

1993

Gilbert Chavez and Rachel Chavez, as parents and guardians of Peter Chavez an incompetent v. American Quarter Horse Association : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Chavez v. American Quarter Horse Association*, No. 930711 (Utah Court of Appeals, 1993).
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IN THE UTAH COURT OF APPEALS

**GILBERT CHAVEZ AND RACHEL
CHAVEZ, as parents and
guardians of PETER CHAVEZ,
an incompetent,**

Plaintiffs,

v.

**AMERICAN QUARTER HORSE
ASSOCIATION; WASHINGTON
COUNTY, UTAH; and JOHN
DOES 1-10,**

Defendants/Appellant,

v.

**INTERNATIONAL ASSOCIATION OF
LIONS CLUBS,**

Third-party defendant/Appellee.

**Docket No. 930711-CA
Priority No.:15**

BRIEF OF APPELLANT

**APPEAL FROM FINAL ORDER AND JUDGMENT OF THE FIFTH
DISTRICT COURT, WASHINGTON COUNTY, STATE OF UTAH
THE HONORABLE JUDGE J. PHILIP EVES, PRESIDING**

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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-3(2)(k) (1993 Supp.).

ISSUES FOR REVIEW AND STANDARD OF REVIEW

1. The Trial Court's Failure to State the Grounds for its Decision.

a. Issue for Review: Whether the trial committed reversible error by refusing to include in its order a statement of the grounds for its decision.

b. Standard for Review: The order of the trial court shall be reviewed to determine whether the refusal to include a statement of the grounds for its decision amounts "to prejudicial error." *Dover Elevator v. Hill Mangum Invest.*, 766 P.2d 424, 426 (Utah App. 1988).

2. The Indemnity Agreement.

a. Issue for Review: Whether the indemnity provisions of the "Application for Recognition of Grading Races" are clear and unambiguous and should be enforced.

b. Standard for Review: The decision of the trial court in granting summary judgment will be reviewed to determine whether it correctly held there were no genuine issues of fact and that its legal decision was correct. *Weese v. Davis County Com'n* 834 P.2d 1, 2-3 (Utah 1992).

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs are the parents of Peter Chavez, a horse jockey who was seriously injured in a horse racing accident at the Dixie Downs horse racing track in St. George, Utah on April 21, 1989. Washington County allegedly

owned and maintained the track; the St. George Lions Club (hereinafter referred to as the "Lions Club") allegedly operated, installed and maintained the racetrack and equipment; and, the American Quarter Horse Association (hereinafter referred to as the "AQHA") sanctioned the results of the race. The plaintiffs allege these defendants were negligent.

The AQHA filed a third party complaint seeking indemnity against the International Association of Lions Clubs (hereinafter referred to as the "International"). The indemnity claim is based on provisions contained in the Application for Recognition of Grading Races dated nine months before the accident and executed by an agent of the Lions Club who, it is alleged, is a subsidiary of the International. The Application for Recognition of Grading Races shall hereinafter be referred to as the "indemnity agreement." The AQHA alleged that the International should be bound by the indemnity agreement on the basis that the Lions Club was acting as the International's agent when it executed the agreement.

B. Course of Proceedings and Disposition in the Trial Court.

This case was filed on July 19, 1991. The plaintiffs filed their First Amended Complaint on September 18, 1992. The AQHA filed its answer to the First Amended Complaint on December 21, 1992. The other defendants also filed their answers. The AQHA's answer included a third party complaint against the International. Thereafter the parties conducted discovery on the plaintiffs' claims.

On May 7, 1993 the International served its Motion for Summary Judgment. The issues were briefed by the International and the AQHA. On June 14, 1993 there was oral argument on the International's motion. The court granted summary judgment to the International from the bench and signed

an Order which indicates that "there are no disputed material facts on the record and that The International is entitled to judgment as a matter of law, . . ." Transcript pg. 956 - 958. The summary judgment order does not indicate the basis for the court's holding.

