

1994

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

Utah Court of Appeals

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UTAH COURT OF APPEALS

DOCKET NO. 940606

IN THE UTAH COURT OF APPEALS

KIRK H. MOWER and UTAH
DEPARTMENT OF HUMAN SERVICES,

Plaintiffs,

vs.

ALEXANDER & ALEXANDER, INC. and
LYNN TRANSPORTATION CO. INC.,

Defendants.

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: Case No. 940606-CA
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: Priority No. 15
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:

BRIEF OF APPELLEE LYNN TRANSPORTATION CO., INC.

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

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MAY 31 1995

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STATEMENT OF JURISDICTION

The Utah Supreme Court had jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(j) (1994). Pursuant to Utah Code Ann. § 78-2-2(4) (1994), this case was poured over to this Court by the Utah Supreme Court. This Court has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2a-3(2)(k) (1994).

ISSUES PRESENTED FOR REVIEW

Defendant and Appellee Lynn Transportation Co., Inc. ("Lynn") is satisfied with the statements of the issues presented in Appellant's brief as issues 4 through 10. However, the first three issues identified by Appellant were not raised, briefed or argued below, and were therefore not preserved for this appeal. Accordingly, Lynn identifies the following additional issue on appeal:

1. Did Appellant preserve the issue of whether the written agreement between Kirk H. Mower and Lynn and dated April 12, 1990 was an integrated contract?

STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Utah Rules of Civ. Pro.; Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). The standard of review in this Court for a trial court's granting of a summary

judgment is correctness. Higgins, 855 P.2d at 235. The trial court's decision granting summary judgment can be affirmed based on any theory, even if such theory was not applied by the trial court. Id. The Court will not, however, reverse the trial court's decision based on theories not presented to the trial court. Franklin Fin.v. New Empire Dev. Co., 659 P.2d 1040 (Utah 1983).

STATEMENT OF THE CASE

Plaintiff and Appellant Kirk H. Mower ("Mower") contracted to be a truck driver for Defendant and Appellee Lynn Transportation Co., Inc. ("Lynn"). R. 298. Mower owned his truck and was an independent contractor. R. 298. While driving a load for Lynn, he was injured when his truck ran off the road. R. 301. Mower had no workers' compensation insurance for his company. R. 301. He filed suit against Lynn and its insurance agent, Defendant and Appellee Alexander & Alexander, Inc. ("Alexander"), claiming that a single "X" mark on a form provided by Alexander to Lynn and filled out by Mower obligated Lynn and Alexander to obtain workers' compensation insurance for Mower. R. 300. He contended this form imposed this obligation notwithstanding his written contract with Lynn, which unambiguously required Mower to obtain such insurance and to indemnify Lynn for such claims. R. 301.

After considerable discovery and indeed, after Mower had certified that he was ready for trial, R. 385-386, Defendants moved for summary judgment. They submitted the contract between Lynn and Mower (executed on April 12, 1990) (the "Agreement") as undisputed evidence. R. 397 & 416-417. In addition, defendants submitted the following additional undisputed facts, which were not disputed (except as noted) by Mower, R. 465:

1. In April of 1990, when Mower applied to be a driver for Lynn, Linda Granath of Lynn gave Mower a form to order liability and bobtail insurance. Defendants attached a copy of that form to their motion, and cited to Ms. Granath's deposition. Defendants' Memorandum in Support of Motion For Summary Judgment ("Defendants' Memo"), R. 398; Granath Deposition, R. 419-421.

2. The form given Mower by Granath, in addition to boxes for bobtail and liability insurance, had a box at the bottom for "Workers' Compensation," which Mower checked. Defendants' Memo, R. 398; Granath Deposition, R. 418.

3. The form was completed by Mower prior to the time when Mower signed the written contract with Lynn. Defendants' Memo, R. 398. Although Mower attempted to dispute this fact by quibbling that it was signed "as part of the same transaction," Mower submitted no evidence in support of this contention, and in fact, he contradicted this argument in his deposition, by

testifying that the form was signed before the Agreement. Mower Deposition, R. 467 & 424. Defendants attached excerpts from Mower's deposition to their motion.

4. Prior to applying at Lynn Transportation, Mower had known Linda Granath and was friendly with her. Defendants' Memo, R. 398.

5. Mower had a single, three-to-five minute conversation with Linda Granath concerning insurance generally, including workers' compensation insurance. Defendants' Memo, R. 398; Mower Deposition, R. 427, 428 & 434.

6. Mower had no other conversations concerning insurance with any representative of Lynn or Alexander prior to his accident on July 28, 1990. Defendants' Memo, R. 399; Mower Deposition, R. 427 & 428.

7. Linda Granath did not say she would obtain workers' compensation insurance for Mower's business. Mower admitted this in his deposition and did not dispute this fact with any evidence in the record. Defendants' Memo, R. 399; Mower Deposition, R. 427.

8. Defendants also submitted that, according to Mower, Linda Granath indicated that she would send in the form and Alexander would compute Mower's premium. Defendants' Memo, R. 399; Mower Deposition, R. 426-427.

9. Defendants also submitted, and Mower did not dispute, that Ms. Granath faxed and mailed the form as filled out by Mower to Alexander. Defendants' Memo, R. 398.

10. Mower never discussed the cost of workers' compensation insurance, other than the fact that it would be expensive, with any representative of Lynn or Alexander, including Linda Granath. Defendants' Memo, R. 399; Mower Deposition, R. 426-427.

11. Mower never discussed how many employees he anticipated his business would have with any representative of Lynn or Alexander, including Linda Granath. Defendants' Memo, R. 399; Mower Deposition, R. 427.

12. Mower never discussed the issue of whether he, as opposed to merely his employees, would be covered under the supposed workers' compensation insurance policy. Defendants' Memo, R. 399; Mower Deposition, R. 427-428.

13. Mower knew that the number of employees to be covered under a workers' compensation policy was important for purposes of making an application for such insurance. Defendants' Memo, R. 399; Mower Deposition, R. 431.

14. Although amounts for "insurance" were deducted from the checks Mower was paid for his services as an independent contractor, Mower had "no idea" what sort of insurance these

deductions were for. Defendants' Memo, R. 400; Mower Deposition, R. 429.

