

1994

Kirk H. Mower and Utah Department of Human Services v. Alexander & Alexander, INC : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Mower v. Alexander & Alexander*, No. 940606 (Utah Court of Appeals, 1994).
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UTAH COURT OF APPEALS
BRIEF

UTAH

DOCKET NO. 940606

IN THE UTAH COURT OF APPEALS

KIRK H. MOWER and UTAH
DEPARTMENT OF HUMAN SERVICES,

Plaintiffs/Appellants,

vs.

ALEXANDER & ALEXANDER, INC.,
an Oklahoma corporation
qualified to do business in
the State of Utah; and LYNN
TRANSPORTATION CO., INC.,
an Iowa corporation,

Defendants/Appellees.

Case No. 940606-CA

Civil No. 910905824CV

Priority No. 15

BRIEF OF THE APPELLANTS

APPEAL FROM TWO SUMMARY JUDGMENTS
OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE RICHARD H. MOFFAT PRESIDING

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FILED

MAR 8 1995

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)	
Plaintiffs/Appellants,)	Case No. 940606-CA
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I.

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

II.

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IV.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2-2(3)(j).

V.

ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

The issues presented for review are:

1. Does the factual issue of whether the Mower/Lynn Transportation agreement (hereinafter "Mower/Lynn Agreement") is an integrated contract present genuine issues of material fact requiring a reversal and setting aside of the summary judgment?
2. Could a fact finder construe the contemporaneously executed insurance order form and Mower/Lynn Agreement as one contract requiring reversal of the summary judgment?
3. Does the parol evidence rule bar a contemporaneously executed insurance order form setting forth how Worker's Compensation would be obtained when the simultaneously executed written contract is silent on the issue and does not set forth or require a specific method for obtaining the Worker's Compensation insurance coverage?
4. Was the parol evidence rule correctly applied to bar Mower's claims for negligence, negligent misrepresentation and breach of contract against Lynn Transportation Co., Inc.

(hereinafter "Lynn" or "Lynn Transportation") and Alexander & Alexander (hereinafter "A&A")?

5. Are the appellees estopped from denying their obligation to purchase Worker's Compensation insurance for Mower or, in the alternative, to notify him that they were unable to do so?

6. Even if a written integrated contract exists between Lynn and Mower requiring Mower to obtain Worker's Compensation coverage, does that bar Mower's claims against A&A for its failure to provide the ordered Worker's Compensation insurance coverage or, in the alternative, inform Mower that A&A could not obtain the coverage?

7. Did Mower fail to provide the notice required by Utah Code Ann. § 35-1-43(3)(a), and if not, does the failure preclude Mower from suing the appellees for failure to provide the ordered Worker's Compensation insurance or, in the alternative, notify Mower that they could not obtain the insurance?

8. Does the Mower/Lynn Agreement entitle Lynn to recover its attorney's fees and costs?

9. Is Lynn Transportation equitably estopped from obtaining attorney's fees under its contract with Mower?

10. Are there material issues of fact which require reversal of the summary judgment?

Each of the foregoing issues were raised in the memoranda supporting and opposing the parties' motions for summary judgment (R. 172-187, 192-276, 395-446, 465-489, 565-570, 633-635).

STANDARD OF REVIEW

A grant of summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. And in deciding whether the trial court properly granted summary judgment, this Court reviews the decision for correctness without any deference to the trial court. E.g., CECO Corporation v. Concrete Specialists, Inc., 772 P.2d 967, 969 (Utah 1989). Further, whether the lower court correctly determined that the contract at issue was an integrated contract is reviewed for correctness, as is the question of whether the lower court correctly applied the parol evidence rule. Union Bank v. Swenson, 707 P.2d 663 (Utah 1985); Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 270 (Utah 1972). In addition, whether written documents merged to form one contract is a question of fact and, on an appeal of a summary judgment, the lower court's conclusion is reviewed under a correction of error standard. Bullfrog Marina, supra at 270. Whether Mower complied with Utah Code Ann. §35-1-43(3)(a), and if not, whether the failure bars Mower's claims, are issues of statutory construction reviewed under a correctness standard. See, generally, Surety Life Insurance Co. v. Smith, 259 U.A.R. 9, 10 (Utah 1995); Berube v. Fashion Center, Ltd., 771 P.2d

1033, 1038 (Utah 1989); Mendez v. State Dept. of Social Services, 813 P.2d 1234, 1236 (Utah App. 1991); Geneva Pipe Co. v. S&H Insurance Co., 714 P.2d 648, 649-50 (Utah 1986). Moreover, whether Lynn was entitled to attorney's fees pursuant to the contract at issue is a question of contract construction and is reviewed for correctness. E.g., Scudder v. Kennecott Corp., 858 P.2d 1005 (Utah App. 1993); Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492, 493 (Utah App. 1991).

Finally, whether material fact issues exist is reviewed de novo, and on review, the appellant is entitled to have all of the facts presented and all of the inferences fairly arising therefrom considered in a light most favorable to him. Geneva Pipe Co., supra.

VI.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

A determinative rule is U.R.C.P. 56, a copy of which is set forth in the Addendum to this Brief.

VII.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition of the Lower Court

This is an appeal from two summary judgments. One judgment dismissed Keith H. Mower's ("Mower's") claims against Lynn Transportation Co., Inc. and Alexander & Alexander, Inc. for breach

of contract, negligence, negligent misrepresentation and fraud (R. 565-570).

The other judgment awarded Lynn Transportation \$34,398.52 in attorney's fees and costs as a result of the lower court's interpretation of a contractual indemnification provision (R. 633-635).

B. Statement of the Facts Relevant to the Issues Presented For Review

On appeal, Mower is entitled to have all of the facts presented and all of the inferences fairly arising therefrom considered in a light most favorable to him. Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991). Viewed in that light, the facts are as follows:

Lynn Transportation is an Iowa trucking company doing business in Utah (R. 177, 297-298, 333, 435). It employs its own drivers and also contracts with independent owner/operators to transport Lynn Transportation loads (R. 297, 299, 435-436).

Up until late 1989, Mower worked as a Lynn employee truck driver (R. 435-436). In April of 1990, Mower toyed with the idea of buying his own semi-truck/tractor, and toward that end, purchased one from Great Basin GMC (R. 436).

Following the purchase of his truck, Mower requested that his former employer allow him to drive for it as an owner/operator (R. 436). On April 12, 1990, Mower met with two company employees

-- Comptroller Susan Archibeque and office worker Linda Murray (R. 423). Archibeque presented the form contract, a copy of which is attached in the Addendum hereto as Exhibit 4 (R. 173, 181, 424). The contract required Mower to obtain "Bobtail" and "Liability" insurance coverage for liability and property damage. The contract also required Mower to obtain Worker's Compensation insurance (R. 172, 181). Paragraph 9(b) of the Agreement states:

The Contractor [Mower] shall obtain and maintain in force and effect Workmen's Compensation insurance . . . covering itself, its drivers, driver's helpers and laborers employed by it (R. 181, 416)

In addition, the same paragraph contains the following indemnification language:

Contractor [Mower] agrees to . . . indemnify and Carrier [Lynn Transportation] harmless from and against any claims, loss or damage brought or alleged by Contractor or its employees against Carrier [Lynn Transportation] for any injury, including death, to Contractor or its employees resulting from the performance of this agreement. (R. 181, 416, 598)

After presenting the form contract to Mower, Susan directed him to Linda and her cubicle to discuss insurance. Both Susan and Linda told Mower that Lynn Transportation could obtain insurance for him cheaper than he could obtain it for himself (R. 427, 466). Linda presented an insurance order form (copy attached in the Addendum as Exhibit 5) prepared and given to her by A&A (R. 396, 418, 477). A&A is a Maryland or Oklahoma corporation

authorized to do business in Utah as an insurance brokerage (R. 297-298, 318, 337). It obtains insurance for its clients, including Lynn Transportation (R. 299, 318, 334, 467). However, it has no offices in Utah. Instead, it provided insurance order forms to Lynn Transportation for use by Lynn's employees and independent contractors. It provided the insurance order form at issue (R. 178, 183, 299, 336, 467-468). A&A's order form contains the following language:

COVERAGE DESIRED: Bobtail _____ Physical
Damage _____ Worker's Compensation _____.
(R. 183)

In her deposition, Linda testified she told Mower that he had to fill out the form to obtain insurance:

Q: Did you tell him that that form had to be filled out for him to get insurance?

A: Yes.

Q: And you understood that form was going to be used to obtain insurance for him?

A: Yes.

(Deposition of Linda Murray, 3-23-92, p. 13; R. 420.)

Mower checked all three insurance blanks, requested Bobtail, Physical Damage and Worker's Compensation insurance coverage, and signed the A&A order form (R. 173, 178, 183, 300, 396, 425, 465). Mower described his subsequent conversation with Linda as follows:

A: She looked at Exhibit 4 [A&A's insurance order form]. And she says: You want us to provide you with Workmen's Compensation? And I said: Yes. And she said: Workmen's Compensation, you are not considered an employee of the company. Lynn Transportation pays for the Workmen's Compensation insurance for our drivers and for our employees. You would have to be added to this policy, and you would be expected to pay the difference between what the policy premium is this month and what the policy premium is next month, you know, with you being added onto it. And she says: It's liable to be expensive. Do you still want it? I says: As long as the company is taking out my insurance, it would be easier for me if all the insurance was handled through the company where I don't have to fool with it and make checks for it and stuff when I'm home.