Prior to the entry of the Order, on June 28, 1993, the AQHA filed its Objections to the International Association of Lions Clubs' Summary Judgment Order. Transcript pg. 904-909. The court did not hear oral argument on the AQHA's objection and the order granting summary judgment was entered in favor of the International on July 7, 1993. The AQHA's Notice of Appeal was served on August 5, 1993. Thereafter, the Utah Court of Appeals moved, on its own motion, to consider this appeal for summary disposition on the grounds that the appeal may not have been properly certified. The parties filed briefs in response to this court's motion. On January 4, 1994, the Utah Court of Appeals issued an Order holding that the appeal was properly before it.

C. Statement of Relevant Facts.

1. The subject of this appeal is the enforceability of the indemnity provisions contained in the "Application for Recognition of Grading Races." The indemnity agreement was signed by Joe Bowcutt who was the track manager for the St. George Lions Club. A copy of the indemnity agreement is attached hereto as Exhibit A. The same indemnity agreement appeared as Exhibit A of the International's Memorandum in Support of Motion for Summary Judgment as to the American Quarter Horse Association's Third-Party Complaint, Transcript pg. 703.

2. The AQHA alleged that the Lions Club is a subsidiary of the International and that the AQHA is entitled to indemnity over and against

the International and the Lions Club pursuant to the above-referenced agreement. Transcript pg. 500-501.

3. The International's motion for summary judgment sought judgment against the AQHA's claim that the Lions Club was a subsidiary of the International and that the agreement was enforceable. Transcript pg. 670-705.

4. The trial court's bench ruling, which granted the International's motion for summary judgment, did not decide whether the Lions Club was a subsidiary of the International. Instead, the trial court's ruling was based on its conclusion that the indemnity agreement could not bind the Lions Club or the International "insofar as any claim arises and a liability is created because the regulations created an unsafe condition, . . ." Reporter's Hearing Transcript, June 14, 1993, pg. 45, ll. 12-16.

5. The trial court's written order granting summary judgment does not specify upon which alternative theory the trial court based its summary judgment order. Transcript pg. 956 - 958. Consequently, the appellant has relied upon the Reporter's Hearing Transcript to determine the issues ruled upon by the trial court. The transcript states: "I don't think I need, then, to go on and deal with the questions of -- of agency." Reporter's Hearing Transcript, June 14, 1993, pg. 45, ll. 18-20. Therefore, whether the International is a party to the Lions Club indemnity agreement is a fact which must be assumed because the trial court made no decision on the issue.

6. The plaintiffs' First Amended Complaint contains the following relevant allegations with respect to the defendants' negligence:

- a. Designing, maintaining, installing, and sanctioning the inside rail at a height which was dangerous to both horse and rider;
- b. Designing, maintaining, installing, and sanctioning the chain-link fence leading to the saddling paddock area by connecting such chain-link fence perpendicular to the inside rail in the proximity of the finish line;
- c. Failing to install a safety rail to protect both horse and rider;
- d. Failing to have proper rules, regulations, and policies regarding inside rail safety;
- e. Designing, maintaining, installing, and sanctioning the gap leading to the saddling paddock area in dangerously close proximity to the chain-link fence complained of above.

Transcript. pg. 354 - 355.

7. The plaintiffs' Answers to Defendant's First Set of Interrogatories and Requests for Production contains interrogatory No. 1 which asks whether the plaintiffs know of any evidence suggesting that the inside rail in the vicinity of the accident did not meet American Quarter horse standard height of 30 inches to 42 inches. In response, the plaintiffs answered: "Deposition testimony of Frank Moore, Butch Jones, Joe Landon, and Joe Wise suggest that at various places around the track the height of the inside rail may have been less than 30 inches." Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Production, pg. 4.

SUMMARY OF ARGUMENTS

1. The trial court failed to provide a statement of the grounds for its summary judgment decision. Rule 52(a), *Utah Rules of Civil Procedure* re-

quires a statement of the grounds for a judgment when there is more than one basis for the party's summary judgment motion. Without such a statement, the appellate court can only rely on the transcript of the hearing to determine the grounds for the ruling and the issues which can properly heard on appeal.

