3 prosecution of the work, delays, etc.:

Subcontractor assumes toward the contractor all obligations and responsibilities that the contractor assumes toward the owner. The subcontractor shall indemnify the contractor and the owner against, and save him harmless from, any and all loss, damage, expenses, costs, and attorney's fees incurred or suffered on account of any breach of the provisions or covenants of this contract.\*

Nowhere is the word "claim" used. The Trial Court dismissed all claims by Interwest against Palmers, Thiokol against Interwest, Thiokol against Palmers, and Thiokol against Fiberglass Structures for breach of contract, breach of warranties or negligence. Interwest suffered no loss or damage or expense under the contract. Therefore, the court found, and there is credible evidence to support the finding, that there was no breach of the provisions or covenants of the subcontract agreement between Interwest Construction and A. H. Palmer & Sons. There being no breach of the contract there is no call for indemnity.

Thiokol sought indemnity from Interwest upon Thiokol's contract with Interwest knowing full well that they had made substantial modifications to the tanks without notice to Interwest or Palmers thus voiding warranty or indemnity claims.

Interwest claimed at the top of page 13 of their brief that "it is undisputed that the tank was within the scope of work

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\* *Emphasis ours.*

provided for in the subcontract with Palmers". This is a gross mis-characterization of the Findings of Fact, Conclusions of Law and the Judgment in this case. The Court found the tank to be the subject to a second contract between Thiokol and Fiberglass Structures.

It is Palmer's position that their obligation of indemnity extends only to the scope of work as found in the contract, plans and specifications and general conditions and does not include separate agreements made by Thiokol with Fiberglass Structures, nor modifications by Thiokol. Findings, paragraphs 23, 25; Conclusions of Law, paragraphs 4 and 5.

Assuming for the purpose of argument that there is in fact a right of indemnification, Interwest is entitled only to those costs and expenses involved in defense of the claim by Thiokol. Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah App. 1988) where the Court said:

However, the right to recover attorney's fees and other litigation expenses remains limited. The indemnitee can only recover those sums incurred in the primary products liability action, i.e., the defense of the claim indemnified against; the indemnitee is not entitled to those fees incurred in establishing the right to indemnity.

Interwest is not entitled to attorney's fees incurred in attempting to prove its claim of indemnity.

Interwest has failed to make a distinction between attorney's fees in defending the claim and attorney's fees incurred in establishing the right to indemnity. Their claim, if any, must exclude those fees incurred in establishing the right to indemnity

and may only include those expenses incurred in defense of the claim.

Interwest in paragraph 6 of the Subcontract Agreement reiterates that indemnity is called for in the event of breach of Palmers' obligation or "performance of the contract" regardless of the negligence of contractor or owner except where the loss or damage is the result of active negligence of owner or contractor and subcontractor did not constitute to the loss.

The Trial Court findings show a loss occasioned by Thiokol's modifications where no notice was given to Palmers or Interwest.

Clearly what Interwest desires is indemnity regardless of contract rights and for acts not even contemplated by the parties. Goldman v. Ecco-Phoenix Electric Corporation, 396 P.2d 377 (Ca. 1964); Tyee Construction Co. v. Pacific Northwest Bell Telephone Company, 472 P.2d 411 (Wash. App. 1970). Here the Washington Court held:

It is inconceivable that respondent would assume all risks incident to the performance of the contract, including damage sustained to property of appellant caused by the unworkability of appellant's own plans and orders. If appellant had wished respondent to assume the responsibility for its mistakes, present or future, the undertaking could easily have been expressed the contract which it drew.

#### CONCLUSION

On August 24, 1988, Thiokol experienced the rupture of one of three storage tanks. Known only to Thiokol were facts relating to modifications to the tank made by Thiokol after the acceptance of the tank from the contractor, Interwest. Like the waters from the

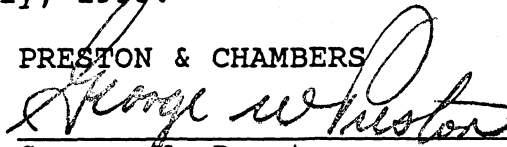
ruptured tanks, claims of breach of contract, warranty and negligence were cast in all directions. Thiokol immediately made demands to Interwest for breach of contract and warranty. Interwest immediately made demands upon Palmers for the same causes and in addition thereto indemnity. The parties became mired in alligators when the real intention was to drain the swamp.

Upon the trial of the case there was evidence and the Trial Court so found, that these tanks were not the best but were in fact made by a separate agreement between Thiokol and Fiberglass Structures in which Palmers and Interwest were essentially "left out of the loop" of negotiations. That Thiokol in its haste to avoid sanctions by the EPA accepted the tanks and placed them in service on or about June 18th. Thiokol, thereafter, modified the tanks adding diaphragm pumps which created a sufficient pressure to create an uplifting force on the tanks which resulted in the failure. The complex nature of this case is only as a result of the failure of Thiokol to willingly disclose evidence of substantial modifications and a complete unwillingness on Thiokol's part to accept any responsibility therefor. This case is further complicated by Interwest bringing this suit in a backward fashion by suing Palmers for indemnity rather than suing Thiokol for the balance due on the contract. Having created complex litigation out of a relatively simple fact situation, Interwest now asks this Court to deny Palmers' attorney's fees by reason of Palmer's breach of the contract, notwithstanding Palmers defending the principle cause of action. Each of these assertions is unsubstantiated and

is contrary to the Findings of Fact and Conclusions of Law. Interwest made no attempt to marshall the evidence, to challenge the court's findings and must therefore fail. R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons respectfully request that this Court affirm Findings of Fact, Conclusions of Law and Judgment of the District Court and grant Palmers reasonable attorney's fees incurred in this appeal.

DATED this 9 day of July, 1993.

PRESTON & CHAMBERS



George W. Preston

Attorney for A. H. Palmer & Sons

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing to the following on this 9 day of July, 1993:

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