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

IN THE NEW MEXICO COURT OF APPEALS

BOBBY WINDHAM and VICKIE K. WINDHAM,

Plaintiffs,

vs.

No. 29,609
Taos County
No. CV-2006-208

L.C.I.2, INC.,

Defendant-Appellee,

and

NATIONWIDE MUTUAL INSURANCE COMPANY,

Intervenor-Appellant.

NATIONWIDE MUTUAL INSURANCE COMPANY'S BRIEF-IN-CHIEF

ORAL ARGUMENT REQUESTED

Appeal from the Eighth Judicial District Court, County of Taos
The Honorable Michael E. Vigil Presiding

Kevin M. Sexton, Esq.
Shannon A. Parden, Esq.
Montgomery & Andrews, P.A.
PO Box 36210
Albuquerque, New Mexico 87176-6210
Attorneys for Nationwide Mutual Ins. Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Cases from Other Jurisdictions

Statutes

Other

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case.

Plaintiffs Bobby and Vicki Windham ("Plaintiffs") brought personal injury and loss of consortium claims against L.C.I.2., Inc. ("LCI2") and the City of Taos ("underlying lawsuit"). Their claims arose out of an accident that occurred on a construction site, the Taos Pool Addition, Taos Youth and Family Center in Taos, New Mexico ("Project"), on August 10, 2004 in Taos, New Mexico. LCI2 was the general contractor. Newt & Butch's Roofing & Sheet Metal, Inc. ("Newt & Butch"), the roofing subcontractor on the Project, employed Bobby Windham. Mr. Windham sustained injuries when he fell through an opening in the roof he was installing at the Project and landed in the empty swimming pool below.

Newt & Butch, which had workers compensation coverage, was not a party to the underlying lawsuit. Plaintiffs did not allege that Newt & Butch was negligent or that Plaintiffs' damages were caused by Newt & Butch.

Nationwide Mutual Insurance Company ("Nationwide"), the insurer for Newt & Butch, provided a defense to LCI2 in the underlying lawsuit pursuant to a reservation of rights. Nationwide's Complaint-in-Intervention, the subject of this Appeal, addresses whether Nationwide has a duty to defend and/or indemnify LCI2 in the underlying lawsuit pursuant to the

policy of insurance that Nationwide issued to Newt & Butch ("Policy"). LCI2 is an additional insured under the Policy, subject to the terms and conditions of the Policy.

B. Course of Proceedings and Disposition Below.

On May 25, 2006, Plaintiffs filed the initial Complaint for Personal Injuries against LCI2 (RP 24-26). On or about June 5, 2006, Plaintiffs filed an Amended Complaint for Personal Injuries against LCI2 and the City (RP 31-33). On or about November 8, 2006, LCI2, by and through its counsel, tendered its defense to Nationwide, as an additional insured, which Nationwide accepted pursuant to a reservation of rights (RP 546, 552, 829, 976-979). On or about May 10, 2007, Plaintiffs filed a Second Amended Complaint ("Complaint") (RP 143-147).

On or about July 11, 2008, Nationwide filed a Complaint-in-Intervention, requesting that the Court declare that Nationwide had no duty to defend or indemnify LCI2 for the claims Plaintiffs brought against LCI2 in Plaintiffs' Complaint (RP 544-557). On or about August 21, 2008, Nationwide filed a Motion for Summary Judgment, requesting that the trial court rule that Nationwide had no duty to defend or indemnify LCI2 (RP 749-758, 816-829, 844-878, 889-896). On or about November 10, 2008, LCI2 filed a Motion for Summary Judgment on the Complaint-in-

Intervention, requesting that the trial court rule that Nationwide had a duty to defend LCI2 (RP 932-980, 1021-1028, 1041-1050). After oral argument on March 2, 2009 (Tr. 1-29), the trial court granted LCI2's Motion for Summary Judgment on the Complaint-In-Intervention, and denied Nationwide's Motion for Summary Judgment. In doing so, the Court impliedly found that there were no allegations in the Complaint that LCI2 was negligent; and it expressly found that NMSA 1978 § 56-7-1(B) (2003) (amended 2005), and not NMSA 1978 § 56-7-1(A) (2003) (amended 2005), applied to the facts of the underlying lawsuit (Tr. 26). Orders were entered on April 29, 2009 (RP 1081-1084). This is an appeal from the two orders.