2. The trial court, according to the hearing transcript, did not rule that the indemnity agreement was unenforceable. Instead, the court identified circumstances which would allow the enforcement of the indemnity agreement. The court considered evidence, which was not consistent with the record, in determining that the indemnity agreement did not fit the circumstances of this case. The evidence in this case, however, suggests that facts exist which may fit the circumstances in which the court would permit the indemnity agreement to operate. If so, then summary judgment was inappropriate.

3. Strict construction of the indemnity agreement permits enforcement of the indemnity provision for the AQHA's own negligence. The term "unsafe conditions" is sufficiently clear and unequivocal that it includes negligence for unsafe or improper regulations. The strict construction rule should not be used to render it impossible to draft an enforceable indemnity provision.

4. The existence of the agreement is evidence that the parties did not want common law rules to govern the indemnity obligations for the race. Instead the parties wanted the agreement to govern the indemnity obligations. If there is no indemnity for causes of actions attacking the AQHA's regulations, there is, ultimately, no protection for the AQHA because any lawsuit involving a horse racing accident would result in an attack

upon the AQHA regulations. The indemnity agreement should be construed to give effect to the intent of the parties.

ARGUMENTS

I

THE TRIAL COURT FAILED TO PROVIDE A STATEMENT OF THE GROUNDS FOR ITS SUMMARY JUDGMENT DECISION

Rule 52(a), Utah Rules of Civil Procedure requires the trial court to “issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.”

The International's motion for summary judgment was based on more than one ground. The International argued it was not bound by the indemnity agreement (Transcript pg. 679); that the indemnity agreement is not valid under Utah law (Transcript pg. 683); and, that it is not vicariously liable for the St. George Lions Club's Contractual Obligations (Transcript pg. 685).

The trial court's Summary Judgment in favor of Third-Party Defendant International Association of Lions Clubs does not state which grounds the trial court relied upon to render its decision. (Transcript pg. 956 - 958).

The AQHA objected to the International's proposed summary judgment order on the ground, among others, that it failed “to state the grounds upon which summary judgment was granted” (Transcript pg. 905).

“Normally, failure to comply with Utah R.Civ.P. 52(a) would constitute reversible error.” *Dover Elevator v. Hill Mangum Invest.*, 766 P.2d 424, 426 (Utah App. 1988). If the appellate court cannot determine from the record and the Reporter's Hearing Transcript the grounds justifying the trial court's

summary judgment order, then failure to do so "may justify remand to the trial court." *Masters v. Worsley*, 777 P.2d 499, 501 (Utah App. 1989).

The AQHA requests this court to remand this case to the trial court with instructions to comply with Rule 52(a) if it is determined the issues argued herein cannot be resolved based on the record before the court.

II

ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT

The International's Motion for Summary Judgment asked the Court to grant summary judgment on several grounds. Although the trial court's summary judgment order does not indicate which ground the court used to make its ruling, the hearing transcript reveals the basis for the trial court's holding.

The transcript of the trial court's bench ruling indicates the court **did not rule** the indemnity agreement was **unenforceable**. Instead, the court, in several places, held the indemnity agreement would require the Lions Club and the International to indemnify the AQHA under certain circumstances. Several quotations from the transcript identify those circumstances:

I think what this agreement says is that the St. George Lions Club agrees to conduct their race meet in accordance with the requirements of the American Quarter Horse Association regulations, and that that's the standard for safe conditions on the track, and that so long as they comply with -- so long as no conditions exist on the track which violate the American Quarter Horse Association's regulations, that the local club will indemnify the American Quarter Horse Association for any problems that arise out of unsafe conditions. Reporter's Hearing Transcript, June 14, 1993, pg. 40, ll. 16-25.

In another place the trial court states:

I interpret the agreement to be that so long as the conditions of the track complied with the requirements of the American Quarter Horse Association's regulations, they are deemed to be safe. Any departure from those regulations creates an unsafe condition for which the local club is responsible for indemnifying the Quarter Horse Association. Reporter's Hearing Transcript, June 14, 1993, pg. 44-45, ll. 23-25, 1-4.