15. It was likewise undisputed, for purposes of the motion, that Mower was injured on the job on or about July 28, 1990. Defendants' Memo, R. 400; Amended Complaint, ¶ 29, R. 301.

16. On July 22, 1992, Timothy C. Allen, presiding administrative law judge for the Industrial Commission of Utah, ruled that "Kirk Mower was an independent contractor and not an employee of Lynn Transportation." Mary Mower v. Lynn Transportation, Case No. 9100271 (Industrial Commission of Utah) (Findings of Fact, Conclusions of Law and Order dated July 22, 1992). Mower has never disputed that status in this action. Defendants' Memo, R. 400.

17. Mower operated M-T Transport, his dba, as a sole proprietor. Defendants' Memo, R. 400; Mower Interrogatory Response, R. 445.

18. No written notice was provided by Mower to the Industrial Commission or any insurance carrier that he, as sole proprietor, was to be covered by any workers' compensation insurance policy applicable to his business. Defendants' Memo, R. 401.

Based on these undisputed facts, Defendants moved for summary judgment. Central to Defendants' arguments in their

motion for summary judgment were the following provisions in the undisputed Agreement between Mower and Lynn:

The Contractor [Mower] shall maintain in force and effect Workman'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, driver's helpers and laborers employed by it in the performance of this Agreement, and shall furnish CARRIER [Lynn] 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.

R. 416. In addition, it is undisputed that the Agreement further provided:

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.

R. 417.

Lynn and Alexander moved for summary judgment on the basis that the contract assigned the duty to obtain workers' compensation insurance to Mower, and that his attempts to shift this obligation on to defendants were therefore legally insufficient. In fact, Lynn maintained that the contract obliged Mower to indemnify it from the very claim he was asserting

against Lynn. In addition, Defendants moved on the basis that Mower, as a sole proprietor of an independent business, would not have been eligible for workers' compensation benefits, so that the policy Mower claimed Defendants should have bought on his behalf would not have covered him in any event.¹

Judge Moffat granted the Defendants' motion for summary judgment on both bases, as well as granting the Defendants' motions to strike the Affidavits of Jerry Anderegg, a supposed expert in insurance whose affidavits were submitted by Mower in an attempt to salvage his case. R. 550-553.² In a later motion, Lynn moved for summary judgment on its counterclaims, submitting as undisputed the amount owing on account from Mower and its attorney's fees expended in defending the action. R. 595-606. Mower stipulated that he did not dispute the amounts or reasonableness of these claims, R. 591-594, but argued that the Agreement did not permit indemnification in this case. R. 617-

¹ Defendants also moved to dismiss Mower's claims for indemnification from potential claims by Mower's common-law wife, who Mower contended was an employee hurt in a separate on-the-job injury. R. 412-413. After the Industrial Commission rejected Mary Mower's workers' compensation claims, Mower abandoned this claim, and in fact went on later to contend that he was the only employee of his company. R. 473; see R. 513.

² Mower has not appealed the granting of the motions to strike the Anderegg Affidavits, having failed to identify or brief any issue regarding the trial court's granting the motion to strike.

620. The trial court rejected this argument, granted Lynn's motion and directed the entry of judgment in favor of Lynn in the amount of \$34,398.52. R. 633-635.

SUMMARY OF ARGUMENTS

This case concerns the enforcement of a clear contractual provision assigning the duty to obtain workers' compensation insurance for Mower's company to Mower. The contract is integrated on its face, and there was no evidence submitted below to rebut the presumption of its integration. In fact, Mower has repeatedly conceded that his contract with Lynn required him to obtain the workers' compensation insurance. Contrary contractual duties cannot be implied in the face of the written Agreement's clear provision. There is therefore no genuine dispute concerning the contractual apportionment of that duty to Mower.

There is likewise no issue of fact concerning the equitable doctrine of estoppel. Mower's alleged "reliance" on the defendants' actions and inactions was not, as a matter of law, reasonable. More importantly, the estoppel doctrine could only be applied to excuse Mower from his contractual obligation if Mower was without fault in this situation. Mower clearly bears significant fault for his failure to comply with his contractual commitments and obtain workers' compensation insurance.

Mower's tort and other common law claims cannot alter the contractual duties established by the Agreement between Mower and Lynn. The duties here arise out of a contractual relationship, and imposing contrary tort duties on Lynn would deprive Lynn of its contractual rights, and frustrate the ability of all commercial parties to govern their respective business responsibilities to one another through contract. Moreover, because Mower's Agreement with Lynn requires him to indemnify Lynn for the very claim he asserts here, any tort claim amounts to a zero-sum proposition: Mower is contractually obligated to repay Lynn for every dollar Lynn is required to pay for Mower's tort claims.

In addition, even if contract or tort law imposed a duty on Lynn to obtain workers' compensation insurance for Mower's company, Mower's injuries would not have been covered under such a policy, so Mower is undamaged by Lynn's alleged failure to obtain such a policy. Mower is a sole proprietor of his business, and would have had to affirmatively give notice to both the insurance carrier and the Utah State Industrial Commission prior to being covered under a workers' compensation policy. It is undisputed that Mower never gave such notice to anyone, so he would not have been covered. The damages he claims (measured by the amount of workers' compensation benefits he would have

received under the policy he claims Lynn should have obtained for him) equal zero.

Finally, the trial court correctly ordered the entry of judgment against Mower and in favor of Lynn in the amount of \$34,398.52. Properly interpreted, the indemnification clause in this case encompasses all the claims asserted in this action by Mower.

ARGUMENT

I. THERE IS NO ISSUE CONCERNING THE TERMS OF MOWER'S CONTRACT WITH LYNN.

A. Mower Did Not Contest The Issue Of Integration Below.

Mower's first point on appeal asserts that the trial court erred in holding that the parol evidence rule barred his claims because issues of fact existed regarding the contract's integration. Mower did not raise this issue below. On the contrary, Mower conceded that his contract with Lynn required him to obtain workers' compensation insurance. Mower's Memorandum In Response To Defendants' Joint Motion For Summary Judgment, R. 465 ("Plaintiff admits he agreed at the time he was hired as an independent contractor, that he would obtain workers' compensation insurance . . . ") and at R. 469 ("all parties admit plaintiff had a duty under the contract to carry worker's compensation insurance"); Mower's Response to Motion For Summary Judgment on Counterclaim, R. 618 ("The contract at issue places responsibility

on plaintiff to obtain worker's compensation insurance"). Rather than contest the contractual theories asserted by defendants in their motion for summary judgment, Mower chose to rely solely on his estoppel and negligence theories. R. 468 through 475. He raised no argument, and pointed to no fact, concerning the written Agreement's integration.