(Deposition of Kirk Mower, 7-21-92, p. 113; R. 432, hereinafter "Mower's Depo., R. ____".)

Mower further explained:

Q: When Linda told you that she would have to add a rider to get you Worker's Compensation . . . what did you say?

A: . . . Let's get it handled.

(Mower's Depo. at 426-427.)

Mower summarized the five-minute conversation as follows: "This is what I want." "You've got it. Go see Susan." (Mower's Depo., R. 434.) Whereupon he did.

Susan asked Mower if he understood the written contract provided to him before he was directed to meet with Linda. Mower replied that he did and signed it (R. 177, 182, 425). That same day, Linda faxed the insurance order form to A&A (R. 306, 320, 376, 396, 420, 468).

The order form ordering Worker's Compensation insurance was received by A&A from Lynn Transportation with the Worker's Compensation box checked. (Id.)

In summary, the insurance form was completed at the same time as the written contract and as part of the hiring process. The insurance form and contract with Lynn Transportation were signed contemporaneously and as part of the transaction wherein Mower became employed as an independent contractor of Lynn Transportation (R. 172, 177, 178, 298-300, 465-66).

According to Mower, Lynn Transportation represented that it would send in the order form and that A&A would compute Mower's premiums (R. 178, 188-89, 300-01, 466-67).

Lynn Transportation told Mower that money would be deducted from payments due to him for insurance ordered from A&A (R. 173, 178, 301, 466). Lynn Transportation, in fact, deducted money to pay for "insurance" (R. 173, 178, 301, 400, 466).

Mower reasonably believed that he had purchased Worker's Compensation insurance (R. 173-74, 178, 188-89, 302, 467). At no time did Lynn Transportation or A&A inform Mr. Mower that:

(a) He could not purchase Worker's Compensation insurance from A&A;

(b) Worker's Compensation insurance had not been put in force;

(c) Additional information was needed to put Worker's Compensation insurance in force;

(d) Money was not being withheld to pay for Worker's Compensation insurance, or that the money held out for insurance did not purchase Worker's Compensation insurance (R. 173, 175, 178, 465, 466).

A&A never notified Mower that:

(a) It did not sell Worker's Compensation insurance;

(b) It was not going to obtain Worker's Compensation insurance for appellant;

(c) It could not, or would not, obtain coverage for appellant (R. 173, 175, 178, 468).

Mower was specifically told by Lynn Transportation employees that:

(a) He could obtain all necessary insurance through Lynn Transportation and that their insurance agent, A&A, and Lynn Transportation would pay for the same with payroll deductions

(Affidavits of Kirk Mower dated 12/3/91 and 11/5/92; R. 178, 300-04, 465);

(b) Worker's Compensation was available through Lynn Transportation (R. 178, 301, 466);

(c) He could order all necessary insurance through Lynn Transportation's agent, A&A (R. 178, 301, 466); and

(d) Insurance ordered on the insurance form provided by Lynn Transportation as to Mr. Mower would be ordered and he would pay for the insurance through payroll deductions (R. 301, 304, 466).

Appellant was a novice in purchasing insurance, and reasonably relied upon A&A and Lynn Transportation to provide him Worker's Compensation insurance or notify him that they could not obtain the insurance for him. Lynn Transportation knew that Mower was driving the truck and that Mower was relying on it to obtain Worker's Compensation insurance for him (R. 188-89, 302, 468).

On or about July 28, 1990, Mower was injured in an accident while driving his tractor-trailer and hauling a load of potatoes for Lynn Transportation. As a result of the accident, Mower's back has been fused and he is permanently disabled (R. 178, 302, 590, 622).

Subsequent to the accident, Mower learned for the first time that he was not covered by Worker's Compensation (R. 302). Since part of his medical expenses were paid by the Utah Department

of Human Services under Medicaid, it has been joined as a party plaintiff in this action (R. 297-310).

Mower sued Lynn Transportation and A&A for breach of contract, negligence, negligent misrepresentation and fraud (R. 2-16). Mower claimed that Lynn Transportation and A&A should have provided him the ordered Worker's Compensation insurance or informed him that they could not get it. Had Mower known that he did not have Worker's Compensation insurance coverage, he would not have driven his truck for Lynn Transportation (R. 178, 302). Claims for fraud and negligence are both fact-intensive. Thus, summary judgment is rarely granted. Early on in the litigation, A&A identified the following factual issues requiring a trial:

1. Whether the form is an order form for Worker's Compensation and whether it was a contract, or whether it was provided as a courtesy service to Lynn Transportation contractors (R. 196).

2. The scope and nature of the insurance coverage offered by Lynn Transportation and A&A and ordered by Mower is in dispute (R. 197).

3. Whether Mower's belief that he had Worker's Compensation was reasonable (R. 198).

However, the factual issues identified by A&A did not prevent Lynn Transportation and A&A from subsequently moving for summary judgment (R. 447-50). In support of their motion, they

presented two arguments. First, they said that, "All of Mower's theories of liability are in direct conflict with the express terms of Mower's contract with Lynn." More specifically, they said that (1) the contract required Mower to obtain Worker's Compensation; (2) estoppel was inapplicable because the court cannot rewrite and integrate a contract; (3) the parol evidence rule excluded the representations made by Lynn's employees and the insurance order form; and (4) Mower could not have reasonably relied upon the employees' representations. The second ground for the summary judgment was that Mower had not provided the notice required by Utah Code Ann. §31A-1-43(3)(a) so he could not have been damaged by Lynn Transportation's and A&A's failure to obtain Worker's Compensation insurance coverage for him (R. 395-446).

The lower court determined that, "The contract between Lynn Transportation and . . . Mower . . . is an integrated contract, and the parol evidence rule therefore bars evidence of prior contemporaneous representations to vary the terms of the contract." (R. 565-66.) The lower court then said:

It is undisputed that the form . . . was signed prior to the time Mower signed the written contract The contract unambiguously assigned the responsibility to obtain Worker's Compensation to . . . Mower (R. 566-67).

Based on the foregoing, the court concluded:

There is no genuine issue of material fact that the written contract controls and the

duty to obtain Worker's Compensation insurance rests with plaintiff Mower and not defendants [Lynn Transportation and A&A]. (R. 567)

The court also said that Mower had not given the notice required by Utah Code Ann. §35-1-43(3)(a), so "there is therefore no genuine issue of material fact from which a fact finder could conclude that the failure to obtain Worker's Compensation insurance . . . resulted in any damage" (R. 567.)

Thereafter, Lynn Transportation moved for summary judgment on an indemnification clause. Specifically, Lynn Transportation said that it was entitled to attorney's fees and court costs because Mower's claims arose from the performance of his contract with Lynn (R. 595-607, 621, 624).

In response, Mower explained that the indemnification clause did not apply because, "The claims of Mower did not arise from the performance of the contract" (R. 618) The court rejected Mower's argument and entered summary judgment for attorney's fees and costs on July 13, 1994 (R. 633-35). Mower timely appealed both Orders on August 5, 1994 (R. 636-37).

VIII.

SUMMARY OF ARGUMENT

POINT I

Whether the Mower/Lynn Written
Agreement Is An Integrated
Contract Presents Genuine Issues of
Material Fact Requiring Reversal
of the Summary Judgment.

Whether a written agreement is an integrated contract is a question of fact requiring reversal of the summary judgment. See, e.g., Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 270 (Utah 1972). Further, before the issue of integration can be resolved, the fact finder must resolve the following three genuine issues of material fact: (1) whether the parties intended the insurance order form and Mower/Lynn Agreement to be construed as one contract (see Bullfrog Marina, supra at 270); (2) whether Mower would have signed the Mower/Lynn Agreement if he had known that the insurance order form would not be construed as part of the contract (see Id.); and (3) whether misrepresentations were made to induce Mower to sign the Mower/Lynn Agreement. See Union Bank v. Swenson, 707 P.2d 663, 666 (Utah 1995). Since the lower court was presented with the foregoing genuine issues of material fact, the lower court's summary judgment is inappropriate and must be reversed. See, generally, e.g., Jackson v. Richter, 259 U.A.R. 3 (Utah 1995).

POINT II

The Lower Court's Misapplication of the Parol Evidence Rule Does Not Justify the Lower Court's Summary Judgment.

The lower court's application of the parol evidence rule does not justify the summary judgment for the following reasons: (1) as set forth in Point I, genuine issues of material fact must be resolved before the parol evidence rule can be applied; (2) the parol evidence rule does not bar Mower's claims against A&A because A&A was not a party to the so-called integrated contract; (3) the parol evidence rule does not bar claims for misrepresentation; (4) the parol evidence rule does not bar negligence claims; and (5) the representations made by Lynn's employees and the A&A order form were not offered to vary the terms of the Mower/Lynn Agreement. Since the misapplication of the parol evidence rule was the basis for the lower court's summary judgment, the summary judgment must be reversed.

POINT III

Whether Lynn Transportation Is Estopped From Denying Its Promise to Obtain Worker's Compensation For Mower Creates Genuine Issues of Material Fact Requiring Reversal of the Summary Judgment.

