

1994

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

George W. Pratt; Andrew H. Stone; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellee; Terry M. Plant; Hanson, Epperson & Smith; Attorneys for Appellee.

Edward T. Wells; Robert J. Debry & Associates; Attorneys for Appellants.

Recommended Citation

Reply Brief, *Mower v. Alexander & Alexander*, No. 940606 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/6253

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

FILED

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

REPLY BRIEF OF THE APPELLANT

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

George W. Pratt - 2642
Andrew H. Stone - 4291
JONES, WALDO, HOLBROOK &
McDONOUGH
170 South Main, #1500
Salt Lake City, UT 84101
Telephone: (801) 521-3200
Attorneys for Appellee Lynn Transportation Co., Inc.

Edward T. Wells - A3422
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915
Attorneys for Appellant

Terry M. Plant - 2610
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970
Telephone: (801) 363-7611
Attorneys for Appellee Alexander & Alexander, Inc.

FILED

AUG 03 1995

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
)

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

Terry M. Plant - 2610
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970
Telephone: (801) 363-7611
Attorneys for Appellee Alexander & Alexander, Inc.

I.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>TABLE OF CONTENTS</u>	ii
II. <u>TABLE OF AUTHORITIES</u>	v
III. <u>INTRODUCTION</u>	1
IV. <u>ARGUMENT</u>	5
 POINT I - <u>WHETHER THE MOWER/LYNN FORM CONTRACT WAS AN INTEGRATED CONTRACT OR WHETHER THE FORM CONTRACT SHOULD BE CONSTRUED TOGETHER WITH THE LYNN PROVIDED INSURANCE FORM AND/OR THE CONTEMPORANEOUS STATEMENTS OF LYNN'S EMPLOYEES, WAS AN ISSUE RAISED BY THE PARTIES AND CONSIDERED IN THE LOWER COURT.</u>	 5
A. <u>Appellees' Briefs:</u>	5
B. <u>Discussion:</u>	6
 POINT II - <u>WHETHER THE MOWER/LYNN FORM AGREEMENT IS A COMPLETE INTEGRATED CONTRACT PRESENTS GENUINE ISSUES OF MATERIAL FACT REQUIRING A REVERSAL OF THE SUMMARY JUDGMENT.</u>	 7
A. <u>Appellees' Briefs:</u>	7
B. <u>Discussion:</u>	8
 POINT III - <u>WHETHER MOWER REASONABLY RELIED ON LYNN'S MISREPRESENTATIONS AND WHETHER THE PROMISES MADE BY LYNN WERE SUFFICIENTLY DEFINITE ARE GENUINE ISSUES OF MATERIAL FACT REQUIRING A REVERSAL OF THE SUMMARY JUDGMENT.</u>	 10
A. <u>Appellees' Briefs:</u>	10
B. <u>Discussion:</u>	11

	<u>Page</u>
POINT IV - <u>THE FORM MOWER/LYNN CONTRACT DOES NOT PRECLUDE MOWER FROM SUING LYNN FOR NEGLIGENCE, NEGLIGENT MISREPRESENTATION AND FRAUD.</u>	13
A. <u>Appellees' Briefs:</u>	13
B. <u>Discussion:</u>	13
POINT V - <u>SIMPLY BECAUSE A&A DID NOT SIGN THE MOWER/LYNN FORM AGREEMENT, DOES NOT BAR MOWER'S CONTRACT AND TORT CLAIMS AGAINST A&A.</u>	15
A. <u>A&A's Brief:</u>	15
B. <u>Discussion:</u>	15
POINT VI - <u>UTAH CODE ANN. §31A-1-43(3)(a) DOES NOT BAR MOWERS CLAIMS AGAINST LYNN TRANSPORTATION AND A&A.</u>	16
A. <u>Appellees' Briefs:</u>	16
B. <u>Discussion:</u>	16
POINT VII - <u>WHETHER PLAINTIFF FAILED TO SHOW EVIDENCE OF BREACH OF CONTRACT, NEGLIGENCE OR MISREPRESENTATION BY A&A WAS NOT AT ISSUE IN THE LOWER COURT. MOREOVER, THERE IS EVIDENCE OF BREACH OF CONTRACT, NEGLIGENCE AND MISREPRESENTATION.</u>	17
A. <u>A&A's Brief:</u>	17
B. <u>Discussion:</u>	17
POINT VIII- <u>THE INDEMNIFICATION CLAUSE CANNOT BE APPLIED TO MOWER'S CLAIMS BECAUSE THE CLAIMS DO NOT RESULT FROM THE PERFORMANCE OF THE FORM AGREEMENT.</u>	19
A. <u>Lynn's Brief:</u>	19
B. <u>Discussion:</u>	19

	<u>Page</u>
POINT IX - <u>A&A IS VICARIOUSLY LIABLE FOR</u>	
<u>LYNN'S MISREPRESENTATION</u>	20
A. <u>A&A's Brief:</u>	20
B. <u>Discussion:</u>	20
IV. <u>CONCLUSION</u>	21

II.