Similarly, the trial court held:

I think if you read that entire agreement together, it says, "Our regulations comply or govern this race meet. You're to conduct it in accordance with our regulations. And if you don't, you're going to have to indemnify us for any injury that occurs." And **insofar as any claim arises and a liability is created because the regulations created an unsafe condition**, I don't think his indemnity agreement binds the Lions Club, either local or International, to indemnify the Quarter Horse Association.

So that would be my ruling on that argument, and that's why I raised the question. I don't think I need, then, to go on and deal with the questions of -- of agency. Reporter's Hearing Transcript, June 14, 1993, pg. 45 ll. 7-20 (emphasis added).

The court concluded the facts fit the interpretation of the indemnity agreement which precluded enforcement. In so doing, the court understood, incorrectly, that the plaintiffs' allegations in their First Amended Complaint were limited to a situation in which liability would be based upon a finding that the AQHA regulations were beneath the standard of care and that the physical conditions of the track met all AQHA regulations. Reporter's Hearing Transcript, June 14, 1993, pg. 42-44.

The plaintiffs' First Amended Complaint suggests that potential liability against the AQHA may be based upon the violation of standards which are not addressed by the AQHA regulations. The allegations of the First Amended Complaint suggest the Lions Club could be found negligent for

"designing, maintaining, installing, and sanctioning the inside rail at a height which was dangerous to both horse and rider." Transcript pg. 354 - 355. Those allegations and the others which refer to the "safety rail" and the "gap leading to the saddling paddock area" do not refer to the AQHA regulations. A jury verdict which concludes the rail and the gap are "dangerous" could result in liability regardless of whether it was determined that the AQHA regulations were improper. Thus, if facts were before the court which, based on its own interpretation of the indemnity agreement, allowed enforcement of the indemnity agreement, then summary judgment was improperly granted.

A decision based on Rule 56, *Utah Rules of Civil Procedure* requires the court to evaluate the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" to determine whether "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case, there were material issues of fact which existed in the record precluding summary judgment.

For example, the plaintiffs' Answers to Defendant's First Set of Interrogatories and Requests for Production contains interrogatory no. 1 which asks whether the plaintiffs know of any evidence suggesting that the inside rail in the vicinity of the accident did not meet American Quarter horse standard height of 30 inches to 42 inches. In response the plaintiffs' answered: "Deposition testimony of Frank Moore, Butch Jones, Joe Landon, and Joe Wise suggest that at various places around the track the height of the inside rail may have been less than 30 inches." Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Production, pg. 4.

The plaintiffs' answer to interrogatory no. 1 indicates there may be evidence that the rail height did not meet the AQHA standards. Accordingly, since the trial court held that "Any departure from those regulations creates an unsafe condition for which the local club is responsible for indemnifying the Quarter Horse Association" summary judgment on the indemnity agreement should not be granted because a circumstance exists which, by the court's own ruling, would permit enforcement of the agreement.

Similarly, the AQHA regulations do not require the use of a so called "safety rail"; however, the plaintiffs' may introduce evidence that a safety rail should have been used. Plaintiffs' former counsel stated in the deposition of Richard Fontana that "[h]e may say that a Fontana Safety Rail may have prevented this accident." Deposition of Richard Fontana, pg. 51, ll. 1-2. Mr. Fontana states:

WITNESS: What you just asked me is should there have been a Fontana Safety Rail? Of course, I would like to see a Fontana Safety Rail.

* * * *

WITNESS: The standards don't say a Fontana Safety Rail, to begin with. The standards call for certain types of rail configurations and design, yes. I truly believe if there's horse racing and there's money involved at a facility, they should have the standard -- a rail that's in those standards.

Now, may that be a Fontana Safety Rail to meet those standards or another type of rail? My answer is yes, definitely.

Deposition of Richard Fontana, pg. 51, ll. 5-7, 13-21.

The deposition of Richard Fontana indicates that a evidence exists from which the jury could conclude that a safety rail should have been used. A safety rail is not part of the AQHA regulations. Therefore, since the trial

court held that "Any departure from those regulations creates an unsafe condition for which the local club is responsible for indemnifying the Quarter Horse Association" summary judgment on the indemnity agreement should not be granted because a circumstance exists which, by the court's own ruling, would permit enforcement of the agreement.

III.