This Court will not consider arguments raised for the first time on appeal. Ong Intern. (USA) v. 11th Ave. Corp., 850 P.2d 447, 455 n.31 (Utah 1993); LeBaron & Assoc. v. Rebel Enter., 823 P.2d 479, 482-84 (Utah App. 1991); Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837-838 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1044-45 (Utah 1983). At the trial court level, Defendants' assertions that the Agreement was integrated went unchallenged.³ R. 404 & 508. Indeed, those arguments were conceded. It would be unfair to permit Mower to change his legal position and now argue that the contract was integrated.

³ Mower briefed only his estoppel theory (in an attempt to defeat Defendants' reliance on the Agreement to bar Mower's claims), his negligence theory, and argued that he had been damaged by defendants' conduct. R. 465-475. He did not brief or otherwise pursue his claims of fraud, agency, or Restatement (Second) of Torts § 323. Thus, these theories have likewise not been preserved for appeal. Ong Intern., 850 P.2d at 455, n.31; LeBaron & Assoc., 823 P.2d at 482-84; Barson, 682 P.2d at 837-38; Franklin Fin., 659 P.2d at 1044-45.

B. There Is No Issue of Fact Concerning the Agreement's Integration.

Even if Mower had properly raised the legal issue of integration below, the trial court was correct in concluding, based on the undisputed facts before the court, that the Agreement was integrated. R. 551. The Agreement at issue in this case contains an express integration clause, in which Mower and Lynn agreed that:

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 the parties.

R. 417. Such a declaration, unambiguous on its face, is regarded by many authorities as conclusive proof of the issue of integration by Professors Corbin and Williston. 4 S. Williston, Williston on Contracts, § 633 (3d ed. 1961); A. L. Corbin, Corbin on Contracts, § 578 at 403, 411 (1960) cited in, Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah App. 1988). "By limiting the contract to the provisions that are in writing, the parties are definitely expressing an intention to nullify antecedent understandings or agreements. They are making the document a complete integration." Corbin, at 411. While Utah apparently admits evidence to rebut such a written statement in a contract, Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985) (dicta), this same case also creates a presumption of integration in such cases, requiring that a party claiming the contract is not

integrated come forward with evidence demonstrating as much. Id.
No such evidence was offered by Mower.

Mower and Lynn agreed that their mutual responsibilities were set forth in the written Contractor Operating Agreement; Mower is now seeking to avoid that Agreement by contending that, instead of the unambiguous provision in that Agreement assigning the obligation to obtain workers' compensation insurance to Mower, an ambiguous and previously executed insurance form imposed that duty on Lynn.

The Agreement's terms are clear; it was Mower's job to obtain workers' compensation insurance for his business, and the parties intended that their written contract set forth all of their obligations to each other. To rely on conduct extrinsic to the contract's clear written terms to impose a contrary duty on Lynn is to ignore the express terms of the parties' contract, as well as Mower's repeated admissions of that contractual duty. In addition, to ignore the Agreement's integration clause frustrates the entire purpose of that clause and ignores the utter failure of Mower to come forward with any evidence indicating that either party intended that the integration clause means something other than what it plainly says. Mower did not demonstrate a genuine issue of fact that the parties intended collateral representations to be incorporated in their contract. The only theories raised by Mower

to avoid this obligation were estoppel and negligence theories. This Court should not permit Mower to rewrite his legal theories on appeal.

Here, the parties agreed that the written contract was an integration of all prior negotiations. Agreement, R. 417. It was intended as a complete statement of the relative responsibilities of the contractor and the carrier. Mower's factually unsupported attempt to circumvent the express provisions of the written contract ignore this basic and undisputed fact.

C. The Parol Evidence Rule Bars the Use of
Collateral Statements and Actions to Vary
the Terms of Lynn's Contract with Mower.

Fundamentally, this case is about enforcing the express terms of a written contract. Whether the case is approached through tort, estoppel or other theories, at root Mower is attempting to disavow the written instrument that the parties previously agreed represented a complete summation of their relationship. None of the facts brought forth by Mower justify setting aside that contract. Mower promised that he would be responsible for obtaining necessary workers' compensation insurance and promised to indemnify Lynn from any on-the-job injuries to his employees or to himself. That express clause precludes imposing a contradictory duty on defendants. Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980) ("An express

agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature").

The parol evidence rule is a substantive rule of contract law designed to protect the ability of parties to memorialize their agreements in writing, without fear that the whole gamut of their dealings will be used to change their final agreement. The Utah Supreme Court has summarized the rule:

When parties have reduced to writing what appears to be a complete and certain agreement it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties; and the parol evidence of contemporaneous conversations, representations or statements will not be received for the purpose of varying or adding to the terms of the written agreement.

Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266, 270 (1972); accord, Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985) ("Simply stated, the rule operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract").⁴

⁴ There is no evidence of fraud here. The only person who Mower accuses of making misleading statements is Linda Granath, a friend of Mower's from his prior job. Neither she nor Lynn would have any motive to mislead Mower about the need to obtain worker's compensation insurance. On the contrary, such insurance was important enough to Lynn to cause it to insert an express
(continued...)

Mower contends that the one-page insurance form was offered not to change the parties' contract, but to clarify the manner in which Mower was to fulfill his duty. This is sophistry. Mower's argument necessarily seeks to shift a contractual duty clearly imposed on Mower over to Lynn, by arguing that the form constituted a separate agreement. Such a construction is directly contrary to the parties' express acknowledgement that the Lynn/Mower Agreement reflected "the entire Agreement and understanding between the parties."