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.</u> , 739 P.2d 239 (Colo. 1987)	14
<u>Bullfrog Marina, Inc. v. Lentz</u> , 501 P.2d 266 (Utah 1972)	9
<u>Clary Insurance Agency v. Doyle</u> , 620 P.2d 194 (Alaska 1980)	14, 19
<u>Fiorentino v. Travelers Insurance Company</u> , 448 F. Supp. 1364 (E.D. Pa. 1978)	19
<u>Garrett v. Garrett</u> , 249 S.E.2d 808 (N.C. App. 1978)	5, 16
<u>LaBaron Associates v. Rebel Enterprises</u> , 823 P.2d 479, 482 (Utah App. 1991)	7
<u>Magic Valley Potato Shippers v. Continental Insurance</u> , 739 P.2d 372 (Idaho 1987)	14
<u>Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc.</u> , 607 P.2d 763 (Or. App. 1980)	14
<u>Rothey v. Walker Bank & Trust Company</u> , 754 P.2d 1222 (Utah 1988)	11
<u>State Farm Insurance Company v. Fort Wayne National Bank</u> , 474 N.E.2d 524 (Ind. App. 1985)	19
<u>Union Bank v. Swenson</u> , 707 P.2d 663, 665 (Utah 1985)	8
<u>Van Der Heyde v. First Colony Life Insurance Company</u> , 845 P.2d 275 (Utah App. 1993)	14, 21
<u>Vina v. Jefferson Insurance Company of New York</u> , 761 P.2d 581, 585 (Utah App. 1988)	14, 21
<u>Winegar v. Froerer Corp.</u> , 813 P.2d 104 (Utah 1991)	18

Statutes:

Utah Code Ann. §31A-1-43	5
Utah Code Ann. §31A-1-43(3)(a)	16, 17
Utah Code Ann. §31A-1-301(43)	14, 20
Utah Code Ann. §31A-21-102(2)	14
Utah Code Ann. §31A-23-102(1)(b)	14, 20
Utah Code Ann. §31A-23-302(1)(a)(i)	14

III.

INTRODUCTION

This appeal results from a dispute over insurance coverage. The appellant, Kirk H. Mower, a self-employed truck driver, is appealing two summary judgments. The first summary judgment dismissed his claims against Lynn Transportation Company, Inc. ("Lynn" or "Lynn Transportation") and Alexander & Alexander, Inc. ("A&A") for failure to procure and provide Worker's Compensation Insurance. The lower court dismissed Mower's breach of contract, negligence, negligent misrepresentation and fraud claims. The second summary 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.

In his opening brief, Mower identified ten (10) issues on appeal. The issues focus on (1) whether there is an integrated contract, or whether issues of fact must be resolved prior to determining the integration issue (Issues 1, 2 and 10); (2) whether the lower court correctly applied the parol evidence rule (Issues 3 and 4); (3) whether equitable estoppel requires reversal of the summary judgment (Issues 5 and 9); (4) contract interpretation (Issues 6 and 8); and (5) statutory construction (Issue 7).

In his opening brief, Mower showed that the first summary judgment must be reversed because there are issues of material fact

that must be resolved before a court can conclude that the written agreement, absent the insurance order form, is an integrated contract. (Appellants' brief, pp. 19-22.) Mower also showed that the court misapplied the parol evidence rule because the rule does not bar claims based upon negligence or misrepresentation. Further, the rule cannot bar claims against a defendant that is not a party to the integrated contract. (Appellant's brief, pp. 24-27).

Mower also explained that there are material issues of fact which must be resolved before the court can determine whether Lynn Transportation is estopped from denying its promise to obtain worker's compensation insurance for Mower and whether Lynn Transportation is estopped from seeking attorney's fees under its form agreement. (Appellant's brief, pp. 28-29, 35-38). In addition, Mower showed that the Mower/Lynn Transportation indemnification clause, when strictly construed, does not apply and the summary judgment awarding attorney's fees must be vacated. (Appellant's brief, pp. 33-34).

Finally, Mower showed that Utah Code Ann. § 35-1-43(3)(a) an Industrial Commission notice provision is no defense to Mower's claims and does not justify the lower court's summary judgment. (Appellant's brief, pp. 30-31).

In its responding brief, appellee, Lynn Transportation,

Inc. argues that Mower did not contest the issue of contract integration in the lower court. Lynn also says there is no material fact issue requiring resolution prior to the lower court's conclusion that the Mower/Lynn agreement, absent the insurance application, was an integrated contract. (Lynn's brief, pp. 10-12.)

From the foregoing conclusory argument, Lynn says that the parol evidence rule bars evidence that the Lynn-provided insurance order form and the statements of Lynn's employees that Lynn would obtain worker's compensation insurance for Mower, were a part of the contract. (Lynn's brief, pp 13-14.) In addition, Lynn says that estoppel is unavailable to Mower as a matter of law, because Mower could not have reasonably relied on Lynn's statements and actions. Lynn also argues that the promises made by Lynn's employees are not sufficiently definite and certain. Moreover, Lynn says that Mower was not without fault so equitable estoppel is inapplicable. (Lynn's brief, pp. 15-24.)

Lynn Transportation also argues that Mower can only sue in contract, not tort. It says "the agreement controls and Mower's remedies are limited to rights evidenced by the contract" (Lynn's brief, p.25). In making its argument, Lynn characterizes Mower's damages as "purely economic, rather than direct damages for his physical injuries." (Lynn's brief, at 27).

In addition, Lynn argues that, because Mower did not notify the Industrial Commission that he wanted the Worker's Compensation Act to apply to him, Mower could not have obtained benefits, even if Lynn had procured the insurance for Mower. (Lynn's brief, pp. 29-33). Finally, Lynn argues that the injury in this case results out of the performance of the Mower/Lynn agreement, so the Utah court properly entered summary judgment in favor of Lynn on the contract indemnification clause. (Lynn's brief, pp. 34-36).