Prior to entry of the two orders being appealed from herein, LCI2 had filed a Motion for Summary Judgment relating to Plaintiffs' claims. On or about October 7, 2008, the trial court granted LCI2's Motion for Summary Judgment. On November 24, 2008, the trial court entered an order dismissing Plaintiffs' claims against LCI2 (RP 1038). The instant appeal is not moot because Plaintiffs are also appealing the trial court's Order granting LCI2's Motion for Summary Judgment. In the event this Court reverses the trial court's granting of summary judgment in favor of LCI2 as to Plaintiffs' claims, Nationwide would, once again, be looked to for a defense of LCI2 in the underlying action and, possibly, for indemnification.

C. Summary of Facts Relevant to the Issues on Review.

On or about August 6, 2003, LCI2 and Newt & Butch entered into a subcontract ("Construction Contract") wherein Newt & Butch agreed to install Tectum III roof panels for the Project. (RP 752, 819-821, 963-965). The Construction Contract was amended on or about August 8, 2003 (RP 752, 822, 966). Pursuant to the Construction Contract, and amendment thereto, Newt & Butch agreed to "indemnify" LCI2 and "save [it] harmless" for any "claims, suits, liability for injuries to persons" on account of any act or omission of Newt & Butch (RP 820, § 8, ¶ 2). In addition, Newt & Butch agreed to add LCI2 as an "additional insured" (RP 822, ¶ 2) under Newt & Butch's Commercial General Liability ("CGL") policy (RP 752, 819-822, 963-966).

Nationwide issued a CGL Policy, Policy Number ACP GLO 7211266174 ("Policy"), to Newt & Butch, which had effective dates of April 1, 2004 to April 1, 2005 (RP 752, 824-827, 950-953). LCI2 is an additional insured to the Policy. The Additional Insured Endorsement to the Policy (emphasis added) provides the following:

> A. Section II – Who Is an Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. **Such person or organization is an**

> **additional insured only with respect to liability arising out of your [Newt & Butch] on-going operations performed for that insured [LCI2].** A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

(RP 752, 827, 953) (emphasis added).

In their Complaint, Plaintiffs allege that, on or about August 10, 2004, Bobby Windham, an employee of Newt & Butch, fell through an opening in the roof deck of the Project, which opening was covered with a vinyl material (RP 31-33, 143-157, 753). Plaintiffs allege that, as Bobby Windham walked across the roof of the structure, he fell through one of the openings and sustained injuries (*Id.*). In their First Amended Complaint, Plaintiffs allege that LCI2, as the general contractor, was responsible for the safety conditions on the Project to create a safety program, **a nondelegable duty**, which should have included the covering of the cutout spaces until the skylights were installed. (RP 32, ¶ 6, RP 753) (emphasis added). In Plaintiffs' Second Amended Complaint, Plaintiffs allege that LCI2, as the general contractor, had a [nondelegable] duty to protect the lives, health, and safety of other persons and to comply with all federal and state safety regulations, and to ensure that no worker worked in conditions that are hazardous or dangerous to his health and safety (RP 144, ¶ 5, RP 753). Both the First and the Second Amended Complaints allege that LCI2

failed to provide coverings of the cutouts for the sky lights; failed to implement safety rules to provide for the protections which would have prevented Plaintiff's injuries; failed to communicate safety rules to provide for the protections that would have prevented Plaintiff's injuries; and failed to monitor and enforce safety rules that would have provided protections and prevented Plaintiff's injuries. (RP 32-33, ¶ 8, RP 145, ¶ 9, RP 753).

There are no allegations contained in the Plaintiffs' Complaint(s) that any act or omission by Newt & Butch contributed to or caused Plaintiffs' injuries and/or damages (or that LCI2 was vicariously liable for any actions or omissions of Newt & Butch). (RP 753, ¶ 6, Tr. 7).

In addition to the above, the following facts were uncontested for purposes of the summary judgment motions: Bobby Windham was Newt & Butch's foreman for the Project (RP 848, 891). Mr. Windham instructed his crew to roll the vinyl over the openings of the skylights. (*Id.*) Mr. Windham fell through an opening that had been covered with vinyl by his crew. (*Id.*) Newt & Butch and Bobby Windham determined the method and manner in which to install the roof on the Project (*Id.*).

The evidence showed that LCI2 retained control over the worksite at the Project with regard to safety at the Project. [Deposition of Alva ("Butch")

Wilson, President and owner of Newt & Butch, RP 864, 128:3-129:15; RP 891, ¶ 2.]