Mower seeks to offer evidence of collateral statements and actions in order to shift an obligation expressly assigned to him by his written Agreement with Lynn. On its face, and on the undisputed factual record, the parties intended the Agreement to serve as a complete expression of their arrangement. If the parol evidence rule (and for that matter, the concept of written contracts) is to have any vitality, it is the written Agreement that must control, not Mower's self-serving and subjective understanding.

⁴ (...continued)
provision in its contract requiring the contractor to obtain that insurance for himself. There is no evidence in the record supporting any intent on Defendants' part to mislead OMower. Although challenged by Lynn to present such evidence in response to Defendants' Motion For Summary Judgment, R. 404, plaintiff offered none.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT ESTOPPEL IS UNAVAILABLE TO MOWER AS A MATTER OF LAW.

Rather than dispute that Mower had agreed that he would be responsible for obtaining workers' compensation insurance, Mower sought to avoid his Agreement with Lynn by invoking the doctrine of equitable estoppel. Contrary to his briefing before this Court, Mower did not plead any affirmative promissory estoppel claims; rather, his estoppel theory was presented solely as a response to Lynn's position that Mower may not impose duties on Lynn that contradict those duties spelled out in the Agreement.⁵

It is well established in this state that "it is not for a court to rewrite a contract improvidently entered into at arm's length or to change the bargain indirectly on the basis of supposed equitable principles." Dalton v. Jerico Constr. Co., 642 P.2d 748, 750 (Utah 1982) quoted in Hal Taylor Assoc. v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982). As the Utah Supreme Court has explained:

The basic rule of contract interpretation is that the intent of the parties is to be ascertained from the content of the instrument itself, the rationale for the rule being to preserve the sanctity of

⁵ Nor would the pleading of a promissory estoppel case have made any difference. Not only would such a theory fail as a matter of law for lack of reasonable reliance (as discussed infra), but such a contract would also necessarily require implying contractual duties contrary to the express Agreement. Utah courts do not imply such contradictory duties. Rio Algom v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).

written instruments. Each contract provision is to be considered in relation to all of the others with a view toward giving affect to all and ignoring none. It is only when an ambiguity exists which cannot be reconciled by an objective and reasonable interpretation of the contract as a whole that a resort may be had to the use of extrinsic evidence.

Utah Valley Bank v. Tanner, 636 P.2d 1060, 1061-62 (Utah 1981).

Application of the doctrine of estoppel here would deprive the written contract between the parties of its intended force, and effect an end run around the parol evidence rule.

A. As a Matter of Law, Mower Could Not Have Reasonably Relied on Lynn's Statements and Actions.

Estoppel requires some action or representation made by the party to be estopped, inconsistent with a later position, on which the party asserting estoppel reasonably relies. Ceco Corp. v. Concrete Specialists, Inc., 772 P.2d 967, 969-970 (Utah 1989). The undisputed facts of this case, as a matter of law, cannot support a finding that Mower behaved reasonably in assuming he had workers' compensation insurance.⁶

It is undisputed in this case that Mower's three-to-five minute conversation with a Lynn employee, on which Mower bases

⁶ The arguments in this section related to reasonable reliance apply equally to Mower's claims of promissory estoppel (unpleaded below, but asserted here) as well as his tort claims of fraud, negligent misrepresentation and his theory of agency. Amended Complaint, ¶ 52, 57, & 82. R. 304-307. As stated above, however, none of those theories has been properly preserved for appeal.

his entire case, took place prior to the signing of the contract between Lynn and Mower. Defendants' Statement of Undisputed Facts, R. 398, Mower Deposition, R. 424-428, 432 & 434. Mower's theory of misrepresentation (the basis for all of his tort and estoppel claims) is that during this brief conversation, Linda Granath, in giving him the form with the workers' compensation blank, somehow committed both Lynn and Alexander to obtain such insurance for Mower. Significantly, however, Mower does not testify that Granath ever said she would obtain such insurance. He seems to have simply assumed that that was the case from their brief conversation. Mower testifies that Granath told him that getting such a policy through Lynn's carrier would be expensive, and would require adding a rider to the existing policy. He does not testify that Granath ever committed to doing anything more than faxing in the form with his "X"-mark on it:

Q. (by Mr. Stone) When Linda [Granath] told you that she would have to add a rider to get you on the Worker's Compensation policy that Lynn had for its drivers what did you say?

A. Verbatim I don't know. Basically what I said was: I won't have time to be dealing with all of this stuff and operate the truck, so what we're going to handle at the company let's get it handled.

Q. Did she tell you she would get Worker's Comp?

- A. No. I was never told that there would be a problem with it.
- Q. So how did you leave it with her?
- A. My understanding was that they was just going to - the - whatever the increase in Workman's Comp would be would be billed on with the rest of the insurance that they were providing.

Mower Deposition, R. 426-427. In response to questioning by counsel for Alexander, Mower elaborated:

- Q. (by Mr. Plant) Did she ever indicate to you how she was going to add you onto their policy?
- A. No. The only thing that was indicated to me is that this paper would go back to Alexander & Alexander, who underwrites all of the insurance for - I don't know whether it's ConAgra or strictly for Lynn Transportation, but that it would be computed through Alexander & Alexander.

Mower Deposition, R. 433. Nor did the form submitted suggest that it would effect workers' compensation insurance for Mower. It merely indicates "coverage desired," and requests that "any premiums I may owe the insurance carrier" be deducted from Mower's checks. R. 418. It cannot be construed as either an application or a binder.

According to Mower, Granath indicated that Lynn Transportation did not provide workers' compensation insurance for its independent contractors as opposed to Lynn's drivers and

other employees, and that such a policy, if purchased through Lynn's insurer "would have to be added" as an expensive "rider" to the Lynn policy. Mower Deposition, R. 432. She did not commit to supplying workers' compensation insurance to Mower. Mower Deposition, p. 427. At best, she committed only to sending in the application as filled out by Mower and it is undisputed that she did just that. R. 398.