Appellee, A&A also filed a responding brief. In its brief, A&A says the summary judgment entered in its favor was correct because Mower failed to present evidence of breach of contract, negligence, fraud or misrepresentation by A&A. (A&A's brief, p. 10). More specifically, A&A says that the insurance order form did not create a contract to procure insurance because allegedly Mower did not present any evidence of mutual consent. (A&A's brief, pp. 11-12). A&A also argues that Mower failed to show that A&A had a duty to procure the worker's compensation insurance.

In addition, A&A argues that it had no contract with Mower, and A&A was not a party to the Mower/Lynn agreement, so it cannot be held liable under any misrepresentation theory. A&A protests that it did not make any affirmative representation, false

or otherwise, to Mower. (A&A's brief, pp. 17-19). Moreover, A&A argues that estoppel cannot apply to this case because A&A was not a party to the agreement. A&A also contends that Mower "can forward no evidence that he relied on any representation, act or omission of A&A." (A&A's brief, p. 21).

Finally, A&A says that § 31A-1-43 bars Mower's claims because in this case, contrary to the facts in Garrett v. Garrett, 249 S.E.2d 808 (N.C. App. 1978), A&A did not recover any premiums or other benefit whereby estoppel could be justified. In their briefs, both appellees also improperly attempt to set forth the facts and inferences supported by the record in the light most favorable to them, rather than in a light favorable to the party opposing summary judgment. This reply brief responds to the arguments raised by both Lynn Transportation and A&A and their improper recitation of the facts.

IV.

ARGUMENT

POINT I

WHETHER THE MOWER/LYNN FORM CONTRACT WAS
AN INTEGRATED CONTRACT OR WHETHER THE FORM
CONTRACT SHOULD BE CONSTRUED TOGETHER WITH THE
LYNN PROVIDED INSURANCE FORM AND/OR THE CONTEMPORANEOUS
STATEMENTS OF LYNN'S EMPLOYEES, WAS AN ISSUE RAISED
BY THE PARTIES AND CONSIDERED IN THE LOWER COURT.

A. Appellees' Briefs:

Lynn Transportation says that Mower raised no argument

and pointed to no fact concerning the written agreement's integration, so this court should not consider Mower's argument that the first summary judgment should be reversed because issues of fact exist regarding the contract's integration. (Lynn's brief, p. 10).

B. Discussion:

It is simply not true that "Mower raised no argument and pointed to no fact, concerning the written agreement's integration" as alleged at p. 10 of Lynn's brief. The fact Mower agreed by contract to obtain insurance does not preclude his claim that he satisfied this duty by ordering insurance through defendants. Both parties raised and contested the contract integration issue. In defendants' joint Motion for Summary Judgment on the plaintiff's claim, Lynn and A&A argued that the issues in this case, should be dealt with using traditional notions of the parol evidence rule and the function of integration clauses within contracts. (R. 395). Subsequently, Mower responded in his "Memorandum in Response to Defendant's Joint Motion for Summary Judgment" that as part of the hiring process, Lynn provided the insurance order form together with the contract and that Lynn's employees told him that "he could obtain all necessary insurance through Lynn Transportation and Alexander & Alexander." Mower explained that both his contract with Lynn and the insurance order form were signed

contemporaneously as part of one transaction wherein Mower became employed as an independent contractor for Lynn. (R. 465-68). Subsequently in his memo, Mower argued that disputed facts which preclude summary judgment in his case include, "the effect of the order form." (R. 475). If there was any question that the issue of integration was contested, and there is not, that question was resolved in paragraph 2 of the Order granting Summary Judgment.

2. The Court determines that the contract between Lynn Transportation and plaintiff Mower. . . is an integrated contract. (R. 566).

In summary, all parties raised the contract integration issue and the court ruled on the issue. That is all that is required to preserve the integration issue for appeal. See e.g. LaBaron Associates v. Rebel Enterprises, 823 P.2d 479, 482 (Utah App. 1991). (To preserve a substantive issue for appeal, party must. . . bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits.)

POINT II

WHETHER THE MOWER/LYNN FORM AGREEMENT IS A COMPLETE INTEGRATED CONTRACT PRESENTS GENUINE ISSUES OF MATERIAL FACT REQUIRING A REVERSAL OF THE SUMMARY JUDGMENT.

A. Appellees' Briefs:

Lynn Transportation, in its brief, argues that the following clause: "This agreement constitutes the entire agreement

and understanding between the parties. . ." is conclusive proof that the parties' written agreement, absent the insurance application, was an integrated contract. Lynn also pleads that "to rely on conduct extrinsic to the contract's clear written terms to impose a contract duty upon Lynn is to ignore the express terms of the parties' contract as well as Mower's repeated admission of that contractual duty [to obtain worker's compensation insurance]." (Lynn's brief, p. 12).

B. Discussion:

Lynn's argument that the form contract is an integrated contract because the contract says so, is not dispositive. As set forth on p. 20 of Mower's opening brief, whether the parties adopt a writing or writings as the final and complete expression of their bargain is a question of fact. Moreover, parol evidence is used (not just the integration clause) to resolve the integration question. E.g. Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985).