UTAH'S STRICT CONSTRUCTION RULE ALLOWS ENFORCEMENT OF THE INDEMNITY AGREEMENT

An analysis of the indemnity contract under the strict construction rule indicates that "[a] party is contractually obligated to assume ultimate financial responsibility for the negligence of another only when that intention is 'clearly and unequivocally expressed.'" A strict reading of the contract, while at the same time looking "at the contract as a whole to determine the parties' intent," requires enforcement of the AQHA indemnity agreement. *Gordon v. CRS Consulting Engineers, Inc.* 820 P.2d 492, 494 (Utah App. 1991).

The indemnity agreement is part of an Application for Recognition of Grading Races. The "Applicant agrees to comply fully with the terms and conditions of this application and the American Quarter Horse Association Regulations for Approved Grading Meets, 20th edition" See Exhibit A. The decision to require track operators to comply with those regulations increased the AQHA's exposure to further liability if, as in this case, a party argued those regulations were deficient.

The increased liability exposure created the need for the next portion of the indemnity agreement which states: "Tentative approval of this application by AQHA does not establish said Association the insurer or

guarantor of the safety or physical condition of Operator's facilities," See Exhibit A. The AQHA recognized the increased potential of liability as a result of accidents which would occur even if the AQHA regulations were followed. Consequently, the provision stated above was drafted to express the intent that the AQHA, even though requiring the track to conduct the race according to its regulations, was not going to insure or guarantee that safety of the race.

The next provision of the indemnity agreement provides the final solution to the problem created by the increased potential of liability as a result of accidents which may occur even if the AQHA regulations were followed. The provision states: "Applicant does hereby agree to indemnify, save and hold harmless the American Quarter Horse Association from any liability arising from unsafe conditions of track facilities or grandstand," See Exhibit A. "Unsafe conditions" is synonymous to saying: ". . . any liability arising from negligence" and encompasses regulations which may be found, by a jury, to be beneath the standard of care.

Opposing counsel would probably argue that the provision does not say that indemnity shall include indemnification for unsafe regulations and that if the AQHA had wanted such indemnity, it should have expressly stated it. This argument highlights the difficulty the strict construction rule imposes upon drafters. If the agreement was worded pursuant to the anticipated argument, then the same argument would allow counsel, in another situation involving an accident, to argue that the indemnity agreement should not be enforced because it did not specifically identify which regulations would be subject to indemnity. Strict Construction should not impose drafting obsta-

cles which lead infinitely toward a conclusion that the agreement is ambiguous and unenforceable.

The phrase "unsafe conditions" is sufficient to include the AQHA rules and regulations. If a jury concluded those rules and regulations were beneath the standard of care, then one would not torture the English language by stating that regulations created an "unsafe condition."

The parties to the indemnity agreement intended its provisions to do something or they would not have signed it. The AQHA only sanctioned the race. The AQHA did not want to guarantee or insure the safety of the race just because they sanctioned it; therefore, the indemnity must go to its regulations or it accomplishes nothing.

IV.

THE INDEMNITY AGREEMENT SHOULD BE CONSTRUED TO GIVE MEANING TO THE CONTRACT

A. The Development of Utah Case Law Continues to Move Away From the Strict Construction of Indemnity Agreements.

In 1989, the Utah Court of Appeals recognized "that the contemporary judicial trend is to limit the application of the strict construction rule." *Pickhover v. Smith's Management Corp.* 771 P.2d 664, 667 (Utah App. 1989). The court stated: "[W]e believe the law of Utah should develop consistent with this trend." *Id.* This appeal of the trial court's summary judgment order in favor of the International provides the Court with the appropriate circumstances to continue the trend away from the rigid application of the strict construction rule. The trend away from the strict construction rule permits the conclusion that the indemnity agreement is enforceable because

no other interpretation provides any reasonable meaning to the indemnity agreement.

