IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ORAL ARGUMENT CALENDAR

MONDAY, AUGUST 22, 2011

2:00 P.M.

No. 29,609

BOBBY WINDHAM and VICKIE K. WINDHAM,

Plaintiffs,

vs.

L.C.I.2, INC., a New Mexico Corporation, — **Paul S. Grand**

Defendant-Appellee,

and

NATIONWIDE MUTUAL INSURANCE COMPANY, — **Kevin M. Sexton, Shannon A. Parden**

Intervenor-Appellant.

Sean R. Calvert (Amicus Curiae)

***PANEL: JUDGES BUSTAMANTE, FRY AND VIGIL**

*Court of Appeals' panel members are listed in seniority order.

Panels may be changed without notice.

Oral Argument will be held in the Albuquerque Court of Appeals Pamela B. Minzner Law Center, 2211 Tucker NE., Albuquerque, NM 87106

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No. 29,609
(Dist. Ct. No. D-820-CV-200600208)

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff-in-Intervention/Appellant,

v.

L.C.I.2., INC.,

Defendant/Defendant-in-Intervention/Appellee.

APPEAL FROM THE DISTRICT COURT OF EIGHTH JUDICIAL DISTRICT
TAOS COUNTY
DISTRICT JUDGE MICHAEL E. VIGIL

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT

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SUMMARY OF PROCEEDINGS

Amici Curiae American Subcontractors Association and American Subcontractors Association of New Mexico, hereinafter collectively "ASA", incorporate by reference the Statement of the Nature of the Proceeding and the Statement of the Case as set forth in Appellant Nationwide Mutual Insurance Company's Docketing Statement.

ARGUMENT

1. The "Anti-Indemnity" Statute At Issue Reflects An Expression Of Fundamental Public Policy By The New Mexico Legislature.

As early as 1983, this Court recognized that the companion anti-indemnity statutes appearing at NMSA 1978, §§56-7-1 and 56-7-2 reflect a strong public policy to promote safety. As noted by this Court in *Guitard v. Gulf Oil Co.*, 100 N.M. 358, 670 P.2d 969 (Ct. App. 1983), "[o]ur interpretation furthers the public policy behind the statute, which is to promote safety ... the operator and the subcontractor will have incentive to monitor the safety of the operation knowing that they will be responsible for their respective percentage of negligence." *Id.*, 100 N.M. at 361. This strong public policy in favor of requiring parties to be responsible for their own negligence and preventing the shifting of liability for the safety of others has been repeated over and over again by our courts. *See*, *Guitard v. Gulf Oil Co.,* 100 N.M. 358, 670 P.2d 969 (Ct. App. 1983); *Amoco Production Co. v. Action Well Service, Inc.*, 107 N.M. 208, 755 P.2d 52 (1988); *Pina v. Gruy Petroleum Management Co.*, 2006-MSC-63, 136 P.3d 1029 (Ct. App. 2006); *Tucker v. R.A. Hanson Company, Inc.*, 956 F.2d 215 (10th Cir. 1992); and *Dennison v. La Plata Electric Assoc.,* 56 F.3d 77 (10th Cir. 1995).

The trial court, in requiring that the subcontractor, Newt & Butch's Roofing & Sheet Metal, Inc., and its insurance carrier, Nationwide Mutual Insurance Company, defend and indemnify L.C.I.2, Inc. on Plaintiff's claims effectively reversed twenty-five years' worth of decisional law in this state. As expressed in *Guitard,* the purpose of the anti-indemnity statutes was to ensure that both the operator, in this case the general contractor, and the subcontractor have an incentive to maintain a safe worksite. In the present case, L.C.I.2 was sued solely for breach of its duty to adopt a safety program and monitor and ensure the safety of the workers at the project. (R.P. 143-47) The trial court's decision runs directly contrary to the prior case law and is contrary to the fundamental public policy as recognized by our courts.

2. The Decision Below Failed To Address The Public Policy Behind The "Anti-Indemnity" Statute.

The trial court denied Nationwide Mutual Insurance Company's Motion for Summary Judgment and granted L.C.I.2's Motion for Summary Judgment without addressing the policy rationale behind Section 56-7-1 as articulated by the courts of this state. (R.P. 1081-1084) Section 56-7-1 is designed to reduce the number of injuries to construction workers by forcing those who lead and supervise construction projects to pay for the consequences of their own negligence using their own insurance and assets, rather than relying on their subcontractors to defend and indemnify them by way of hold harmless clauses and additional insured requirements. *See, Tucker v. R.A. Hanson Co., Inc.,* 956 F.2d 215, 218 (10th Cir. 1992) (the anti-indemnity statute protects workers "by ensuring that all those involved in its construction know that they will be held financially liable") and *National Union Fire Insurance*

Co. v. Nationwide Insurance, 82 Cal. Rptr. 2d 16, 22 (Cal. App. 4th Dist. 1999) (limited construction of an additional insured endorsement "furthers California's interest in preventing construction-related accidents").