In contesting summary judgment, Mower showed by attached affidavits that at the time he signed the Mower/Lynn form contract, he also signed the insurance order form provided by Lynn and A&A. He was also told that Lynn would deduct insurance premium money from checks paid to Mower, which Lynn did. From the foregoing, Mower believed that he had complied with his duty under the

contract by ordering insurance through Lynn and A&A. Further, by supplemented affidavit of Jerry Anderegg¹, Mower showed that Lynn and A&A had an obligation to purchase the insurance ordered by Mower or to notify him that the insurance was unavailable (R. 536, 491 at ¶ 6, 7). By supplemented affidavit of Anderegg, Mower also showed that his belief that he had worker's compensation insurance was reasonable. (R. 536, 491 at ¶ 9). Moreover, in appellee's Memoranda in Support of the Summary Judgment, Lynn and A&A each admitted that Lynn provided the A&A insurance order form to Mower contemporaneously with the Mower/Lynn form agreement. They also admit that Lynn told Mower that Lynn would order the insurance from A&A and compute Mower's premiums. (R. 398-401). The foregoing is sufficient evidence to show that the Mower/Lynn form contract was not a complete integrated contract. Instead, the two related agreements should have been construed together. C.f. Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266 (Utah 1972) (trial court did not err in following the rule of law that when two or more

¹ At page 7 and f.n. 2 of its brief, Lynn notes the court granted its Motion to Strike the "Anderegg Affidavit" and claims this was not appealed. The Order granting summary judgment which is on appeal here also granted the Motion to Strike so that issue is in fact on appeal. However, the supplemental affidavit of Jerry Anderegg was filed after the Motion to Strike and was never subject to the motion. It should be noted the supplemental affidavit corrected the deficiencies claimed to exist in the motions which were subject to the Motion to Strike. The supplemental affidavit, after setting out proper foundation related all opinions given in the previous affidavits. See R. 536-540.

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. . . although they do not in terms refer to each other).

POINT III

WHETHER MOWER REASONABLY RELIED
ON LYNN'S MISREPRESENTATIONS AND WHETHER
THE PROMISES MADE BY LYNN WERE SUFFICIENTLY DEFINITE
ARE GENUINE ISSUES OF MATERIAL FACT REQUIRING
A REVERSAL OF THE SUMMARY JUDGMENT.

A. Appellees' Briefs:

In its brief, Lynn says that as a matter of law, Mower couldn't have relied on its employees' misrepresentations because "Mower does not testify that Granath [Lynn's employee] ever said she would obtain such [worker's compensation] insurance; that Granath never committed to do anything more than faxing the form with his [Mower's] 'X' on it". Further, Lynn says that Mower never received a rider or any other indication that his insurance was in effect, and he never saw a calculation of premium." Lynn also says that, Mower cannot rely on a statement contrary to the form contract".² (Lynn's brief, pp. 16-21). Finally, Lynn says its

² There is not in fact any "contrary statement" to the form contract. The contract merely required Mower to obtain insurance. Mower, in good faith, tried to do so in the manner suggested by Lynn itself. See opening Brief at pp. 6-11. Nothing in or about the contract touches in any way on the manner in which insurance was to be obtained. Since the contract did not control the method of obtaining insurance, it is not contrary to the terms of the

employees' promises were indefinite so Mower could not possibly have relied on them. (Lynn's brief, p. 24). This is a claim for the jury to decide. Lynn also argues that Mower was not without fault. This is another factual issue.

B. Discussion:

The first problem with Lynn's argument is that the question of reasonable reliance is a factual issue to be resolved by the jury. C.f. Rothey v. Walker Bank & Trust Company, 754 P.2d 1222 (Utah 1988). Reliance is a fact issue. It is not an "as a matter of law issue". Lynn does an excellent job in taking snippets from the record to support its no reasonable reliance argument. However, it omits an abundance of evidence showing that Lynn's representations were definite and the Mower reasonably relied on them. A brief summary of such evidence follows:

1. After presenting Mower with the form contract, Lynn directed him to Linda Murray (Granath) to discuss and obtain insurance. (R. 398, 427, 466.).

2. Lynn's employees specifically told Mower that Lynn could order worker's compensation insurance cheaper than he could get it himself and money would be withheld from his checks to pay for the insurance. R. 427, 466, 486-89 (Mower Affidavit).

contract to claim Lynn agreed to effect the insurance through A&A on Mower's behalf.

3. Mower was a former Lynn employee, knew Linda, and knew that Linda's job was to obtain insurance for Lynn's employees.

4. Linda presented A&A's order form to Mower and told him that Lynn would compute the premiums for whatever insurance he ordered and would deduct them from Mower's checks. Lynn did deduct insurance premiums from Mower's checks. R. 486-89.

5. Mower requested worker's compensation, bobtail and liability insurance by using the A&A form supplied by Lynn. Bobtail and liability insurance were obtained, worker's compensation insurance was not obtained. R. 477.

6. Neither Lynn nor A&A ever told Mower that they had not obtained worker's compensation coverage for Mower along with his other insurance. R. 173, 175, 178, 466.

7. An expert witness testified, that under the foregoing circumstances, Mower's belief that he had worker's compensation insurance was reasonable. R. 490-93.

All of the above, though briefly summarized, shows that whether Mower reasonably relied on Lynn's misrepresentations is a fact issue requiring a reversal of the summary judgment.

A second problem with Lynn's argument is that contrary to the unsupported assertions in their brief, the statements made by Lynn's employees were not contrary to the form Mower/Lynn agreement. See f.n. 1, supra. The form contract requires Mower to

obtain worker's compensation insurance but it does not specify how such coverage was to be obtained. Lynn told Mower that coverage could be obtained through A&A with payment to be made by deductions by Lynn from Mower's checks. Such deductions were, in fact, made. That representation does not directly or indirectly contradict the Mower/Lynn form agreement. In fact, it shows attempted compliance by Mower. It simply provides one way that Mower could obtain worker's compensation insurance to satisfy his contract with Lynn.