Mower contends that he "assumed" he obtained workers' compensation insurance by marking a single box on a facsimile form. He did not discuss price. R. 426. Even though he admitted that such facts would be important, he testified that he did not discuss how many employees he was going to have, or the fact that he wanted coverage for himself, as well. R. 427, 431. He claims he never received any certificates for any kind of insurance. He spoke with one individual for less than five minutes concerning all the various forms of insurance necessary for his trucking business. By his own admission, this person did not tell him that she would obtain workers' compensation insurance for M-T Transport; she told him, according to Mower, that a rider would have to be created and that "expensive" premiums would have to be calculated after the "paper work" went "back to Alexander & Alexander." Mower Deposition, R. 433. Mower never received a rider or any other indication that his

insurance was in effect, and he never saw a calculation of premium. No reasonable person could "assume," under these circumstances, that his business had purchased insurance for its employees and owner.

B. One Cannot Reasonably Rely on a Statement
Contrary to a Subsequent Integrated Written
Contract.

More importantly, it cannot, as a matter of law, be reasonable for Mower to rely on statements directly at odds with the terms of his written contract. Larson v. Wycoff Co., 624 P.2d 1151 (Utah 1981); Huck v. Huck, 734 P.2d 417 (Utah 1986).

In Larson v. Wycoff Co., an employee sought insurance benefits for claims he incurred after becoming a part-time employee. His company's insurance handbook stated that such benefits were only available to full-time employees. When he converted from full-time employment to part-time employment, the company mistakenly continued to pay some benefits. When the company ultimately stopped paying, the employee argued that the company should be estopped from denying the continued coverage under the insurance policy for full-time employees. The Utah Supreme Court rejected this argument and upheld the trial court's summary judgment in favor of the defendants, stating:

A party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could

ascertain the true situation. . . . Furthermore, a determination of the issue of estoppel is not dependent on the subjective state of mind of the person claiming he was misled, but rather is to be based on an objective test, i.e., what would a reasonable person conclude under the circumstances. . . . It was not reasonable for plaintiff to rely on additional payments as assuring the continuation of his coverage. He did not discuss his status in relation to employee benefits with anyone in a position to speak for the company, but he had read the handbook and knew insurance benefits were available only to full-time employees. While he undoubtedly welcomed the payments mistakenly made by Wycoff, he should have known that he was no longer eligible and that an error may have been made.

Id., at 1155-1156. In the case at bar, after the supposed misleading representations of Linda Granath, Mower signed a contract explicitly accepting the sole responsibility for obtaining workers' compensation insurance for his business. As in Larson v. Wycoff, it is simply not reasonable for Mower to have assumed that, notwithstanding the explicit terms of the contract, Lynn or Alexander would provide this workers' compensation insurance for him.⁷ He is charged with knowledge

⁷ Additional support for this proposition can be found in Huck v. Huck, 734 P.2d 417, a divorce case in which a husband contended that the wife was estopped from claiming any interest in certain real properties acquired by the couple:

Plaintiff points to several occasions when defendant stated she wanted nothing to do with the properties and claimed no interest therein. However, since the prenuptial agreement clearly

(continued...)

of the provisions of his Agreement. No one ever told him such insurance had been obtained, and he could easily have found out by simple inquiry.

It is significant that in both Huck v. Huck and Larson v. Wycoff Co., the statements alleged to create an estoppel occurred after the written agreement between the parties. Here it is undisputed that the supposed oral misrepresentations were made prior to the execution of a written contract. In such a case, issues of estoppel are more properly dealt with using traditional notions of the parol evidence rule and the function of integration clauses within written contracts. In any event, however, in a situation where the supposed representations creating an estoppel occur prior to a written agreement instead of subsequent to the agreement, the arguments against application of estoppel are even stronger than when the reverse is true. Leaving aside the integrity and purpose of written contracts, how can one "rely" on an oral statement and then sign a conflicting written agreement? Reasonable reliance is plainly doubtful in a case where inconsistent representations are made after the

⁷ (...continued)
gave her an interest, plaintiff could not have reasonably relied on her gratuitous oral disclaimers.

Id., at 420-21.

party's written agreement; but after all, such agreements can conceivably be changed after their execution. It is preposterous, however, to claim that one relied on such an inconsistent statement made prior to the contrary written contract and later continued to do so even after signing it. To accept such an argument (absent evidence of active fraud on the other party's part) would void the effect of the integration clause agreed to by the parties and contained in the written Agreement at issue here.

C. Lynn's Conduct Was Insufficient to Justify Application of Estoppel.

Furthermore, the undisputed facts in this case do not justify the application of equitable estoppel, even if the doctrine were available in the face of a contrary written agreement. For estoppel to be applied:

The promise or representation relied on must be sufficiently definite and certain that the plaintiff acting as a reasonable and prudent person under the circumstances would be justified in placing reliance upon it; and in case of uncertainty or doubt the responsibility is upon the plaintiff to ascertain the facts before acting upon it.

Petty v. Gindy Mfg. Corp., 17 Utah 2d 32, 404 P.2d 30, 32 (1965).

There is nothing definite about the statements of Linda Granath, as testified to by Kirk Mower. Mower has failed to point to any

evidence demonstrating a representation that is "sufficiently definite and certain" to justify application of estoppel.

What Mower relied on was his vague assumption that Lynn would obtain insurance for him. Based on the three- to five-minute conversation and a single "X" mark, Mower now contends that Lynn promised to get him not only workers' compensation insurance, but also promised to determine that Mower himself desired to be considered an employee under that policy and take the affirmative step of notifying both the State Industrial Commission and the insurance carrier of that desire. This entire assumption is made by Mower despite the fact that no one ever told him they were going to get him workers' compensation insurance. Mower Deposition, R. 427. He made these assumptions notwithstanding the fact that he never discussed whether he, as a sole proprietor, would be considered an employee, notwithstanding the fact that he never discussed how many employees he anticipated having, and notwithstanding the fact that he never discussed rates or length of term. Most importantly, he made this assumption in the face of his express promise to the contrary, contained in the written contract he signed, that he would obtain the workers' compensation insurance required by law.