Promissory estoppel relates primarily to those informal contracts which lack consideration but where, because of facts surrounding the transaction, injustice can only be avoided by

enforcing the promise. Easton v. Wycoff, 4 Utah 2d 386, 388, 295 P.2d 332 (1956).

Application of the doctrine creates the following genuine issues of material fact, each warranting a reversal of the summary judgment: (1) whether Lynn Transportation made a representation or omission; (2) whether Mower reasonably and justifiably relied on Lynn's representations, acts or omissions; and (3) whether Mower changed his position to his detriment based on his reliance. Since summary judgment is appropriate only when there are no genuine issues of material fact, the lower court's summary judgments must be reversed.

POINT IV

Utah Code Ann. §35-1-43(3)(a) Does Not Bar Mower From Seeking Damages Against Lynn Transportation and A&A For Their Failure to Provide the Ordered Worker's Compensation Insurance Coverage Or Their Failure to Notify Mower That They Could Not Obtain the Coverage.

Utah Code Ann. §35-1-43 defines the terms "employee", "worker", "workman" and "operator." It allows sole proprietors to elect to include themselves as an employee under the Worker's Compensation Act by giving notice to the Industrial Commission and the sole proprietor's insurance carrier. Notice statutes such as §35-1-43 do not provide a defense to an insurance carrier seeking to deny coverage. See Garrett v. Garrett, 249 S.E.2d 808 (N. C.

App. 1978). It follows that notice statutes such as §35-1-43 are no defense for an insurance brokerage such as A&A or a contractor such as Lynn Transportation for failing to obtain the ordered Worker's Compensation insurance coverage, nor could it be. Mower could not provide the statutory notice to his insurance carrier until A&A and Lynn provided him an insurance carrier to notify.

POINT V

The Lower Court Misconstrued the Mower/Lynn Agreement When It Awarded Lynn Transportation Attorney's Fees and Costs.

When the indemnification clause at issue is strictly construed, it becomes obvious that Mower's negligence and breach of an oral contract claims do not result from the performance of the Mower/Lynn written Agreement. Since the indemnification clause at issue does not apply to Mower's claims, the summary judgment awarding costs and attorney's fees pursuant to the indemnification clause must be vacated.

POINT VI

Lynn Transportation is Estopped From Seeking Indemnification (Attorney's Fees) Under the Mower/Lynn Agreement.

One of Mower's defenses to Lynn Transportation's claim for attorney's fees under the Mower/Lynn Agreement is the doctrine of equitable estoppel. Equitable estoppel requires three factual elements: (1) a representation, act or omission; (2) justifiable

reliance; and (3) a change of position to one's detriment based on the reliance. Rothey v. Walker Bank & Trust, 754 P.2d 1222, 1225 (Utah 1988); United American Life Insurance Co. v. Zions First National Bank, 641 P.2d 158, 161 (Utah 1982). As set forth in the Statement of the Case section of this Brief, the record shows that each of the foregoing factual elements is present and/or disputed in this case. Thus, the existence of these genuine issues of material fact requires a reversal of the summary judgment awarding attorney's fees and costs under the Mower/Lynn Agreement.

IX.

ARGUMENT

POINT I

Whether the Mower/Lynn Written Agreement Is An Integrated Contract Presents Genuine Issues of Material Fact Requiring Reversal of the Summary Judgment.

A. Factual and Procedural Background

As set forth in the Statement of the Case section of this Brief, Lynn and A&A obtained a summary judgment by arguing to the lower court that the Mower/Lynn Agreement was an integrated contract justifying application of the parol evidence rule to bar all of Mower's fact-sensitive claims. Mower contended that the contract was not integrated; that the parties intended the insurance order form to be construed with the Mower/Lynn Agreement; and that the representations made by Lynn's employees to induce

Mower to sign the contract all created genuine issues of material fact as to whether the parties intended the Mower/Lynn Agreement as a final expression of their agreement. The lower court found that the Mower/Lynn Agreement was an integrated contract, but it did not consider the insurance order form or the representations of Lynn's employees in arriving at its conclusion (R. 565-570).

B. Standard of Review

Whether the Mower/Lynn Agreement is a complete integrated contract is a question of fact. E.g., Union Bank v. Swenson, 707 P.2d 663, 665, 666-67 (Utah 1985); Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 270 (1972). Whether a genuine issue of fact exists is reviewed de novo, and on review, Mower is entitled to have all of the facts presented and all of the inferences fairly arising therefrom considered in a light most favorable to him. E.g., Geneva Pipe Co. v. S&H Insurance Co., 714 P.2d 648, 649 (Utah 1986).

C. Legal Analysis

Whenever, as in this case, a litigant insists that a writing before the court is an integration, and asks for the application of the parol evidence rule, the court must determine as a question of fact whether the parties did, in fact, adopt a particular writing or writings as the final and complete expression of their bargain. Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266, 270 (1972). In resolving this genuine issue of

material fact, parol evidence is admissible. Union Bank v. Swenson, 701 P.2d 663, 665 (Utah 1985).

Additional genuine issues of material fact occur when, as in this case, one party contends that two simultaneously executed writings (the insurance order form and the Mower/Lynn Agreement) should be construed together, and the other party contends that only the last signed document was the agreement. See Bullfrog Marina, supra at 270-71, wherein the court stated:

In the instant action, the trial court found after full consideration of the entire transaction, including the purpose to be served by the lease and the employment contract, defendant would not have leased the boats to plaintiff unless he could operate the houseboat rental service.

* * *

The trial court did not err in following the rule of law that when two or more instruments are executed by the same parties contemporaneously or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together

Similarly, in this case, a fact finder could, and should, find that the contemporaneously executed insurance order form and the Mower/Lynn Agreement were part of the same transaction and concern the same subject matter (Worker's Compensation insurance). This genuine issue of material fact requires reversal of the summary judgment. See Bullfrog Marina, supra.

Another genuine issue of material fact was created by the Lynn employees' representations that they would order and obtain Worker's Compensation for Mower through A&A. These representations show that the Mower/Lynn Agreement was not intended to be a final integration. Moreover, Mower's Affidavit alleges that he would not have operated the truck under the Mower/Lynn Agreement without the misrepresentations (R. 487). These allegations raise issues of material fact requiring reversal of the summary judgment. See Union Bank v. Swenson, supra at 666.

POINT II

The Lower Court's Misapplication of the Parol Evidence Rule Does Not Justify the Lower Court's Summary Judgment.

A. Factual and Procedural Background

Mower sued Lynn Transportation and A&A for their failure to obtain Worker's Compensation insurance coverage for Mower or to notify him that they could not obtain the coverage. Mower alleged claims for negligence, negligent misrepresentation, fraud and breach of contract (R. 297-310). As set forth in the Statement of the Case section of this Brief, Lynn's employees told Mower that they could obtain Worker's Compensation cheaper than he could and that Worker's Compensation insurance premiums could be deducted from Lynn settlement checks to Mower. They also provided him with A&A's order form -- a form supplied by A&A to Lynn to be used by

Lynn's employees and independent contractors. Insurance premiums were deducted from Mower's checks. No one from Lynn or A&A told Mower that he did not have Worker's Compensation insurance coverage or that A&A and Lynn could not obtain Worker's Compensation insurance coverage for him. Mower reasonably believed that Lynn and A&A had secured the Worker's Compensation insurance coverage. Had he known differently, he would not have driven the truck until coverage was secured (R. 487).

Despite all of that, the lower court granted summary judgment dismissing the foregoing fact-sensitive claims. The Court first found that the Mower/Lynn Agreement was an integrated contract, and then reasoned that since it is undisputed that Mower signed A&A's insurance order form just before he signed the Mower/Lynn Agreement, "There is no genuine issue of material fact that controlled and the duty to obtain Worker's Compensation insurance rested on Mower and not Lynn or A&A" (R. 567).

B. Standard of Review

Whether the lower court correctly applied the parol evidence rule is viewed for correctness with no deference to the trial court. Bullfrog Marina, supra; Union Bank, supra.

C. Legal Analysis

1. Introduction

The parol evidence rule has a narrow application. The rule operates in the absence of fraud only to exclude

contemporaneous statements or representations offered for the purpose of varying the terms of an integrated contract. Union Bank, supra at 665. As hereinafter set forth, there are numerous reasons why the parol evidence rule does not justify the lower court's summary judgment.

2. Whether the Mower/Lynn Agreement Is An Integrated Contract Is a Factual Issue Which Creates Genuine Issues of Material Fact, So the Court Should Not Have Applied the Parol Evidence Rule.

The Court may apply the parol evidence rule only when there is an integrated contract. Bullfrog, supra at 270. It cannot be applied when there is a dispute over whether the agreement is an integrated contract. Union Bank, supra at 666-668. As set forth in Point I of the Argument section of this Brief, whether the Mower/Lynn Agreement is an integrated contract is a question of fact, and there are numerous genuine issues of material fact that must be determined to resolve this ultimate fact issue. Thus, the Court should not have applied the parol evidence rule. The court's premature application of the rule requires a reversal of the lower court's summary judgment. Union Bank, supra.

3. The Parol Evidence Rule Does Not Bar Mower's Claims Against A&A Because A&A Was Not a Party to the Mower/Lynn Agreement.