POINT IV

THE FORM MOWER/LYNN CONTRACT DOES
NOT PRECLUDE MOWER FROM SUING LYNN FOR
NEGLIGENCE, NEGLIGENT MISREPRESENTATION
AND FRAUD.

A. Appellees' Briefs:

Lynn says that because the contract executed by and between Mower and Lynn defines the duty regarding the acquisition of Worker's Compensation insurance, Mower's alleged causes of action may only sound in contract. (Lynn's brief at 25). Lynn also says that since Mower's claim is for purely economic loss, only such losses are recoverable under a contract claim. (Lynn's brief, pp. 27, 28 and f.n. 9).

B. Discussion.

Lynn and A&A's liability to Mower springs from three

sources: (1) Lynn's oral or contract promise to obtain insurance³; (2) Lynn's misrepresentation that Lynn could obtain worker's compensation insurance from A&A; and, (3) A&A and Lynn's negligent performance of the insurance broker duties⁴. Thus, when Lynn and A&A failed to obtain the worker's compensation insurance or notify Mower that coverage was not available, they became subject to suit under theories of breach of contract, negligence and fraud. E.g. Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc., 607 P.2d 763 (Or. App. 1980) (breach of contract, negligence); Magic Valley Potato Shippers v. Continental Insurance, 739 P.2d 372 (Idaho 1987) (fraud); Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc., 739 P.2d 239 (Colo. 1987) (negligence); Clary Insurance Agency v. Doyle, 620 P.2d 194 (Alaska 1980) (negligence). C.f. Utah Code Ann. §31A-21-102(2) (binding oral contracts may be made as to worker's compensation insurance); §31A-23-302(1)(a)(i) (unfair marketing practice to make any communication which contains

³ As set forth in Point VII of this Brief, A&A is vicariously liable for Lynn's promises and misrepresentations. An oral promise to procure insurance is enforceable. C.f. Utah Code Ann. §31A-21-102(2) (buying oral contracts of insurance may. . . be made. . . as to worker's compensation insurance. . . .).

⁴ An insurance broker is a person or entity who acts in procuring insurance on behalf of the applicant. Utah Code Ann. §§31A-1-301(43); 31A-23-102(1)(b) (whether a person or entity acts as an agent for the applicant is a question of fact precluding summary judgment) Van Der Heyde v. First Colony Life Insurance Company, 845 P.2d 275 (Utah App. 1993); Vina v. Jefferson Insurance Company of New York, 761 P.2d 581, 585 (Utah App. 1988).

false or misleading information relating to an insurance contract including information which is false or misleading because it is incomplete).

POINT V

SIMPLY BECAUSE A&A DID NOT SIGN THE MOWER/LYNN
FORM AGREEMENT, DOES NOT BAR MOWER'S
CONTRACT AND TORT CLAIMS AGAINST A&A.

A. A&A's Brief:

A&A says that since Mower admits that A&A was not a party to the Mower/Lynn form agreement, Lynn was not acting as A&A's agent so Mower can't sue A&A for breach of contract or for any misrepresentations made to Lynn. A&A also said it is undisputed that Lynn is not an insurance agent or broker so A&A has no vicarious liability for Lynn's misrepresentations. (A&A's Brief, pp. 9-10, 16-20).

B. Discussion:

Lynn was A&A's agent or at least a jury could conclude that Lynn was A&A's agent. See Opening Brief pp, 6-9. An agent is one who acts for another. There is ample evidence that Lynn acted for A&A to solicit insurance orders. See generally pp 6-9 of Appellant's Opening Brief. For example, Lynn told Mower it would obtain insurance for him through A&A (R. 427, 466). The order form given to Mower was prepared by A&A (R. 396, 418, 477). A&A is a broker (R. 297-98, 318, 337). A&A has no Utah office but provides

order forms to Lynn (R. 178, 183, 299, 336, 467-68). From the above, a jury could conclude that Lynn was A&A's agent. Thus, A&A's claim that it should not be vicariously liable, does not justify the lower court's summary judgment.

POINT VI

UTAH CODE ANN. §31A-1-43(3)(a) DOES
NOT BAR MOWERS CLAIMS AGAINST
LYNN TRANSPORTATION AND A&A.

A. Appellees' Briefs:

Lynn says that even if it had obtained the ordered worker's compensation insurance, that Mower would not have received benefits because Mower did not notify the Industrial Commission as set forth in *Utah Code Ann. §31A-1-43(3)(a)*. In effect, Lynn says that Mower was not damaged by Lynn's misconduct but by Mower's failure in filing the notice.

B. Discussion:

Neither Lynn Transportation nor A&A cite any case law for their unsupported notion that notice provisions like *Utah Code Ann. §31-1-43(a)* bar claims for worker's compensation coverage. Just the opposite is true. In the only reported case, the parties have discovered, Garrett v. Garrett, 249 S.E.2d 808 (N.C. App. 1978), the court held that the insurance carrier was estopped from using a similar statute as a defence to a demand for worker's compensation coverage. If Lynn and A&A are estopped from using

Utah Code Ann. §31-1-43(3)(a), then their failure to obtain coverage results in damage.

The supplemental affidavit of Jerry Anderegg (R. 536-540) explains that compliance with §31A-1-43(3)(a) is normally undertaken by the agent (A&A) on behalf of the client. Anderegg further testified the agent or broker (Lynn/A&A) has a duty to inform the client about the requirements of §31A-1-43(3)(a) and failure to do so breaches their duty to the client. Id.