In a typical relationship between an insured and an insurer, the insured is constrained in its behavior by the recognition that risky activity will result in higher insurance premiums or termination of coverage. However, "the additional insured is insulated against this prospect by the fact that it is not responsible for premium payments to the insurer and is unaffected by the raising of premiums ... there is no motivation or incentive for the additional insured to exercise a high standard of care." *Mehta, Additional Insured States in Construction Contracts and Moral Hazard*, 3 Conn. Ins. L. J. 169, 186-87 (1996). "[T]he moral hazard of insurance [is] the chance that the existence of insurance will increase the likelihood of the insured event." *Hall v. Life Insurance Company of North America*, 317 F.3d 773, 775 (7th Cir. 2003); *see also*, *Charter Oaks Fire Insurance Co. v. Color Converting Industries Co.*, 45 F.3d 1170, 1174 (7th Cir. 1995).

In the context of insurance, the moral hazard problem is ordinarily alleviated by "monitoring" of the named insured by the insurance carrier. *See Mehta*, 3 Conn. L. J. at 185-86. Insurance carriers can provide affirmative incentives to their named insureds to reduce the risk of loss, and they can also monitor the loss experience of their named insureds and adjust premiums accordingly. *Id.* at 186-87. In fact, insurance carriers share loss experience information with each other through rating organizations, which are explicitly exempted from federal anti-trust laws. *See* 15 U.S.C. § 1012(b). The ability to share loss experience information solves the moral hazard problem for most common forms of insurance, but

losses are tracked to the named insured, and thus the additional insured is unaffected by the raising of premiums. *Mehta*, 3 Conn. L. J. at 186-87. "[W]hile the primary insured, by way of its direct contractual relationship with the insurer, has a continuing motivation to exercise high standards of care, the additional insured has no such motivation once the contract has been executed. Without this continuing motivation, the additional insured's standard of care will expose third parties to the increased likelihood of harm." *Id.* at 187.

Thus, narrow construction of additional insured coverage furthers the state's policy interest in preventing construction-related accidents. *National Union Fire Insurance Co. v. Nationwide Insurance*, 82 Cal. Rpt. 2d 16, 22 (Cal. App. 4th Dist. 1999); *Lamb v. Armco, Inc.*, 518 N.E.2d 53, 55-56 (Ohio App. 1986); *Davis v. Comm. Edison Co.*, 336 N.E.2d 881, 884 (Ill. Supr. 1975); and *Jankele v. Texas Co.*, 54 P.2d 425, 427 (Utah 1936).

3. The Trial Court Failed To Acknowledge The Clear Indication By The Legislature That No Defense Obligation Was Required Under The Circumstances.

It is axiomatic that this Court, in interpreting a statute, must give meaning to every word of the statute. *See, State ex rel. Helman v. Gallegos*, 117 N.M. 346, 355, 871 P.2d 1352, 1361 (1994); and *State v. Pearson*, 2000-NMCA-102, 8, 129 N.M. 762, 765 (Ct. App. 2000). In this instance, the trial court failed to recognize that the Legislature, in enacting Section 56-7-1, has already specifically addressed the issue before the Court. In enacting Section 56-7-1, the Legislature prohibited certain clauses as set forth at 56-7-1(A), but allowed a limited category of indemnity

provisions as set forth at 56-7-1(B)(1). It is in the juxtaposition of these two subsections that the Legislature made clear its intent.

Subsection A of 56-7-1 provides in part that a provision "that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract ..." is void as against the public policy previously recognized by this Court. Subsection B(1), in almost identical language, provides in part that a construction contract may contain a provision "that requires one party to the contract to indemnify, hold harmless or insure the other party to the contract ... ." The only difference between the language utilized by the Legislature in Subsection A and that used in Subsection B is that Subsection B does not contain "or defend".

Clearly, in enacting the statute, the Legislature recognized that there were several related but different obligations imposed by contract for the purpose of shifting the risk of bodily injury or property damage. In voiding certain clauses as against public policy, the Legislature specifically voided clauses requiring that one party defend the other for that party's negligence. When the Legislature identified what clauses would be allowed, however, the Legislature allowed certain indemnity, hold harmless and insurance clauses, but did not provide for any obligation to defend the other party to the contract.

In arguing the applicability of Section 56-7-1 below, L.C.I.2 apparently recognized that the word "defend" does not appear in Subsection (B)(1), but failed to appreciate that indemnification did not necessarily include an obligation to defend.

> So Section B1 and it says, A construction contract may contain – this is what's allowable. It may contain a provision that or shall be enforced only to the extent that it, and I'll paraphrase,

> requires one party to indemnify, hold harmless, or et cetera, the other party ... So you may defend and indemnify if it arises out of Newt & Butch's acts.

(TR-9, l. 23 – TR-10, l. 6). Nowhere in the "et cetera" does the statute allow the passing of the obligation to defend another party to the contract for acts that are alleged to be the sole negligence of the party being indemnified.

CONCLUSION

The trial court's decision that, since the injuries were related to the work performed by Newt & Butch, or in the language argued by L.C.I.2 arose out of the work of Newt & Butch, fails to take into account the prior decisions of the courts of this state and the Legislature's purpose in enacting the anti-indemnity statute. This Court should reverse the trial court decision as it ignores the clear direction from the Legislature and as it is contrary to the express public policy of this state.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing pleading was mailed this 29th day of January, 2010, to:

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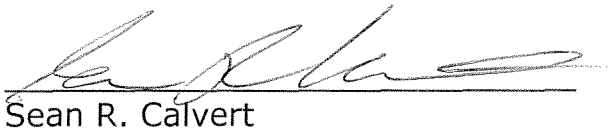

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