The parol evidence rule applies only to those who are parties to the written contract. E.g., Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 381 (Iowa 1983); Denha v. Jacob, 446 N.W.2d 303,

306 (Mich. App. 1989); Sullivan v. Estate of J. C. Eason, 558 So.2d 830, 832 (Miss. 1990). Since A&A was not a party to the Mower/Lynn Agreement, the parol evidence rule cannot possibly bar Mower's claims for negligence and breach of contract (order form) against A&A. Thus, that part of the summary judgment dismissing Mower's claims against A&A must be reversed.

4. The Parol Evidence Rule Does Not Bar Claims for Fraud And/Or Negligent Misrepresentation.

The parol evidence rule operates "in the absence of fraud." Bullfrog Marina, supra at 270 (emphasis added). It does not bar a claim for fraud. Union Bank, supra at 665; see Berkeley Bank For Cooperatives v. Meibos, 607 P.2d 798 (1981). Nor does it bar a plaintiff from showing that misrepresentations were made either intentionally or negligently which caused the innocent party to sign the agreement. See Union Bank, supra at 666.

In this case, there is evidence that Lynn Transportation misrepresented to Mower that it would obtain Worker's Compensation for Mower and that Mower could pay for it by deductions from his settlement checks; that Mower reasonably relied on the misrepresentation and was induced by the misrepresentation to sign the contract; that Mower's belief was reasonable; and that as a result of his reliance on the misrepresentations, he was damaged. Since the record factually establishes a prima facie case of fraud and/or negligent misrepresentation, the lower court should not have

applied the parol evidence rule to bar these claims. Since the erroneous application of the parol evidence rule was the primary basis for the lower court's summary judgment, the summary judgment should be reversed.

5. The Parol Evidence Rule Does Not Apply to Negligence Claims.

The parol evidence rule is a narrow principle of contract interpretation. Union Bank, supra at 665. It is applied to contract claims. Restatement Contracts (Second) §213. It is codified in Utah's Uniform Commercial Code. See Utah Code Ann. §70A-2-202. However, it has no application to torts. See 9 Wigmore, Evidence §§2401, 2404 (Chadborne Rev. 1981) (rule applies to jural acts).

Mower is clearly entitled to recover for the negligence of Lynn Transportation and A&A in failing to effect Worker's Compensation coverage for Mower. E.g., Fiorentino v. The Travelers Insurance Co., 448 F. Supp. 1364 (E.D. Pa. 1978); State Farm Insurance Co. v. Fort Wayne National Bank, 474 N.E.2d 524 (Ind. App. 1985); Connell v. State Farm Mutual Automobile Ins. Co., 482 So.2d 1165 (Ala. 1985); Zitelman v. Metropolitan Insurance Agency, 482 A.2d 426 (D.C. App. 1984); Hunter v. State of Florida, 391 So.2d 234 (Fla. App. 1981); Clary Insurance Agency v. Doyle, 620 P.2d 194 (Alaska 1980); Stuart v. National Indemnity Co., 7 Ohio App.3d 63, 454 N.E.2d 158 (1982).

To recover, Mower must show:

- (1) Negligence in the representation of the type or extent of coverage to be obtained;
- (2) Reliance on the agent's representation in ordering insurance;
- (3) Loss as a result of misrepresentation; and
- (4) Justifiable reliance on misrepresentation. See Fiorentino, supra at 1369.

Since the parol evidence rule does not bar a negligence claim, and since a factual dispute exists as to all of the above elements, the summary judgment must be reversed.

6. The Parol Evidence Rule Does Not Bar Contemporaneous Representations Or Writings When They Are Not Offered to Vary the Terms of the Contract.

In this case, the representations made by Lynn's employees and the insurance order form were not offered to vary the terms of the Mower/Lynn Agreement. The Agreement does not specify how Mower is to obtain the Worker's Compensation insurance required by the Agreement. It is silent on the issue. Thus, the representations and insurance order form should have been allowed to show how Mower was to obtain the Worker's Compensation insurance.

POINT III

Whether Lynn Transportation Is Estopped From Denying Its Promise to Obtain Worker's Compensation for Mower Creates Genuine Issues of Material Fact Requiring Reversal of the Summary Judgment.

A. Factual and Procedural Background

In responding to Lynn Transportation's and A&A's motion for summary judgment, Mower said that Lynn Transportation was estopped from denying its promise to obtain Worker's Compensation insurance for Mower. As set forth in the Statement of the Case section of this Brief, Lynn's employees told Mower that they could purchase all of the necessary insurance for him, provided him the insurance order form submitted to them by A&A, and told Mower that his Worker's Compensation premium would be deducted from his settlement checks. Mower and an insurance expert both said that Mower had reasonably relied on the foregoing promises and was induced not to obtain Worker's Compensation insurance in some other way, all to his detriment (R. 188-91). The lower court did not specifically address the promissory estoppel issue in its Order granting summary judgment.

B. Standard of Review

Whether the lower court correctly applied or failed to apply the doctrine of promissory estoppel is reviewed for correctness. See Petty v. Gindy Manufacturing Corp., 404 P.2d 30, 33 (Utah 1965).

C. Legal Analysis

Promissory estoppel relates primarily to those informal contracts which lack consideration but where, because of the facts surrounding the transaction, injustice can only be avoided by enforcing the promise. Easton v. Wycoff, 4 Utah 2d 386, 388, 295 P.2d 332 (1956). Estoppel is invoked to prevent injustice when one has reasonably relied to his detriment on a representation or omission. See United American Life Insurance Co. v. Zions First National Bank, 641 P.2d 158, 161 (Utah 1982). Generally, to invoke the doctrine requires the presence of three factual elements: (1) a representation, act or omission; (2) justifiable reliance; and (3) a change of position to one's detriment based on the reliance. These are factual issues. See Rothey v. Walker Bank & Trust, 754 P.2d 1222, 1224-25 (Utah 1988).

The case law is clear in holding that where an insurance broker or agent agrees to procure a policy under circumstances which would lead an applicant to believe that insurance has been obtained, the law requires the agent to perform the duty undertaken. State Farm Insurance Co. v. Fort Wayne National Bank, 474 N.E.2d 524 (Ind. App. 1985); Sheridan v. Greenberg, 391 So.2d 234 (Fla. App. 1981); Stuart v. National Indemnity Co., 7 Ohio App.3d 63, 454 N.E.2d 158 (1982).

Since the decision of whether to apply the doctrine of promissory estoppel in this case to prevent Lynn Transportation

from denying its promise to obtain Worker's Compensation for Mower creates the foregoing genuine issues of material fact, the summary judgment must be reversed.

POINT IV

Utah Code Ann. §35-1-43(3)(a) Does
Not Bar Mower From Seeking Damages
Against Lynn Transportation
and A&A For Their Failure to
Provide the Ordered Worker's Compensation
Insurance Coverage Or Their
Failure to Notify Mower That
They Could Not Obtain the Coverage.

A. Factual and Procedural Background

Under the Mower/Lynn Agreement, Mower agreed to obtain Worker's Compensation insurance covering himself and his employees. Under the A&A order form, Mower ordered Worker's Compensation for himself and his employees from A&A. Neither Lynn Transportation nor A&A ordered the Worker's Compensation insurance or notified Mower that they could not obtain the Worker's Compensation insurance for him.

In its summary judgment Order, the lower court found as a fact that Mower did not notify the insurance carrier or the Industrial Commission, as set forth in Utah Code Ann. §35-1-43(3)(a). From the foregoing, the Court concluded that Mower could not be damaged by Lynn Transportation's and A&A's failure to obtain the ordered Worker's Compensation insurance or, in the alternative, their failure to notify Mower that they could not obtain the

insurance. The record shows no legal support for the lower court's novel construction of Utah Code Ann. §35-1-43(3)(a).

B. Standard of Review

An appellate court reviews a trial court's interpretation of a statute on a correctness of error basis without deference. Surety Life Insurance Co. v. Smith, 259 U.A.R. 9, 10 (Utah 1995); Berube v. Fashion Center, Ltd., 771 P.2d 1033, 1038 (Utah 1989); Mendez v. State Dept. of Social Services, 813 P.2d 1234, 1236 (Utah App. 1991).

C. Legal Analysis

Section 35-1-43 defines the terms "employee", "worker", "workmen" and "operator" as used in this [Worker's Compensation] statute. Subsection (3)(a) provides that a "sole proprietorship may elect to include as an employee under this chapter . . . the owner of the sole proprietorship." If the sole proprietor makes the election, it is directed to serve notice of it upon its insurance carrier and upon the Industrial Commission. No sole proprietor is considered an employee under the Worker's Compensation statute until the notice has been given. The statute does not specifically preclude a sole proprietor from obtaining Worker's Compensation insurance or suing those who have agreed to provide Worker's Compensation insurance, but then failed to do so, nor could it. Mower could not possibly notify his insurance

carrier, as required by §35-1-43(3)(a), until his brokers, Lynn and A&A, provided Mower an insurance carrier.