The trend away from the strict construction rule was addressed by the Utah Supreme Court in *Freund v. Utah Power & Light Company*, 793 P.2d 362 (Utah 1990). The indemnity agreement in *Freund* involved a commercial setting. The court quoted two cases for the proposition that:

In such circumstances it is not necessary that the exculpatory language refers expressly to the negligence of the indemnitee, so long as the intention to indemnify can be **"clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances."**

Freund at 370 (quoting *Niagara Frontier Transportation Authority v. Tri-Delta Construction Corp.* 107 A.D.2d 450, 451, 487 N.Y.S.2d 428, 430 (1985) and *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153, 344 N.Y.S.2d 336, 339, 297 N.E.2d 80, 82 (1973)). The court concluded: "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." *Id.*

The holding in *Freund* involved an indemnity agreement entered into in a commercial setting. The agreement between the AQHA, the Lions Club and the International probably was not commercial. Even so, the intention of the parties should be determined by evaluating their objectives and the surrounding facts and circumstances.

B. The Objectives and Surrounding Facts and Circumstances Reveal the Intentions of the Parties.

Strict construction does not necessarily mean that an indemnity contract must use the word "negligence" to clearly and unequivocally create an obligation to indemnify for the indemnitee's negligence.

In *Gordon v. CRS Consulting Engineers, Inc.* 820 P.2d 492 (Utah App. 1991), the court recognized that “[i]n interpreting a contract, we look at the contract as a whole to determine the parties’ intent. *Id.* at 494. The application of the strict construction rule with respect to an indemnity agreement results in the “presumption against an intent to indemnify unless ‘that intention is clearly and unequivocally expressed.’” *Id.* (quoting *Union Pac. R.R. v. El Paso Nat’l Gas Co.*, 408 P.2d 910, 913 (1965)).

Overcoming the presumption against an intent to indemnify for the indemnitee’s negligence is possible because the expression of a clear and unequivocal intent to indemnify can be found from the surrounding circumstances.

The beginning point to determine the intent of the parties is a simple conclusion drawn from the fact that the parties signed the agreement: Since the agreement included indemnity provisions it follows, at least, that the parties intended the agreement, rather than common law rules, to govern their rights and liabilities regarding indemnity obligations for the horse races.

The Oregon Supreme Court recognized this approach in *Southern Pacific Co. v. Morrison-Knudsen Co.*, 338 P.2d 665 (Or. 1959). Oregon court’s also use the strict construction rule holding that “indemnity agreements are not construed to cover losses to the indemnitee caused by his own negligence unless such effect is expressed clearly and unequivocally.” *Id.* at 671.

In the *Southern Pacific* case, the court ruled upon the enforceability of a similar indemnity provision. The relevant portions of the provision state:

Said bunker shall be constructed and maintained at all times in a manner satisfactory to Railroad. . . . [similar to the AQHA provision requiring the Applicant to

comply with its regulations] Industry hereby agrees to indemnify and save harmless Railroad, its agents, successors and assigns from all liability, costs and expenses resulting directly or indirectly from the presence or use of said bunker. [Similar to the AQHA provision requiring indemnity from any liability arising from unsafe conditions.]

Id. at 667.

The Oregon court reasoned that the parties intended to indemnify the Railroad from its own negligence because "the Industry was dependent to a large degree upon the cooperation of the Railroad, without which the bunker would have been of little or no value to it." *Id.* at 672-673. Similarly, the Lions Club and the International depended to a large degree upon the AQHA's willingness to sanction the results of the horse races. Thus, the AQHA, by providing the Lions Club and the International with the guidelines which would allow the races to be sanctioned, "exposed itself to the hazards of an increased, immeasurable tort liability. Under the circumstances, it was only natural and the exercise of sound business judgment that the [AQHA] would demand protection including the consequences of its own acts." *Id.* at 673.

The evaluation of the circumstances together with the language of the indemnity agreement allowed the Oregon Court to conclude that the intention to indemnify for the negligence of the indemnitee was clearly and unequivocally expressed.

[W]e feel that the indemnity provision here is clear, certain, and sufficiently broad and comprehensive, so as to warrant only the conclusion that the true intentment of the agreement was to save Southern Pacific harmless from its negligence under these circumstances.

Id. at 674.