POINT VII

WHETHER PLAINTIFF FAILED TO SHOW EVIDENCE
OF BREACH OF CONTRACT, NEGLIGENCE OR MISREPRESENTATION
BY A&A WAS NOT AT ISSUE IN THE LOWER COURT.
MOREOVER, THERE IS EVIDENCE OF BREACH
OF CONTRACT, NEGLIGENCE AND MISREPRESENTATION.

A. A&A's Brief:

In its brief, A&A argues that plaintiff failed to show material evidence of breach of contract, negligence, fraud or misrepresentation by A&A in the lower court (A&A Brief at 10-14).

B. Discussion:

A&A has apparently misapprehended Mower's argument on the parol evidence rule. In a nutshell, plaintiff asserts that since A&A was not a party to the driving contract between Lynn and Mower, it cannot avail itself of legal rules related to an integrated contract to avoid liability for its own acts of breach of contract, negligence, fraud or misrepresentation. See Opening Brief at 24-

27.

Taken in the light most favorable to Mower [Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991)]. The facts set out in Appellants' Opening Brief show:

1. Mower was required to obtain worker's compensation insurance R. 172, 181.

2. Mower was given an A&A form by Lynn and told Lynn would get insurance for him through A&A and would deduct premiums from his settlement check. R. 396, 418, 427, 466, 477.

3. Mower used the A&A form to order insurance and checked the box to order worker's compensation insurance. R. 477, 486-87; Kirk Mower Depo. p. 113.

4. Mower was justified in believing he had obtained insurance from A&A. See Anderegg Affidavit ¶ 9, R. 483-84.

A&A argues there was no mutual assent. Yet a jury could easily find the A&A form to be an offer to procure the listed coverages which was accepted by Mower when he checked the boxes and caused the form to be delivered to A&A. In fact, the procuring by A&A of bobtail and liability coverage pursuant to the order form creates a past performance which in itself shows mutual assent to the contract. The fact that A&A provided two of the three coverages listed on its order form, and collected premiums therefore, without obtaining worker's compensation insurance or

informing Mower it was not doing so, creates evidence of a failure by A&A to do its duty to provide insurance to Mower. See Anderegg Affidavits at R. 483, 536. Such conduct provides a clear basis for recovery. E.g. Fiorentino v. Travelers Insurance Company, 448 F. Supp. 1364 (E.D. Pa. 1978); State Farm Insurance Company v. Fort Wayne National Bank, 474 N.E.2d 524 (Ind. App. 1985); Clary Insurance Agency v. Doyle, 620 P.2d 194 (Alaska 1980).

POINT VIII

THE INDEMNIFICATION CLAUSE CANNOT BE APPLIED
TO MOWER'S CLAIMS BECAUSE THE CLAIMS DO NOT RESULT
FROM THE PERFORMANCE OF THE FORM AGREEMENT.

A. Lynn's Brief:

In its brief, Lynn argues that Mower's claim results from the performance of the form agreement because "it is undisputed that Mower's injury occurred while he was performing this agreement." It also says that it is clear from the parties form agreement that the parties intended Mower to assume the responsibility of complying with the Worker's Compensation law so the indemnification clause must apply. (Lynn's brief at 35).

B. Discussion:

Mower's injuries, for which damages are sought herein, occurred because worker's compensation insurance was not in force at the time of his accident. Had there been an extant worker's compensation policy, Mower would have no claimed injuries.

Mower's injuries thus occurred as a result of the failure of Lynn and A&A to perform a separate, though related, contemporaneous agreement. That the agreement arose from an attempt by Mower to comply with his duty under the Lynn agreement to obtain insurance should not and in fact does not implicate that agreement which contains the indemnification.

POINT IX

A&A IS VICARIOUSLY LIABLE FOR LYNN'S MISREPRESENTATION.

A. A&A's Brief:

A&A claims it is not liable to Mower because A&A was not a signatory to the Mower/Lynn form contract. A&A's Brief at 11-14. A&A also says it had no communication with Mower so it cannot be found liable for fraud or misrepresentation. A&A's Brief pp. 16-22.

B. Discussion:

A&A's liability to Mower does not depend on whether A&A was a signatory to the Mower/Lynn form contract. Rather, A&A's liability springs from its action as an insurance broker. A&A is an insurance broker. (R. 297-98, 318, 337). An insurance broker is an entity or person who acts in procuring insurance on behalf of an applicant. Utah Code Ann. §§31A-1-301(43); §31A-23-102(1)(b). However, A&A did not maintain an office in Utah. Instead, it did business by providing to Lynn Transportation insurance order forms

to be used by Lynn's truck drivers to order insurance (R. 178, 183, 299, 336, 467-68). Lynn would process the forms for A&A and Lynn's truck drivers. The form supplied to Mower with check-off spaces to order worker's compensation coverage is a representation (written) that (1) A&A sells worker's compensation insurance; and (2) worker's compensation insurance can be obtained by checking the appropriate box on the form. From the foregoing, a jury could easily conclude that Lynn was an agent of A&A and that A&A and Lynn acted as an insurance broker for Mower. Misrepresentations were made by A&A. The issue of whether an agent is an agent of the applicant or the insured, is a question of fact, precluding summary judgment. See Van Der Heyde v. First Colony Life Insurance Company, 845 P.2d 275 (Utah App. 1993); Vina v. Jefferson Insurance Company of New York, 761 P.2d 581, 585 (Utah App. 1988).