As indicated above, on or about November 8, 2006, LCI2, by and through its counsel, tendered the defense and indemnification of LCI2 to Nationwide as an additional insured under the Policy (RP 546, 552, 829). Nationwide accepted the defense of LCI2 pursuant to a reservation of rights (RP 546, 976). Nationwide's reservation of rights letter specifically provides, in pertinent part, as follows:

> We are accepting this tender under a reservation because at this time, it is uncertain whether this incident arose out of Mr. Windham's work for Newt & Butch's or whether Mr. Windham's injuries arose out of L.C.I.2's individual negligence. Nationwide reserves its right to not defend or indemnify L.C.I.2 for any damages arising out of its individual negligence.

(RP 976-979). Nationwide's reservation of rights was consistent with the provisions contained in New Mexico's "anti-indemnity statute", NMSA (1978) § 56-7-1 (2003) (RP 1023).

II. ARGUMENT

THE TRIAL COURT ERRED IN DETERMINING THAT NEWT & BUTCH HAD A DUTY TO DEFEND LCI2 WHERE PLAINTIFFS' COMPLAINT(S) ALLEGED CLAIMS FOR BODILY INJURY CAUSED BY OR RESULTING FROM, IN WHOLE OR IN PART, THE NEGLIGENCE, ACT OR OMISSION OF LCI2.

1. Applicable Standard of Review.

On appeal, the whole record is examined for any evidence that places a genuine issue of material fact in dispute. *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶15, 123 N.M. 752, 758, 945 P.2d 970, 976; *Gardner-Zemke Co. v. State*, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). Questions of law, and application of the law to undisputed facts, are reviewed *de novo*. *Davis v. The Board of County Commissioners of Dona Ana County,* 1999-NMCA-110, ¶ 11, 127 N.M. 785, 790. Where the material facts are not disputed, the construction and effect of a contract is a question of law, which the appellate court reviews *de novo*. *Archunde v. International Surplus Lines Ins. Co.*, 120 N.M. 724, 728, 905 P.2d 1128, 1132 (Ct. App. 1995). "Where no material facts are in dispute . . . [the appellate court is] in as good a position as the district court to resolve questions of law." *Farmers Ins. Co. of Arizona v. Sedillo*, 2000-NMCA-094, ¶5, 129 N.M. 674, 675, 11 P.3d 1236, 1237.

Denial of a motion for summary judgment is reviewable where contained in appealable order granting the opposing party's cross-motion. *Davis v. Board of County Commissioners of Dona Ana County,* 1999-NMCA-110, at ¶ 11. The Court reviews whether there is sufficient evidence for the denial of the motion. *Id.* Where cross-motions for summary

judgment are presented on the basis of a common legal issue, the Court may reverse both the grant of one party's motion and the denial of the opposing party's cross-motion and award judgment on the cross-motion. *Grisham v. Allstate Ins. Co.*, 1999-NMCA-153, ¶ 2, 128 N.M. 340, 341, 992 P.2d 891, 892.

2. Preservation of Issue

Nationwide preserved this issue in its August 21, 2008 Motion for Summary Judgment and in its related briefs (RP 749-758, 816-829, 889-896). It also preserved this issue in its Response to LCI2's Motion for Summary Judgment (RP 1021-1028). The issue was also preserved at the March 2, 2009 oral argument (Tr. 1-29).

3. Points and Authorities

a. Section 56-7-1 voids a provision in a construction contract that requires one party [purported indemnitor] to provide a defense to another party [purported indemnitee] for injuries caused by or resulting from, in whole or in part, the negligence, act or omission of the purported indemnitee.[1]

The relevant sections of § 56-7-1 are as follows (emphasis added and deleted):

[1] Section 56-7-1 (2003) was amended effective July 1, 2003, the month prior to when LCI2 and Newt & Butch entered into the relevant construction contract. The 2005 amendment to § 56-7-1 inserted the current section D and redesignated §§ D and E as §§ (E) and (F). Sec. 56-7-1, Historical Notes. References in the trial transcripts and trial briefs are to § 56-7-1(F) (2005); § 56-7-1(F) (2005) is identical to § 56-7-1(E) of the 2003 version in effect at the time the contract was entered into. References herein will be to § 56-7-1(E) (2003).

§ 56-7-1. Real property; indemnity agreements; agreements void

A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or **defend** the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property **caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee**, its officers, employees or agents, **is void, unenforceable and against the public policy of the state**.

B. A construction contract may contain a provision that, or **shall be enforced only to the extent that**, it:

(1) requires one party to the contract to **indemnify, hold harmless or insure** the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents; or

(2) requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.