D. Mower's Conduct Precludes Application Of Estoppel.

In addition, application of the doctrine of estoppel requires that the person invoking estoppel be "without fault." Masters v. Worsley, 777 P.2d 499, 503 (Utah App. 1989); Morgan v. Board of State Lands, 549 P.2d 695, 697 (Utah 1976). In this case, the undisputed facts demonstrate ample fault on the part of Mower. This becomes abundantly clear if, for the purposes of argument, the Court considers how estoppel might apply against Mower. From defendants' standpoint, Mower signed an express written contract that he would obtain workers' compensation insurance and indemnify Lynn for any claims for injuries incurred by him or his employees in the course of performing the contract. Mower contends that he reasonably relied on defendants' supposed representations despite his knowledge of the content of the contract, the fact that he had never discussed rates, terms, or number of employees to be covered, and the fact that he never received any confirmation that he had received workers' compensation insurance. Lynn, on the other hand, relied on Mower's statement by permitting him to drive the truck; it is undisputed that the contract was an express precondition to Mower ever carrying a load on Lynn's behalf. The undisputed facts make it readily apparent which party should bear the burden of this

loss-Mower is hardly "without fault" and cannot take refuge in the doctrine of estoppel.

The terms of the parties' written contract are undisputed. The vague and inconclusive nature of the representations alleged to have been made by Defendants are set forth in Mower's deposition testimony. It is undisputed that his conversation lasted less than five minutes. It is undisputed that no representative of Lynn ever told Mower that they would obtain workers' compensation insurance for him. It is undisputed that no one discussed how many employees he would have, and that Mower never mentioned his desire to be covered, as sole proprietor of his trucking business. These facts are more than sufficient to legally preclude the application of estoppel to invalidate the express terms of the parties' written contract, and to bar plaintiffs' claims that Mower should be excused from his contractually-assumed responsibilities.

III. MOWER'S TORT CLAIMS CANNOT BE MAINTAINED.

Independent of the specific reasons stated above, because the contract executed by and between Mower and Lynn Transportation defined the duty regarding the acquisition of workers' compensation coverage, Mower's alleged causes of action may only sound in contract. See Allred v. Brown, 261 Utah Adv. Rep. 42 (Utah App. 1995); Interwest Constr. v. Palmer, 886 P.2d

92, 101 (Utah App. 1994); Beck v. Farmers Ins. Exch., 701 P.2d 795, 799-800 (Utah 1985).

The parties' contract in this case clearly and unambiguously defines the duty with respect to the acquisition of workers' compensation coverage. That definition, as an element of the contract, was a bargained-for condition in the relationship between Mower and Lynn Transportation. As such, the Agreement controls and Mower's action is limited to the rights established by that contract. Mower's attempt to avoid these contractual duties by asserting numerous tort claims is unavailing, given Utah courts' repeated recognition that when parties define their relationship and duties contractually, liability with respect to such duties may not lie in tort.⁸ This distinction between tort and contract law was recently reemphasized by this Court in Interwest Construction:

In Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985), the Utah Supreme Court addressed the often-blurred distinction between tort and contract liability. Id. at 799-800. The Court clarified this distinction by holding that if

⁸ "In some cases an act or omission resulting in a breach of contract may also constitute a breach of duty that is not subsumed by the contract and may thereby give rise to a cause of action sounding in tort." "[A] party may recover in tort[, therefore,] for breaches of duties which are independent of contract terms." Interwest Constr., 886 P.2d at 101 (citation omitted) (emphasis added). Mower, however, has not plead a breach of any duty independent of the duties assigned in the Agreement between Mower and Lynn Transportation.

parties arrange rights, duties, and obligations under a contract, any cause of action for breach of those contractually defined obligations, rights, or duties lies in contract, not in tort. Id. In the words of the Court, when "the duties or obligations of the parties are contractual rather than fiduciary . . . a breach of those express or implied duties can give rise only to a cause of action in contract, not one in tort." Id. at 800.

Interwest Constr., 886 P.2d at 101. See also Allred, 261 Utah Adv. Rep. at 44 (holding the same with respect to duties defined in a bailment contract).

The principle expressed in Interwest Construction, Beck and Allred is not new, it is simply the concept that parties are free to make choices and define duties and their relationships in contract - commonly referred to as "freedom of contract."

"[W]here the parties are otherwise competent and free to make a choice as to the provisions of their contract, it is fundamental that [the] terms of the contract made by the parties must govern their rights and duties."

* * *

The very notion of contract is the consensual formation of relationships with bargained-for duties. An essential corollary of the concept of bargained-for duties is bargained-for liabilities for failure to perform them.

* * *

The effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for-- limited liability. . . . No reason appears to support such a radical shift from bargained-for

duties and liabilities to the imposition of duties and liabilities that were expressly negated by the parties themselves when they decided to abandon their status as legal strangers and define their relationship by contract. Tort law proceeds from a long historical evolution of externally imposed duties and liabilities. Contract law proceeds from an even longer historical evolution of bargained-for duties and liabilities. The careless and unnecessary blanket confusion of tort and contract would undermine the carefully evolved utility of both.

Isler v. Texas Oil & Gas Corp., 749 F.2d 22, 23 (10th Cir. 1984)
(quotations and citations omitted).

It is important to recognize that the damages Mower seeks in this action are purely economic, rather than direct damages for his physical injuries. There is no claim in this case that Lynn bears any responsibility for Mower's accident and resulting injuries, or even any claim that Lynn was statutorily required to provide insurance for Mower's on-the-job injury. Rather, Mower contends that Lynn is liable for having failed to provide him coverage for the possibility of those injuries based on Lynn's conduct in contracting with Mower. Accordingly, the duty Mower claims was breached by Lynn was a duty to provide a purely economic benefit rather than to exercise care for Mower's personal safety. That type of duty is governed by contract law, and may not be imposed in the abstract under a tort theory.

Maack v. Resource Design and Constr., Inc., 875 P.2d 570, 580

(Utah App. 1994).⁹ Whether Mower characterizes his claims as contract or tort, Lynn had no duty to secure the economic benefit of workers' compensation insurance for him.