Essentially, if the jury finds that Lynn and A&A acted as an insurance broker for Mower, the jury can hold Lynn and A&A liable for failure to obtain insurance or to notify Mower that insurance was not available under theories of breach of contract, negligence and/or fraud.

V.

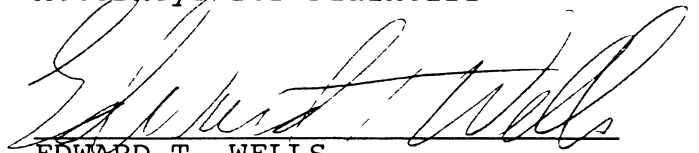
CONCLUSION

Appellant's opening brief identified numerous issues of material fact requiring reversal of the two summary judgments.

Further, none of the reasons advanced by Lynn Transportation and Alexander & Alexander justify the lower court's summary judgments. For these reasons, the summary judgments should be vacated and the case remanded to the trial court.

RESPECTFULLY SUBMITTED this 3rd day of August, 1995.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

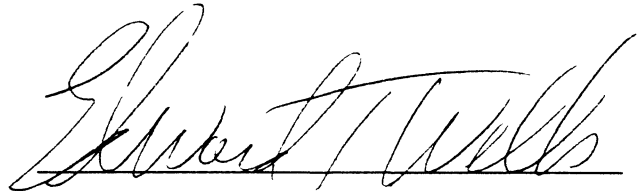

EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing **REPLY BRIEF OF THE APPELLANT** (Mower v. Alexander) were mailed, postage prepaid, this 3rd day of August, 1995 to the following:

George W. Pratt
Andrew H. Stone
JONES, WALDO, HOLBROOK &
McDONOUGH
170 South Main, #1500
Salt Lake City, UT 84101

Terry M. Plant - 2610
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970

A handwritten signature in dark ink, appearing to read "Robert T. Wells", is written over a horizontal line.

APPENDIX

Jerry Anderegg Affidavit - dated January 13, 1992

Jerry Anderegg Affidavit - dated November 5, 1992

Kirk Mower Affidavit

1/13/92

EDWARD T. WELLS - A3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

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

KIRK H. MOWER,

Plaintiff,

vs.

ALEXANDER & ALEXANDER, INC., an
Oklahoma corporation qualified
to do business in the State of
Utah and LYNN TRANSPORTATION
COMPANY, INC., an Iowa corpor-
ation,

Defendant.

AFFIDAVIT OF JERRY ANDEREGG

Civil No. 910905824CV

Judge Moffat

STATE OF UTAH)
) ss:
COUNTY OF SALT LAKE)

Jerry Anderegg, being duly sworn, deposes and says:

1. I am a resident of Salt Lake County, Utah and over
the age of 21 years.

2. I am currently licensed by the State of Utah as a
registered insurance agent and broker.

3. I have been an insurance agent for 18 years.

4. I have been an insurance broker for 10 years.

5. I have reviewed the form attached hereto as Ex. A.

FILE COPY


6. In my opinion as a licensed insurance broker and agent, an insurance broker who received Exhibit A from a potential client would have an obligation to purchase all of the requested coverages including worker's compensation coverage for that client.

7. In the event a requested form of coverage such as worker's compensation was not available, a broker or agent would, in my opinion as a licensed agent and broker, have a duty to inform the client in writing that such coverage was not available and had not been purchased.

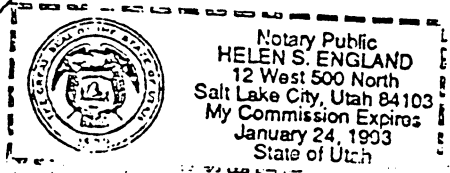
8. In my opinion as a licensed insurance agent and broker, if any insurance agent or broker accepted money to purchase insurance from a client who had used Exhibit A to order the insurance, such agent and/or broker would have a duty to provide worker's compensation insurance to the client or in the alternative to inform the client in writing that worker's compensation insurance had not been purchased.

9. In my opinion, if Kirk Mower delivered the form attached hereto as Exhibit A to his employer for the purpose of ordering insurance and money was withheld from his pay to pay for insurance, Kirk Mower would be justified in believing he had purchased worker's compensation insurance.

DATED this 13th day of January, 1992.

By: 
JERRY ANDEREGG
2

SWORN AND SUBSCRIBED TO before me this 13th day of January, 1992.



Helen S. England
NOTARY PUBLIC

RESIDING IN: Salt Lake City Ut

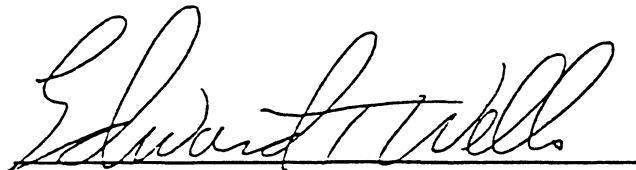
My Commission Expires:
1-24-93

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT OF JERRY ANDEREGG (Mower v. Alexander) was mailed, postage prepaid, this 28th day of January, 1992 to the following:

George Pratt
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main, #1500
Salt Lake City, UT 84101

Terry Plant
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970

A handwritten signature in cursive script, appearing to read "Edward T. Webb", is written over a horizontal line.

5278-019\jn

EDWARD T. WELLS - A3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

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

KIRK H. MOWER,

Plaintiff,

vs.

ALEXANDER & ALEXANDER, INC., an
Oklahoma corporation qualified
to do business in the State of
Utah and LYNN TRANSPORTATION
COMPANY, INC., an Iowa corpor-
ation,

Defendant.