In addition, Mower is not seeking damages for any right or privilege granted under Utah's Worker's Compensation statute. Thus, whether he is considered an employee under the statute is immaterial. What Mower is seeking are damages that are proximately caused by Lynn's and A&A's negligent failure to provide the insurance that would cover him in the event of a worker accident, and their failure to notify him that they could not obtain the coverage. Mower also seeks the same damages under a breach of contract claim.

Moreover, there are no reported cases wherein an insurance broker like A&A or a contracting party like Lynn has attempted to use a statutory notification provision as a defense for a failure to provide the insurance coverage. However, in Garrett v. Garrett, 249 S.E.2d 808 (N. C. App. 1978), the North Carolina Appeals Court held that an insurance carrier was estopped from using a similar notice statute as a defense to a demand for Worker's Compensation insurance coverage. Simply put, coverage does not depend upon compliance with the notice statute, but on the terms of the policy itself.

POINT V

The Lower Court Misconstrued
the Mower/Lynn Agreement When
It Awarded Lynn Transportation
Attorney's Fees and Costs.

A. Factual and Procedural Background

The indemnification clause at issue reads:

[Mower] agrees to . . . indemnify [Lynn Transportation] from and against any claims, loss or damage . . . for any injury . . . to [Mower] resulting from performance of this agreement.

Lynn Transportation argued that the foregoing requires Mower to pay Lynn's attorney's fees and costs incurred in defending against Mower's claims (R. 598-607). Mower responded that his claims did not arise from the performance of the Mower/Lynn Agreement, and that instead, the claims resulted from Lynn's negligent failure to obtain Worker's Compensation insurance coverage and from its breach of an oral agreement (R. 617-620). The lower court ruled that the foregoing indemnification clause required Mower to pay Lynn's attorney's fees and costs (R. 633-35).

B. Standard of Review

Whether the terms of an indemnification agreement are ambiguous and whether the trial court properly interpreted an indemnification agreement are legal conclusions reviewed for correctness. Scudder v. Kennecott Corp., 858 P.2d 1005, 1008 (Utah

App. 1993); Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492, 493 (Utah App. 1991).

C. Legal Analysis

The law is clear that indemnification agreements are strictly construed against the drafter. Freund v. Utah Power & Light Co., 793 P.2d 362, 370 (Utah 1990); Scudder v. Kennecott Corp., 858 P.2d 1005, 1008 (Utah App. 1993). This is particularly so when, as in this case, the negligent party attempts to shift the financial responsibility for its own negligence. Pickhover v. Smith Management Corp., 771 P.2d 664 (Utah App. 1989). In this case, there is a factual presumption against an intent to indemnify unless it is clearly and unequivocally expressed. Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492 (Utah App. 1991). Indemnification is not achieved by inference or implication from general language. Pickhover, supra at 667. The indemnification provision at issue specifically requires Mower to indemnify Lynn only when the claim, loss, damage or injury "results from the performance of this agreement."

However, the claims, injury and damage set forth in Mower's Complaint did not arise from the performance of the Mower/Lynn Agreement. The claims arose out of Lynn's negligent failure to obtain Worker's Compensation insurance or to notify Mower that it could not do so. The claims also arose from a separate oral agreement or promise to purchase the Worker's

Compensation insurance for Mower. Thus, the indemnification language does not apply in a summary judgment awarding attorney's fees and costs under the indemnification clause, and must be vacated.

POINT VI

Lynn Transportation Is Estopped From Seeking Indemnification (Attorney's Fees) Under the Mower/Lynn Agreement.

A. Factual and Procedural Background

After Lynn Transportation obtained a summary judgment dismissing Mower's claims, it moved for an order granting summary judgment on the issue of attorney's fees. Lynn said that the following paragraph entitled him to fees:

[Mower] agrees to . . . indemnify [Lynn Transportation] from and against any claims, loss or damage . . . for any injury . . . to [Mower] resulting from performance of this agreement.

In response, Mower replied that Lynn was equitably estopped from enforcing the contract provisions. More specifically, Mower said that Lynn made the following misrepresentations and/or omissions: (1) Lynn Transportation would obtain Worker's Compensation for Mower and allow Mower to pay for the premiums with deductions from his settlement checks; (2) it ordered the insurance from A&A for Mower; (3) Lynn Transportation deducted insurance premiums from Mower's checks; (4) Lynn Transportation never told Mower that it had not purchased Worker's

Compensation insurance or that it was not able to obtain Worker's Compensation insurance for Mower; and (5) Lynn never required additional proof of Worker's Compensation coverage from Mower. The record also shows that Mower reasonably relied on the foregoing representations and omissions (R. 188-89). In addition, there is no factual dispute that Mower changed his position to his detriment based on the reliance; that is, had he not reasonably relied on Lynn's representations and omissions, he would have purchased Worker's Compensation from some other source before driving his truck. However, the lower court, in granting summary judgment, did not address the equitable estoppel issue.

B. Standard of Review

Whether the trial court properly applied or failed to apply the doctrine of equitable estoppel is reviewed de novo under a correctness standard. See Rothery v. Walker Bank & Trust, 754 P.2d 1222 (Utah 1988).

C. Legal Analysis

Equitable estoppel is invoked to prevent injustice when one has reasonably relied to his detriment on a negligent misrepresentation or omission. See United American Life Insurance Co. v. Zions First National Bank, *supra*; Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689, 694 (1979).

Equitable estoppel precludes a party from asserting rights when another party has justifiably relied on the acts,

omissions, representations or statements of the party or changed positions so that he will suffer injury if the former party is allowed to repudiate his contract. Rothey, supra at 1224. Three elements must be present: (1) a representation, act or omission; (2) justifiable reliance; and (3) a change of position to one's detriment based on the reliance. These are factual issues. Id. at 1225; United American Life Insurance Co. v. Zions First National Bank, 641 P.2d 158, 161 (Utah 1982).

In the lower court, Lynn asserted that by his contract, Mower agreed to obtain Worker's Compensation insurance and to indemnify Lynn Transportation from all claims presented in this lawsuit. Mower responded that Lynn Transportation was equitably estopped to claim the benefits of the contract indemnification language. "The general rules of estoppel apply to the operation and effect of a contract of indemnity as between indemnitor and indemnitee." Rothey v. Walker Bank & Trust Co., 754 P.2d 1222, 1224 (Utah 1988).

To invoke equitable estoppel, a party need only show conduct by another party which leads him, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is allowed to repudiate its contract. E.g., United American Life Insurance Co. v. Zions First National Bank, 641 P.2d 158, 161 (Utah 1982); Celebrity Club, Inc. v. Utah Liquor Control

Commission, 602 P.2d 689, 694 (Utah 1979); Mendez v. State Dept. of Social Services, 813 P.2d 1234, 1236 (Utah App. 1991).

In the present case, the facts and reasonable inferences set forth in the Statement of the Case and summarized in the Factual and Procedural Background set forth above show all of the elements of equitable estoppel. Clearly, Lynn Transportation was negligent in failing to obtain Worker's Compensation insurance for Mower.

The facts show that Mower relied on a false, negligent representation by Lynn Transportation (that Worker's Compensation insurance would be obtained if Mower checked the box to order such coverage). Clearly, Mower relied on this promise. The promise turned out to be false. The fault for lack of coverage clearly lies with Lynn Transportation and A&A, whose negligence created a non-insured situation. Estoppel must be invoked herein to prevent a manifest injustice to Mower. Celebrity Club, Inc. v. Utah Liquor Control Commission, supra; Mendez v. State Dept. of Social Services, 813 P.2d 1234, 1236 (Utah App. 1991); Eldredge v. Utah State Retirement Board, 795 P.2d 671, 675 (Utah App. 1990).

At a bare minimum, the issues of misrepresentation and reasonable reliance present genuine issues of material fact requiring reversal of the summary judgment awarding indemnification and attorney's fees. See Ward v. Richards & Rossano, Inc., 51 Wash. App. 423, 754 P.2d 120, 127 (Wash. App. 1988); see also,

Mendez v. State Dept. of Social Services, 813 P.2d 1234, 1237 (Utah App. 1991).

X.

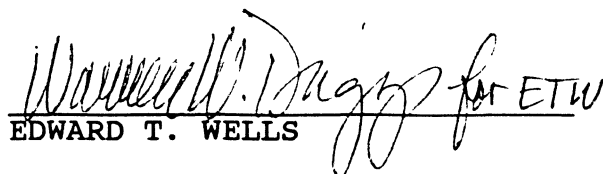
CONCLUSION

The summary judgment dismissing Mower's breach of contract, negligence and fraud claims should be dismissed because: (1) whether the Mower/Lynn Agreement is an integrated contract presents numerous genuine issues of material fact; (2) the lower court's misapplication of the parol evidence rule does not justify the summary judgment; (3) whether the appellees are estopped from denying their promise to obtain Worker's Compensation for Mower creates genuine issues of material fact; and (4) Utah Code Ann. §35-1-43(3)(a)'s notice provisions do not bar Mower's claims.

The summary judgment awarding Lynn Transportation's costs and attorney's fees should be reversed because the lower court misconstrued the indemnification provision, and Lynn Transportation is estopped from seeking indemnification under the Mower/Lynn Agreement.