Finally, as a practical point, there is simply no room for recognizing both contract and tort theories in this case. If the Agreement is fully enforced, Mower has agreed to indemnify and hold Lynn harmless from "any claim . . . for any injury . . . resulting from the performance of this Agreement." R. 416. It is undisputed that Mower received his injuries (for which he seeks compensating benefits) while performing the Agreement with Lynn; he was hurt when his truck ran off the road while he was carrying a load on behalf of Lynn. This being the case, he is contractually obligated to indemnify Lynn from his own claims. Success against Lynn on his supposedly separate tort claims only expands his contractual obligation to indemnify Lynn. This result is no surprise; the plain intent of the indemnification provision, which appears in the same clause as the provision requiring Mower to obtain workers' compensation insurance, was to

⁹ "Contract law protects expectancy interests created through agreement between the parties, while tort law protects individuals and their property from physical harm by imposing a duty to exercise reasonable care." Maack v. Resource Design and Const., Inc., 875 P.2d 570, 580 (Utah App. 1994). Mower's theories of non-intentional torts fail because his claim is for purely economic loss, and such losses are recoverable only pursuant to contract. Id.; Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994).

shift the entire burden of complying with the workers' compensation statutes on to Mower, the independent contractor. If that portion of the Agreement is given its intended effect, there can be no tort claim by Mower against Lynn based on a different apportionment of responsibility under those laws.

The Agreement expressly provides that Mower has the duty to acquire workers' compensation coverage for himself and any employees that he retains. This was a bargained-for condition in the contract, whereby Mower expressly accepted the obligation to secure workers' compensation coverage with respect to his relationship with Lynn Transportation, as that relationship was defined in the contract. Consequently, any cause of action regarding the failure to secure workers' compensation coverage is governed by contract and no cause of action in tort may lie. Accordingly, all of Mower's tort claims - to the extent they are premised on the alleged failure to acquire workers' compensation coverage - were properly rejected by the trial court.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE BASIS THAT MOWER WAS NOT ENTITLED TO WORKERS' COMPENSATION BENEFITS.

Even if Lynn and Alexander were somehow obligated to obtain workers' compensation insurance for Mower's business, neither of the two injuries alleged by Mower would have resulted in any benefits under an ordinary workers' compensation insurance

policy. Accordingly, Defendants are not liable to Mower for any damages in this action.

Mower acknowledges that he is the sole proprietor of M-T Transport, and that it was in that capacity that he contracted with Lynn.

Workers' compensation insurance covers the risk imposed by law pursuant to the workers' compensation laws. Utah Code Ann. § 31A-1-301(83) (defining "workers' compensation insurance"). Those laws require compensation be provided employees for losses sustained from injuries or death arising out of and in the course of an employee's employment. Utah Code Ann. § 35-1-45. However, sole proprietors are not ordinarily included within this statute's coverage:

A partnership or sole proprietorship may elect to include as an employee under this chapter any partner of the partnership or the owner of the sole proprietorship. If a partnership or sole proprietorship makes this election, it shall serve written notice upon its insurance carrier and upon the Commission naming the persons to be covered. No partner of a partnership or owner of a sole proprietorship is considered an employee under this chapter until this notice has been given.

Utah Code Ann. § 35-1-43(3)(a) (emphasis added). Thus, a sole proprietor who fails to affirmatively give notice to both the applicable insurance carrier and the Industrial Commission identifying himself as a person to be covered does not obtain coverage for his own injuries.

Here, it is undisputed that no such notice was given by any entity to the Industrial Commission or any insurance carrier. The single form filled out by Mower makes no mention that Kirk H. Mower, sole proprietor of M-T Transport, is to be covered by any workers' compensation insurance supposedly ordered by the form; moreover, it was never sent or intended to be sent to the Industrial Commission. No other form was submitted by Mower or any other entity. Nothing in his contract with Lynn required Mower to make the election to include the sole proprietor within the coverage of M-T Transport's required policy. Mower did not discuss with any representative of Lynn or Alexander whether he, as opposed to merely his employees, should be covered by the workers' compensation insurance he desired.

This being the case, workers' compensation insurance would not have covered Mower's injuries received in his accident on July 28th. He was the sole proprietor of his business, not an employee of M-T Transport. The damages for his medical treatment and alleged disability would not have been recoverable under an ordinary workers' compensation insurance policy. Even if Lynn and Alexander were obligated to obtain such a policy, they would not be responsible to compensate Mower for his medical or disability benefits.

Mower counters this argument by arguing that defendants somehow should have known that he wanted to have his own injuries covered as well as those of his employees. Mower's arguments concerning this point are based on a misreading of the parties' Agreement. The Agreement requires only workers' compensation insurance within the limits of state law. State law does not require sole proprietors to be insured for their on-the-job injuries. Workers' compensation insurance covers employees, but not the owners of the business unless they opt in. The Agreement requires nothing more.

Contrary to Mower's unsupported assertions, the order form on which Mower relies makes no mention of whether the "Owner/Operator" referenced on the form is to be covered under any workers' compensation policy, as opposed to merely the business's employees. And Mower's arguments below that Defendants were obligated to provide notice to the insurance carrier and the Commission on his behalf stretches Mower's theory to the point of absurdity. Mower has pointed to no evidence to counter the undisputed fact that Mower never discussed how many employees he anticipated employing and never discussed whether he, as opposed to

merely his employees, would be covered under this supposed policy.¹⁰

The North Carolina case cited by Mower, Garrett v. North Carolina Farm Bureau Ins. Co., 249 S.E.2d 808 (N.C. Ct. App. 1978) is therefore plainly inapposite. In that case, a partner in the business had specifically requested that he be covered under the policy, and premiums were calculated and collected from him based on that request. None of these elements are present in this case.

Similarly, Mower's argument on appeal that he was unable to notify the insurance carrier until he was provided with a policy

¹⁰ Plaintiffs submitted the affidavits of a supposed insurance "expert," Jerry Anderegg, who purported to testify that it is the insurance agent's duty to inform the insurance carrier that the owner is to be insured as a worker. The trial court granted defendants' Motions To Strike Anderegg's Affidavits. Mower has not briefed or identified any issue in this appeal arguing that the granting of those Motions to Strike was improper. Even if the Court were inclined to review that decision, however, the Court can reject Anderegg's unsupported testimony out of hand. Anderegg's conclusory testimony that it is the insurance agent's "duty" to notify the insurance carrier that the sole proprietor's injuries are to be covered is directly contrary to Utah statutory law. The statute requires that the sole proprietorship "shall serve written notice upon its insurance carrier and upon the commission naming the person to be covered." Utah Code Ann. § 35-1-43(3)(a). The insurance agent is the carrier's agent, not Mower's; the statute requires the sole proprietorship to serve the notice on the carrier. Anderegg appears to contend that the insurance carrier was obligated to serve the notice on itself. Oral, or implied notice, as argued here by plaintiffs, simply fails to meet the limiting terms of the statute. Anderegg's opinion cannot change express statutory duties imposed by the Utah Legislature on Mower.