An important step in the analysis used by the court in *Southern Pacific* was the recognition that the terms of the indemnity provision should have some meaning from the fact the parties signed the agreement. The court held that " We do not think the parties here intended such an idle gesture by the inclusion of the recovery provision. Unless the parties intended to embrace liabilities resulting from the Railroad's negligence, [the indemnity agreement] can have no meaning." *Id.* at 674.

Likewise, the AQHA indemnity agreement has no meaning unless the agreement is construed to include indemnity for the AQHA's own negligence. Without the indemnity provisions, the simple act--when compared with the involved and numerous acts necessary to maintain the track facilities and conduct the races--of sanctioning the races results in potential liability which far exceeds the usual risks common to the AQHA's ordinary operations. The AQHA drafted the indemnity provisions of the agreement to avoid those potential risks of increased liability.

The court in *Southern Pacific Co.* accepted a construction of the contract which gave meaning to the contract. The AQHA indemnity agreement should be construed in a similar fashion because, otherwise, no meaning is given to the expressed intent that the indemnity agreement govern the parties' rights and not some other common law principles.

CONCLUSION


The AQHA requests the Utah Court of Appeals to reverse the trial court's summary judgment decision in favor of the International. The record contains facts from which a jury could conclude that the indemnity agreement is applicable given the trial court's interpretation of the agreement. The enforceability of the indemnity agreement and its application

to the negligence of the AQHA, including its regulations, is clearly and unequivocally stated in the provisions which speak of "unsafe conditions." Furthermore, failing to enforce the indemnity provisions for the AQHA's own negligence renders the agreement meaningless because the AQHA does nothing for which liability could be imposed except ask that its regulations be followed.

The appellant has argued that summary judgment was granted because the trial court determined the indemnity agreement was unenforceable given the facts it considered. The appellant could not argue the issues of agency presented in the International's Motion for Summary Judgment because, as the hearing transcript reveals, the trial did not rule on those issues; therefore, they could not be appealed. Consequently, if the appellate court cannot determine this appeal based upon the rulings preserved in the hearing transcript, then the AQHA asks the appellate court to remand this case to the trial court with direction to enter a statement of the grounds for its decision.

DATED this 11th day of March, 1994.

DUNN & DUNN



TIM DALTON DUNN
GLEN T. HALE
Attorneys for Appellant

(Original signature)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief of Appellant** was mailed, postage prepaid, on the _____ day of March, 1994, to the following:


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(Original signature)

EXHIBIT "A"

APPLICATION FOR RECOGNITION OF GRADING RACES

Track Operator ST. GEORGE LIONS CLUB
(Name of Person(s) or

Organization; if organization, name of authorized representative) herein after referred to as "Applicant", hereby applies for recognition by American Quarter Horse Association for grading races at

DIXIE DOWNS
(Name of track)

is located at P.O. BOX 214
(Mailing Address)

ST. GEORGE, UTAH 84770
(City, State and Zip Code)

Recognition is requested for grading races to be held on the following dates:

APRIL 21 & 22, 1989

APRIL 28 & 29, 1989

Applicant agrees to comply fully with the terms and conditions of this application under the American Quarter Horse Association Regulations for Approved Grading Meets, 20th edition, or any future edition or amendment thereof (which publication is incorporated in by reference and made a part hereof for all purposes) and Applicant's failure to comply will be cause for refusal of recognition of any and all races, and will void any further approval of races conducted by Applicant. When the Association determines that all races have been conducted according to this agreement, and all other regulations of the Association, then, and only in such event, will such races be recognized and charted.

Tentative approval of this application by AQHA does not establish said Association as insurer or guarantor of the safety or physical condition of Operator's facilities, safety of any race, or reasonableness of stewards' rulings; however, Applicant does hereby agree to indemnify, save and hold harmless the American Quarter Horse Association from any liability arising from unsafe conditions of track facilities or grandstand, or from payment of stakes or purses, or publication or dissemination by Association of information concerning any disciplinary rulings of Applicant's stewards.

This application is signed in duplicate on this the 13th day of July 1988.

St George Lions Club
Joe Smith - Track Manager
Signature (Operator and/or Owner)

P.O. Box 214
St. George, Utah 84770
Address (Operator and/or Owner)

EXHIBIT