Respectfully submitted this 24 day of March, 1995.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellants

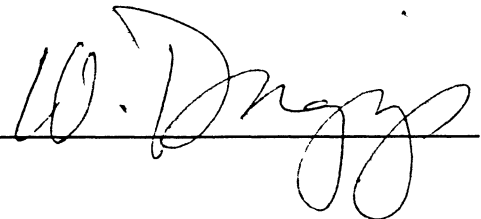

EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing **BRIEF OF APPELLANTS** (Mower, et al. v. Alexander & Alexander, Inc., et al.) were mailed, postage prepaid, this 24 day of March, 1995 to the following:

George W. Pratt
Andrew H. Stone
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main Street, #1500
Salt Lake City, Utah 84101
Attorneys for Appellee
Lynn Transportation Co., Inc.

Terry M. Plant
HANSON, EPPERSON & SMITH, P.C.
4 Triad Center, #500
P. O. Box 2970
Salt Lake City, Utah 84110
Attorneys for Appellee
Alexander & Alexander, Inc.



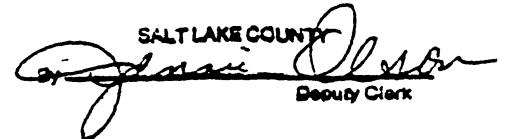
ADDENDUM

1. Order - 1/26/93
2. Order - 7/13/94
3. U.R.C.P. 56
4. Mower/Lynn Agreement
5. Insurance Order Form

Tab 1

FILED DISTRICT COURT
Third Judicial District

JAN 26 1993

SALT LAKE COUNTY

Deputy Clerk

George W. Pratt (USB #2642)
Andrew H. Stone (USB #4921)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Lynn Transportation Company, Inc.
1500 First Interstate Plaza
170 South Main Street
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Telephone: (801) 521-3200

Terry M. Plant (USB #2610)
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P.O. Box 2970
Salt Lake City, Utah 84110
Telephone: (801) 363-7611

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

KIRK H. MOWER and the "UTAH
DEPARTMENT OF HUMAN SERVICES," :

Plaintiffs, :

vs. :

ALEXANDER & ALEXANDER, an
Oklahoma corporation qualified to do
business in the State of Utah; and LYNN
TRANSPORTATION COMPANY, INC., an
Ohio corporation, :

Defendants. :

LYNN TRANSPORTATION CO., INC., :

Counterclaim-
plaintiff, :

ORDER

Civil No. 910905824CV

Honorable Richard H. Moffat

FILE COPY

vs.	:
	:
KIRK H. MOWER,	:
	:
Counterclaim-	:
defendant.	:

This matter came before the Court on defendants' joint motion for summary judgment on December 4, 1992 at 9:30 a.m. In addition, defendant Lynn Transportation's motion to strike the affidavits of Jerry Anderegg, in which defendant Alexander & Alexander had joined, had been submitted to the Court for a decision. Based on the memoranda and other materials submitted by the parties, and the arguments of counsel, the Court rules as follows:

1. The motion to strike the affidavits of Jerry Anderegg is granted for the reasons stated in defendant's motion. However, even if those affidavits were admitted, the undisputed facts would still mandate the following summary judgment.

2. The Court determines that the contract between Lynn Transportation and plaintiff Mower attached as Exhibit "A" to plaintiff's complaint is an integrated contract, and that the parol evidence rule therefore bars evidence of prior or contemporaneous representations to vary the terms of that contract. The Court determines, pursuant to 4-501(2)(b) of the Code of Judicial Administration, that it is undisputed that the form attached as Exhibit "B" to plaintiff Mower's Amended Complaint was signed prior to the time Mower signed the written contract with Lynn attached as Exhibit "A" to plaintiff's complaint. The

written contract identified as Exhibit "A" unambiguously assigned the responsibility to obtain worker's compensation insurance to plaintiff Mower. Accordingly, there is no genuine issue of material fact that the written contract controls and the duty to obtain worker's compensation insurance rested with plaintiff Mower, and not defendants.

3. In addition, the Court determines that it is undisputed that Mower was a sole proprietor of his business and that he failed to give notice either to the Industrial Commission or to any insurance carrier of his alleged desire to have injuries to himself covered under any workers' compensation insurance policy. Thus, plaintiff Mower would not have been covered by a workers' compensation insurance policy even if defendants had obtained one for him. The statutory duty to give such notice to the Industrial Commission and the insurance carrier is imposed upon the sole proprietor. Utah Code Ann. § 35-1-43(3)(a). There is therefore no genuine issue of material fact from which a factfinder could conclude that defendants' alleged failure to obtain workers' compensation insurance for plaintiff resulted in any damage to plaintiff.

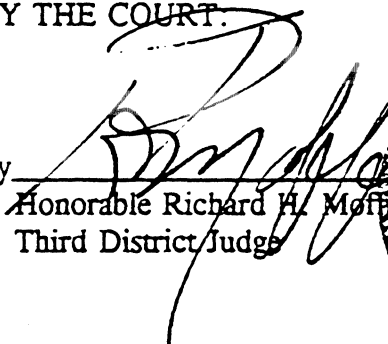
Accordingly, pursuant to Rule 56(c) of the Utah Rules of Civil Procedure, the Court determines that the defendants Lynn Transportation and Alexander & Alexander are entitled to summary judgment in their favor and against plaintiffs Mower and the Department of Human Services on all causes of action in plaintiff's amended complaint alleged against defendants. The Court hereby GRANTS defendants' motion for summary judgment.

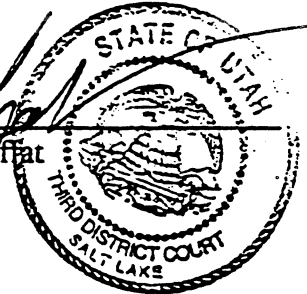
SO ORDERED.

Dated this 26 day of January, 1992.

BY THE COURT.

By


Honorable Richard H. Moffat
Third District Judge



Tab 2

RECEIVED
THIRD JUDICIAL DISTRICT COURT

JUL 13 1994

By R. O. Hyde

George W. Pratt (USB #2642)
Andrew H. Stone (USB #4921)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Lynn Transportation Company, Inc.
1500 First Interstate Plaza
170 South Main Street
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Telephone: (801) 521-3200

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

KIRK H. MOWER and the "UTAH
DEPARTMENT OF HUMAN SERVICES,"

Plaintiffs,

vs.

ALEXANDER & ALEXANDER, an Oklahoma
corporation qualified to do business in the State
of Utah; and LYNN TRANSPORTATION
COMPANY, INC., an Ohio corporation,

Defendants.

LYNN TRANSPORTATION CO., INC.,

Counterclaim-plaintiff,

vs.

KIRK H. MOWER,

Counterclaim-defendant.

ORDER

Civil No. 910905824CV

Honorable Richard H. Moffat

This matter came on before the court on Friday, June 24, 1994 on Defendant Lynn

Transportation Co., Inc.'s Motion for Summary Judgment. The Honorable Ronald O. Hyde

presided. Based upon the arguments of counsel and the memoranda, stipulation and affidavit on file, the court GRANTS defendant's motion.

Accordingly, it is hereby ordered, and the clerk is directed to prepare and enter a Judgment, as follows:

1) Summary Judgment is granted on Lynn Transportation's First Claim for relief, in favor of Defendant Lynn Transportation and against plaintiff Kirk H. Mower, in the amount of Thirty-Two Thousand Five Hundred Twenty-Six Dollars and Eighty-Three Cents, (\$32,526.83), based on the indemnity provision in the contract between Lynn Transportation and Kirk H. Mower, attached as Exhibit A to Mower's Complaint.

2) In addition, Summary Judgment is granted on Lynn Transportation's Second Claim for relief, in favor of Defendant Lynn Transportation and against plaintiff Kirk H. Mower, in the amount of One Thousand Eight Hundred Seventy One Dollars and Sixty-Nine Cents, (\$1,871.69), requiring a total Judgment on Lynn Transportation Co., Inc.'s First and Second Claims for relief in the amount of Thirty-Four Thousand, Three Hundred Ninety Eight Dollars and Fifty-Two Cents (\$34,398.52).

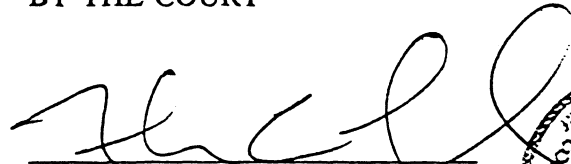
3) Lynn Transportation's Third Claim for Relief is hereby ordered DISMISSED
without prejudice.

All amounts to bear interest at the statutory rate from the date of entry.

So Ordered.