misses the point. First, his ignorance of the identity of the carrier does not excuse him from his failure to notify the Industrial Commission. He certainly knew or should have known of that entity's location. Second, this argument fails to accommodate the necessary implications of Mower's theory of reliance. He claims that he thought workers' compensation insurance had been obtained. Amended Complaint, ¶ 25, R 301 ("The acts of defendants and each of them caused Mower to believe that he carried workers' compensation insurance as required by law and by the contract"). That being the case, Mower has no excuse for failing to notify the appropriate entities of his desire to opt in, as a sole proprietor, to the workers' compensation system. Alternatively, if he thought he was still waiting for Defendants to supply him with a policy, he had no business driving.

V. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF LYNN ON LYNN'S CLAIM FOR INDEMNITY.

Mower did not contest any of the statements of material undisputed facts submitted by Lynn in support of its motion for summary judgment on its counterclaims. Significantly, Mower did not contest, by way of affidavit or citation to any other material in the record undisputed Fact No. 2:

2. On or about July 28, 1990, Mower was injured in an accident while driving his tractor-trailer in the course of performing the Contractor Operating Agreement between Lynn and Mower. At

the time, Mower was hauling a load for Lynn and was injured when his truck ran off the road.

Mower did not contest the reasonableness of the attorneys' fees sought by Lynn in any fashion. Instead, he confined his arguments to whether the indemnification clause contained in the Agreement applied in this case. In short, Mower contended that because he characterized his claims asserted in this lawsuit as not arising out of the contract, the contractual language does not apply.

The contractual language, however, is clear:

CONTRACTOR [Mower] agrees to protect, defend, indemnify, and hold CARRIER [Lynn] 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.

Contractor Operating Agreement (Exhibit A to Mower's Amended Complaint), ¶ 9(b). R. 416. As is plain from the above language, Mower's duty to indemnify Lynn is not limited to claims brought under the contract. It encompasses "any claim, loss or damage" for "any injury . . . resulting from the performance of this Agreement." The only question is whether the injury arose out of the Agreement's performance, not whether the claim is based on the Agreement. It is undisputed that Mower's injury occurred while he was performing this Agreement.

Mower's argument that the duty to indemnify applies only to claims brought under the Agreement is not only unsupported by the grammar of the clause, but its breadth as well. The duty applies to claims alleged by Mower's employees, who are presumably not parties to this Agreement and would not be able to assert rights under it. A claim by such an employee would therefore not be brought under the Agreement, but would plainly be covered by the clause.

The context of the indemnification clause also supports the trial court's ruling. It is found in the same paragraph as, and immediately follows, the provision requiring Mower to obtain workers' compensation insurance. It is clear from the Agreement that the parties intended that Mower assume the entire burden of complying with applicable workers' compensation laws and paying for any workplace injury occurring to Mower or his employees. The function of the indemnification clause was to protect Lynn from any responsibility for these duties. Plainly, part of the liability Lynn was seeking to avoid was that which might flow from a failure by Mower to obtain workers' compensation insurance, and claims that employees of Mower eligible for workers' compensation benefits might attempt to make as a result against Lynn. See Utah Code Ann. § 35-1-42(6)(a) (defining statutory employers). In fact, Mower did fail to get such insurance. As a result, he now seeks to recover

the value of workers' compensation benefits from Lynn. Mower's claims in this case are exactly the type of claims intended by the parties to fall within Mower's indemnification obligation.

It is undisputed that the injury in this case arose out of the performance of the Agreement. Mower was driving a load for Lynn at the time of his alleged injury. It is that injury for which he seeks compensation. The Agreement requires Mower to indemnify Lynn for any claim brought against Lynn for such an injury.

The amounts due under the indemnity provision and Lynn's other counterclaims¹¹ were not disputed. Mower is obligated to pay his account and to honor his commitment to indemnify Lynn. The trial court properly entered summary judgment on Lynn's counterclaims.

CONCLUSION

The trial court correctly granted summary judgment to Defendants. Lynn's contract with Mower spells out Mower's and Lynn's respective duties. Mower raised no issue of fact, and did not even contest, Defendants' arguments that the Agreement was

¹¹ Mower stipulated that judgment could be entered in the amount of \$1,871.69 on Lynn's claim on its account with Mower. In addition, Mower stipulated to the reasonableness of the attorney's fees and costs under the indemnity provisions, and contested only Lynn's contractual rights to claim them from Mower.

integrated. Contrary duties cannot be implied under contract or estoppel principles.

Tort theory also cannot alter Lynn's and Mower's contractual allocation of the duty to obtain workers' compensation insurance for Mower's business. Mower abandoned all of his tort claims other than negligence, and that theory, like the others, cannot be reconciled with the parties' Agreement respecting the duty to obtain coverage. Moreover, Mower agreed to indemnify Lynn for this type of claim, so a tort theory nets him nothing from Lynn.

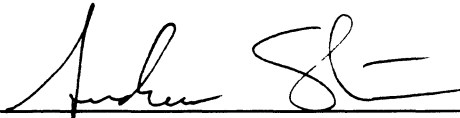
Mower was a sole proprietor who never opted to be covered by the workers' compensation system. As such, even if Lynn had obtained a workers' compensation policy on his behalf, Mower would not have been eligible for the benefits which he seeks in this action. He has not been damaged by Lynn's supposed failure to obtain workers' compensation insurance on his behalf.

Finally, the trial court correctly granted summary judgment on Lynn's counterclaims. The amount of those claims was not in dispute; the legal entitlement to the bulk of them was correctly decided in Lynn's favor. Mower agreed to indemnify Lynn from the claims he asserts in this action.

The Court should affirm the trial court's order in all respects.

Respectfully submitted this 25th day of May, 1995.

JONES, WALDO, HOLBROOK & McDONOUGH

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellee Lynn Transportation Co., Inc. were mailed, postage prepaid, the 25th day of May, 1995 to the following:

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