AFFIDAVIT OF JERRY
ANDEREGG

Civil No. 910905824CV

Judge Moffat

STATE OF UTAH)
) ss:
COUNTY OF SALT LAKE)

Jerry Anderegg, being first duly sworn deposes and says:

1. I am a licensed insurance agent and broker. My qualifications are set forth in my previous affidavit dated January 13, 1992 filed in this action.

2. I have reviewed the issues in this matter and based upon personal knowledge and experience render the following opinions:

a) Mr. Mower acted reasonably in assuming he had purchased Worker's Compensation insurance which would cover him for on the job injuries.

b) Providing a form such as Exhibit A attached hereto to a layman which form provides a space to order Worker's Compensation coverage would, in my opinion, create in the layman a reasonable belief that if he checked the box for Worker's Compensation coverage, he had ordered such coverage and Worker's Compensation insurance would be provided unless he was expressly informed after submission of the order form that such coverage was not being provided.

c) In my experience sole proprietors often include themselves under Worker's Compensation policies. It is my opinion that it is the duty of the insurance agent to inform the insurance carrier that the owner is to be insured as a worker.

d) In my opinion it is the duty of the insurance agent to obtain from the customer all information necessary to effect the desired coverages. In my opinion, failure of a customer to volunteer information would not be a proper basis to support a claim that coverage was not provided due to a lack of sufficient information to effect the coverage.

e) Mr. Mower acted reasonably in assuming he had purchased Worker's Compensation coverage.

f) Under the facts of this case, I believe Mr. Mower was justified in believing he had purchased Worker's Compensation coverage.

g) In my opinion, it is the duty of the insurance agent to inform the customer of all steps which must be taken to effect coverage.

h) In my opinion, if the insurance agent fails to provide information to a customer which is necessary to effect coverage, the agent is responsible for any failure of coverage.

3. In my opinion, the responsibility for failure to order and effect Worker's Compensation coverage for Mr. Mower in this case rests with Lynn Transportation Company and Alexander and Alexander.

DATED this ____ day of November, 1992.

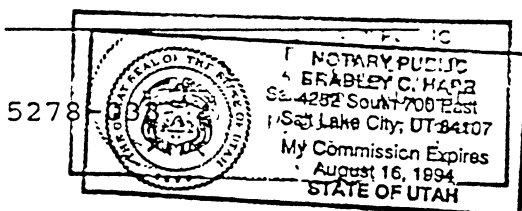

JERRY ANDEREGG

SWORN AND SUBSCRIBED TO before me this 5 day of November, 1992.


NOTARY PUBLIC

RESIDING IN: S. C. County

My Commission Expires:



CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT OF JERRY ANDEREGG (Mower v. Alexander) was mailed, postage prepaid, this 5th day of November, 1992 to the following:

Andrew H. Stone
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main, #1500
Salt Lake City, UT 84101

Terry Plant
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970

Janna Lund

EDWARD T. WELLS - A3422
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915

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

KIRK H. MOWER,)	
)	
Plaintiff,)	AFFIDAVIT OF KIRK MOWER
)	
vs.)	
)	
ALEXANDER & ALEXANDER, INC., an)	
Oklahoma corporation qualified)	
to do business in the State of)	
Utah and LYNN TRANSPORTATION)	Civil No. 910905824CV
COMPANY, INC., an Iowa corpor-)	
ation,)	
)	Judge Moffat
Defendant.)	

STATE OF UTAH)
) ss:
COUNTY OF SALT LAKE)

Kirk H. Mower, being duly sworn, deposes and says:

1. I am the plaintiff in the above named action.
2. On April 12, 1990, I entered into a contract with Lynn Transportation Co., Inc. to lease my truck to them and to then drive the truck to transport goods for Lynn Transportation in interstate commerce.

3. I was provided a form (Exhibit A) by Lynn Transportation to order insurance. I filled out the form and indicated I wished to purchase worker's compensation insurance.

4. I was told money to pay for the insurance would be withheld from my settlement checks.

5. Money was withheld from my settlement checks to pay for "insurance."

6. I beleived I had purchased worker's compensation insurance.

7. I would not have operated the truck if I have known there was no worker's compensation insurance in force.

8. I understood Lynn Transportation was acting for Alexander & Alexander to help me order insurance.

9. I was injured on the job on July 28, 1990. My lower back was seriously injured.

10. My doctor has told me I need a spinal fusion operation and will always be disabled to some degree.

11. I do not have money to pay my attorney's costs to go out of state for depositions.

12. All transactions with the defendnats in this case occured in Salt Lake County, Utah.

DATED this 3 day of December, 1991.

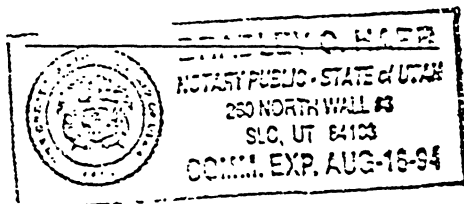
By: Kirk H. Mower
KIRK H. MOWER

SWORN AND SUBSCRIBED TO before me this 3 day of
December, 1991.

Bradley C. Flier
NOTARY PUBLIC

RESIDING IN: S.L. County

My Commission Expires:




CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT OF KIRK MOWER (Mower v. Alexander) was hand delivered, this 3 day of December, 1991 to the following:

George Pratt
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main, #1500
Salt Lake City, UT 84101

Terry Plant
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970



5278-006\jn