7-13-94

BY THE COURT


The Honorable Ronald O. Hyde
District Judge

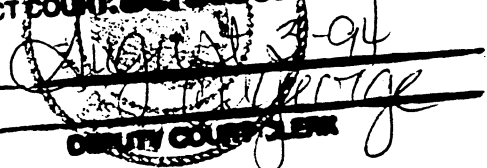


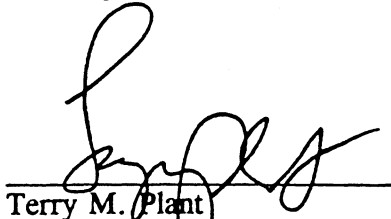
APPROVED AS TO FORM:



Edward T. Wells

Attorney for Plaintiff Kirk H. Mower

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH.
DATE: August 3-94

CLERK



Terry M. Plant

Attorney for Defendant Alexander & Alexander

Tab 3

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran

from the date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see *Central Bank & Trust Co. v. Jensen*, *supra*, and Rule 58A(d)).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇌ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set

forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
—Contents.
—Corporation.
—Experts.
—Inconsistency with deposition.
—Necessity of opposing affidavits.
—Resting on pleadings.
—Objection.
—Sufficiency.
—Hearsay and opinion testimony.
—Superseding pleadings.
—Unpleaded defenses.
—Verified pleading.
—Waiver of right to contest.
—When unavailable.
—Exclusive control of facts.
—Who may make.
Affirmative defense.
Answers to interrogatories.
Appeal.
—Adversely affected party.
—Standard of review.
Attorney's fees.
Availability of motion.
Compliance with rule.
Cross-motions.
Damages.
Discovery.
Disputed facts.
Evidence.
—Facts considered.
—Improper evidence.
—Proof.
—Weight of testimony.
Implicit rulings.

Improper party plaintiff.
Issue of fact.
—Notice.
—Corporate existence.
—Deeds.
—Lease as security.
Judicial attitude.
Motion for new trial.
Motion to dismiss.
Motion to reconsider.
Notice.
—Provision not jurisdictional.
—Waiver of defect.
Procedural due process.
Purpose.
Scope.
Summary judgment improper.
—Damage to insured vehicle.
—Dispersal of interest.
—Findings by court.
—Foreclosure of trust deeds.
—Fraud or duress.
—Guardianship.
—Mortgage note.
—Negligence.
—Nonspecific denial of requests for admission.
—Note.
—Recovery for goods and services.
—Stock ownership.
—Wrongful possession.
Summary judgment proper.
—Contract action.
—Contract terms.
—Deceit.
—Jurisdiction.
—Negligence.

Tab 4

- ...and shall be responsible for any and all damages to its own equipment. CARRIER assu...
12. When moving shipments lost on CARRIER's trailers, CONTRACTOR shall be responsible to CARRIER for damage, loss and/or theft of the CARRIER's equipment and/or component parts caused by carelessness, negligence, improper usage and/or abuse of said equipment, except in the event of an accident liability will not exceed a deductible of \$500 and further agrees:
- Not to make any alterations, changes or modifications to CARRIER's equipment, except as may be necessary to comply with applicable regulations, without written consent of CARRIER.
 - To immediately remove flat tires to prevent irreparable damage and loss of said tires.
 - To return CARRIER's equipment with same tires that were mounted on said equipment at time CONTRACTOR or its agents took possession same. In the event foreign tires are found on CARRIER's equipment, CONTRACTOR will be held liable.
 - To use CARRIER's equipment only in the ordinary course of CARRIER's business as a motor common or contract carrier.
- In the event of such loss to the CARRIER, the loss will be deducted from CONTRACTOR's settlement. CARRIER will make available to CONTRACTOR a written explanation and itemization of any deductions for damage to CARRIER's equipment prior to or at the time such deductions are made.
13. The CONTRACTOR shall be responsible and liable to CARRIER and agrees to pay for shortage of, loss of, or damage to cargo transported by CARRIER in the event that such shortage, loss or damage is caused directly or indirectly by the operations of CONTRACTOR or its employee agents. Such monies shall be deducted from any monies due CONTRACTOR under this Agreement. CARRIER will make available to CONTRACTOR a written explanation and itemization of any deductions for cargo or property damage prior to or at the time such deductions are made.
- If any losses, shortages or damages to cargo are brought to the attention of CONTRACTOR on delivery, CONTRACTOR shall first notify CARRIER and obtain authorization prior to signing any delivery receipts or similar documents acknowledging the losses, shortages or damages to cargo. Failure to do so on CONTRACTOR's part shall make CONTRACTOR liable for the losses, shortages, or damages to cargo.
14. The CARRIER may require CONTRACTOR to deposit with the CARRIER Five Hundred Dollars (\$500.00) to be placed in an escrow fund. The fund shall be established by depositing \$25.00 per week from payments due CONTRACTOR under this Agreement until such time as a total of \$500 has been accumulated. Additional deposits shall be made from payments due CONTRACTOR as necessary to maintain a balance of \$500.00. Upon cancellation of this Agreement, the escrow fund will be used to clear CONTRACTOR's account. Any charges to or purchases made by the CONTRACTOR from CARRIER will be deducted from the escrow fund and the balance will be paid to CONTRACTOR within forty-five (45) days of cancellation of this Agreement. In the event CARRIER temporarily advances funds to CONTRACTOR so as to enable CONTRACTOR to fulfill obligations under Paragraph 5 of this Agreement, such advances shall be considered as reductions in the escrow account until repaid. CARRIER shall provide to CONTRACTOR an accounting of any transaction involving the escrow fund. This accounting will be provided upon CONTRACTOR's request at any time and shall include all deductions or additions made to the escrow fund. Interest derived from the escrow fund shall be paid to CONTRACTOR on a quarterly basis. This payment will be made on the first settlement after the end of each quarter. Interest will be paid on the average daily balance in the account during each quarter. The interest rate will be established on the first day of the quarter and shall be the average yield on 91-day, 13-week U.S. Treasury Bills as established in the most recent weekly auction prior to the first day of the quarter by the Department of Treasury.
15. The CONTRACTOR agrees and it is mutually understood that if CONTRACTOR, or its employees and/or agents used in the performance of this Agreement, shall collect any sums of money from customers on account of bills rendered to customers by CARRIER, during the course of CONTRACTOR's operations, it will hold such money as a trustee for CARRIER and will hold it apart from its own funds and will deliver such monies to CARRIER forthwith.
16. This Agreement shall not be construed as a restriction upon CONTRACTOR's right to engage in any other business it desires.
17. As required by 49 C.F.R. Part 1058, the CARRIER shall provide identification required by governmental agencies to be affixed to the Equipment. The CONTRACTOR agrees that such identification shall be so affixed only during the period of the Agreement and only when the equipment is active being used in the service of the CARRIER and removed from the Equipment if and when it is used in other service. The CONTRACTOR shall return identification to CARRIER upon termination of this Agreement. In the event CONTRACTOR fails to return such identification, \$100.00 will be forfeited by CONTRACTOR and appropriate deduction made from CONTRACTOR's final settlement.
18. In the event either party commits a material breach of any term of this Agreement, the other party shall have the right to terminate this Agreement immediately and hold the party committing the breach liable for damages.
19. The CONTRACTOR shall exercise all diligent efforts to conduct its operation under this Agreement to assure continued satisfaction of CARRIER customers.
20. Except to the extent otherwise provided in Appendix B to this Agreement, this Agreement shall continue in effect for a period of thirty (30) days from the day and date first above written, said term to be automatically renewed for successive thirty (30) day periods unless either party hereto shall give to the other written notice of cancellation thirty (30) days prior to the expiration of the initial term or any renewal thereof.
21. If, for any reason, CONTRACTOR shall fail to complete transportation of commodities in transit, or abandons a shipment or otherwise subject CARRIER to liabilities to shippers or governmental agencies on account of the acts or omissions of CONTRACTOR en route, CONTRACTOR expressly agrees that CARRIER shall have the right to complete performance using the same or other equipment, and hold CONTRACTOR liable to the cost thereof and for any other damages. CONTRACTOR hereby waives any recourse against CARRIER for such action and agrees to reimburse CARRIER for any costs and expenses arising out of such completion of such trip, and to pay to CARRIER any damages for which CARRIER may be held liable in ship, or arising out of such breach of contract by CONTRACTOR.
22. This Agreement constitutes the entire Agreement and understanding between the parties and shall not be modified, altered, changed or amended in any respect unless in writing and signed by both parties.
23. The parties intend to create by this Agreement the relationship of CARRIER and INDEPENDENT CONTRACTOR and not an EMPLOYER-EMPLOYEE relationship. Neither the CONTRACTOR nor its employees are to be considered employees of the CARRIER at any time under any circumstances for any purpose. Neither party is the agent of the other and neither party shall have the right to bind the other by contract or otherwise except as herein specifically provided.
24. A waiver by either party at any time of any of the terms, conditions, or covenants of this Agreement, or of any default or breach shall not be deemed or taken as a waiver at any time thereafter of the same or any other term, condition or covenant herein contained, nor of the strict and prompt performance thereof.
- Any term, condition or covenant herein contained that is held to be invalid by any court of competent jurisdiction shall be considered deleted from this Agreement, but such deletion shall in no way affect any other term, condition or covenant herein contained or the parties' obligations with respect thereto.
25. It is agreed that each and all of the rights, options or remedies under this Agreement are cumulative, and no one of them shall be exclusive of the other or exclusive of any remedies provided by law, and that exercise of one right, option or remedy by either party shall not impair that party's rights to any other right, option or remedy.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this 4-12 day of 1990 and same shall be considered binding upon both parties and shall remain in full force and effect unless and until cancelled according to the terms of this Agreement.

CONTRACTOR

07027

CARRIER

0031

of 24 (the "CONTRACTOR").

WITNESSETH, THAT:

WHEREAS, the CARRIER, an Interstate For Hire Motor Carrier, operating under a Certificate of Public Convenience and Necessity or Permit issued by the Interstate Commerce Commission ("ICC"), and pursuant to exemptions from economic regulation specified in the Interstate Commerce Act or regulations thereunder, wishes to obtain transportation through an agreement with CONTRACTOR; and

WHEREAS, CONTRACTOR is engaged in the business of transporting freight by motor vehicle; and

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties mutually agree as follows:

1. The CONTRACTOR agrees to use the equipment more specifically described in Appendix A to this Agreement, and by reference made a part hereof (the "Equipment"), together with drivers and all other labor CONTRACTOR deems appropriate to transport, load and unload on behalf of CARRIER, or on behalf of such other carriers as CARRIER may designate through authorized Trip Lease or Interchange agreements, such commodities as the CARRIER may make available to the CONTRACTOR. The CARRIER agrees to make commodities available from time to time for transportation by the CONTRACTOR, however, this shall not be construed as an agreement by the CARRIER to furnish, nor the CONTRACTOR to accept any specific number of loads or pounds of freight for transportation at any particular time or any particular place.

2. It is understood and agreed that the performance of this Agreement, and the relationship of the parties hereunder shall be, to the extent that they are applicable, in accordance with the requirements of the Interstate Commerce Act, and the rules and regulations of the ICC and the U.S. Department of Transportation ("DOT"), as modified and amended from time to time.

3. The CONTRACTOR is not obligated to purchase or rent any products, equipment, or services from the CARRIER as a condition to entering into this Agreement.

4. For each trip made by the CONTRACTOR under the terms of this Agreement, the CARRIER agrees, with such exceptions as agreed to between CARRIER and CONTRACTOR, and specifically provided for on CARRIER's prenumbered trip record issued to CONTRACTOR or its driver for each trip, to pay CONTRACTOR according to the terms of the Schedule set forth in Appendix B to this Agreement, which may be modified from time to time by mutual agreement of the parties.

This amount shall constitute full payment to CONTRACTOR, including all payments for pick-ups, delivery and transportation between points of origin and destination and all loading and unloading. Any amounts overpaid by CARRIER for pick-up, delivery, overcharge claims on previous loads and similar items shall be deducted from this amount. The CARRIER will make available to CONTRACTOR for its examination, upon reasonable request, copies of its tariffs.

5. As required by 49 C.F.R. §1057.12(g), the CARRIER shall settle with CONTRACTOR within 15 days after the CONTRACTOR submits, by mail or in person, the necessary delivery documents and other paperwork concerning a trip in the service of the CARRIER. The required documents shall include all signed delivery receipts, and related shipping documents, including bills of lading, driver's daily logs, mileage reports, vehicle inspection reports and such other evidence of proper delivery as may be required by the Rules and Regulations of the ICC or the DOT. It is understood and agreed that all of the aforementioned documents and/or related documents may contain information relating exclusively to CARRIER'S business and must not be released to any parties other than duly authorized CARRIER personnel.

In any case where the CONTRACTOR has secured an advance of any kind from the CARRIER, or if there shall be any other amounts due to the CARRIER, or to affiliates of the CARRIER from the CONTRACTOR or CONTRACTOR's authorized agents or employees, the CARRIER shall be authorized to deduct the amount of such advance or other amounts due to the CARRIER from the CONTRACTOR in settling with CONTRACTOR under the terms of the Agreement. In addition, the CARRIER shall have a period of thirty (30) days after termination of this Agreement to verify the account of the CONTRACTOR as to money owed the CONTRACTOR and to make appropriate deductions before final settlement.

6. The CONTRACTOR recognizes the CARRIER's business of providing motor carrier transportation services to the public is subject to regulation by the Federal Government acting through the ICC and the DOT, and by various state and local governments. The CONTRACTOR shall have the responsibility of:

- a. Maintaining or causing the Equipment to be maintained in a state of repair required by all applicable regulations;
- b. Operating the Equipment in accord with all applicable regulations;
- c. Utilizing only those drivers to operate the Equipment who are qualified under all applicable regulations;
- d. Doing all other things necessary to conduct the transportation services provided in this Agreement in accord with all applicable regulations.

7. The CONTRACTOR shall determine the means and methods of the performance of all transportation services undertaken by the CONTRACTOR under this Agreement. The CONTRACTOR has and shall retain all responsibility for:

- a. Hiring, setting the wages, hours and working conditions and adjusting the grievances of, supervising, training, disciplining and firing all drivers, driver's helpers and other workers deemed necessary by CONTRACTOR for the performance of its obligations under the terms of this Agreement, which drivers, drivers' helpers, and other workers are and shall remain the employees of the CONTRACTOR.
- b. Selecting, purchasing or leasing, financing, and maintaining or causing the Equipment to be maintained.
- c. Paying all operating expense including, but not limited to, all expenses of fuel for Equipment, road taxes, fuel or mileage taxes, fines for parking, moving or weight violations (except that CARRIER shall be responsible for fines for overweight and oversized trailers when trailers are pro-loaded, sealed, or the load is containerized, and for improperly permitted over-dimension loads, unless the violation results from the act or omission of the CONTRACTOR), empty mileage, tolls, ferries, detention and accessorial services, or any other levies or assessments resulting from the performance of this Agreement.
- d. Purchasing fuel in the amount necessary to balance fuel taxes due in each state. CONTRACTOR agrees to keep and make available fuel tickets, drivers records and other documents necessary for reporting purposes. CONTRACTOR further authorizes CARRIER to deduct from each settlement the total amount necessary to compensate CARRIER for the amount it must pay for CONTRACTOR's failure to balance such fuel purchases.

8. The CONTRACTOR has and shall retain sole financial responsibility for all Federal highway use taxes, withholding and employment taxes due to Federal, state or local governments on account of drivers, drivers' helpers and other workers deemed necessary by CONTRACTOR for the performance of its obligations under the terms of this Agreement. The CONTRACTOR agrees to save and hold harmless the CARRIER from any claims by drivers, drivers' helpers and other workers used by the CONTRACTOR, or by any Federal, state or local governmental agency, on account of withholding and employment taxes, or any other actions arising from the CONTRACTOR's relationship with its employees.

9. As required by 49 CFR §1057.12(k), responsibility for obtaining insurance coverage shall be as follows:

- a. The CARRIER shall obtain and maintain in force and effect during the entire term of this Agreement insurance coverage for the protection of the public pursuant to ICC regulations under 49 U.S.C. §10927.
- b. The CONTRACTOR shall obtain and maintain in force and effect Workmen's Compensation Insurance (with All States Endorsement) to the full extent of statutory limits of all states in which work will be performed pursuant to the terms of this Agreement covering itself, its drivers, drivers' helpers and laborers employed by it in the performance of this Agreement, and shall furnish CARRIER with a copy of policy evidencing such coverage or a Certificate of Insurance in lieu thereof. CONTRACTOR agrees to protect, defend, indemnify, and hold CARRIER harmless from and against any claim, loss or damage brought or alleged by CONTRACTOR or its employees against CARRIER for any injury, including death, to CONTRACTOR or its employees resulting from the performance of this Agreement.
- c. The CONTRACTOR agrees to obtain and maintain in full force and effect during the entire period of this Agreement, Bobtail and Deadhead Insurance Coverage with respect to public liability and property damage in the limits of \$250,000 for any person, \$750,000 for any accident, and \$50,000 property damage in any accident concerning the Equipment and/or CARRIER's equipment and agree to furnish evidence of such coverage to CARRIER and arrange for CARRIER to be named as additional insured under such policy.

Tab 5

Attn. Jim: 7/1 key

copy sent 4-13-90

Alexander
& Alexander

CALL IN INFORMATION TO MARY BACKENSTOSE
IMMEDIATELY. THEN SENT A PHOTO COPY OF
COMPLETED FORM TO AAA INC. FOR OUR FILES.

LYNN TRANSPORTATION - SALT LAKE CITY
OWNER/OPERATOR

Lynn's EXHIBIT 4
7-21-90
SUSAN W. COX KINGSBURY, NP, CSR, RT
WITNESS R. Mower

Effective Date of Coverage April 13 1990

Name of Owner/Operator Kirk H Mower

Address 755 W Genesee Ave
Salt Lake City, Utah 84104

CO. UNIT #	YEAR	MAKE	SERIAL #	VALUE
1. 2022	1987	Value-White	1W0400CF9H V304059	\$40,000.00
2.				\$

LOSS PAYABLES:

1. ASSOCIATES COMMERCIAL CORP P.O. Box #113 SLC UT 84127
2.

DRIVER INFORMATION

Name Kirk Mower (as on License)
Address 755 W Genesee Ave (as on License)
Salt Lake City, Utah 84104
Date of Birth 7-2-78 License # 7866180
Social Security 525-62-4637 State of Issue Utah

FOR MY CONVENIENCE, I REQUEST THE ABOVE MOTOR CARRIER TO DEDUCT MONTHLY
FROM SETTLEMENTS DUE ME, ANY PREMIUMS I MAY OWE THE INSURANCE CARRIER
AND REMIT THAT AMOUNT TO THE AGENT AND AUTHORIZED REPRESENTATIVE.

Signed by the Safety Director

Signature of Owner/Operator

COVERAGE DESIRED:

0012

Bobtail ☒ Physical Damage ☒ Workers Compensation ☒