***

E. As used in this section, "indemnify" or "hold harmless" includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.

References herein will be to the 2003 version of § 56-7-1 unless otherwise indicated. (*See* footnote 1.)

The trial court (Tr 26) incorrectly ruled that, pursuant to § 56-7-1(B), Nationwide had a duty to defend LCI2. The court also incorrectly ruled that § 56-7-1(A) did not apply. Section 56-7-1(A), by its express terms, precludes an agreement in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or **defend** the other party to the contract for injury caused by or resulting from, **in whole or in part**, the negligence, act, or omission of the indemnitee. Pursuant to the express terms of § 56-7-1(B), a provision in a construction contract that requires one party to indemnify, hold harmless, or insure (*i.e.*, not defend) the other party to the contract, will only be enforced to the extent that it is determined that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor. As noted herein, § 56-7-1(B) specifically does not include a requirement that the indemnitor "defend" the purported indemnitee. Under § 56-7-1(B), in order for an indemnitor to be liable for an indemnitee's attorney fees, a determination must be made that claimant's damages were caused by, or arose out of, the acts or omissions of the indemnitor. No such determination was made in the underlying lawsuit.

Section 56-7-1(E) supports the preceding interpretation of § 56-7-1(B) in that § 56-7-1(E) provides that the terms "indemnify" and "hold harmless" include any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section. Section 56-7-1(E) does not allow for the "defense" of an indemnitor pursuant to an additional insured endorsement.

Section 56-7-1 provides that an indemnitor is only required to hold harmless and indemnify the indemnitee under certain circumstances (*i.e.*, when damages are determined to have arisen out of the acts of omissions of the indemnitor). Nothing contained in § 56-7-1 provides for a duty to defend (although there is a potential for recovery of attorney fees). Section 56-7-1 specifically precludes an indemnitee from being indemnified and/or held harmless for damages (including attorney fees) that are caused, in whole or in part, by the acts or omissions of the indemnitee. New Mexico courts have consistently enforced § 56-7-1 and have voided and otherwise prohibited any contractual provision that would require one party from defending and indemnifying another party for any liability arising from that party's own negligence. *See Sierra v. Garcia*, 106 N.M. 574, 575, 746 P.2d 1105, 1107 (1987).

In New Mexico, the duty to defend is distinct from the duty to indemnify. *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-08, ¶ 31, 146 N.M. 717, 213 P.3d 1146. Sections 56-7-1(A) and (B) clearly make a distinction between the duty to defend and the duty to indemnify, as the word "defend" is absent from § 56-7-1(B), as is the word "claims" following "only to the extent" in § 56-7-1(B). As noted by one court:

> The phrase "indemnify and hold harmless," in the technical sense, suggests an intent to reimburse the indemnitee for damages which may be asserted against the indemnitee for its own negligence. If that were the end of it, the trial court's interpretation would be correct.
>
> The additional phrase, "to the extent," however, suggests a "comparative negligence" construction under which each party is accountable "to the extent" their negligence contributes to the injury.

Braegelmann v. Horizon Development Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985) (general contractor not entitled to indemnification to extent damages were caused by general contractor's own negligence). *See also* Samir B. Mehta, *Additional Insured Status in Construction Contracts and Moral Hazard*, 3 Conn. Ins. L. J. 169, fn. 52 (when the demand for a defense is based on a broad form indemnity clause in which the indemnitor agrees to hold the indemnitee harmless from liabilities, costs, and expenses arising from the indemnitor's performance, but contains no

separate express defense obligation, the duty to defend does not arise until there is a determination that the indemnitor was at fault) (quoting Linda R. Beck, *Ethical Issues in Joint Representation Under Subcontract Requirements for Defense and Additional Insured Status*, THE CONSTRUCTION LAWYER, January 1995 at 25); *compare Crawford v. Weather Shield Mfg. Inc.,* 44 Cal.4th 541, 187 P.3d 424 (Cal. 2008) (where contract contained separate provisions for indemnification and a duty to defend). In standard usage, "indemnify" means:

> [t]o restore the victim of a loss, *in whole or in part*, by payment, repair, or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. To make good; to compensate; to make reimbursement to one of a loss already incurred by him.

Walsh Construction Co. v. Mutual of Enumclaw, 189 Or. App. 400, 406, 76 P.3d 164, 167 (Or. App. 2003), *affirmed* 104 P.3d 1146 (2005) [quoting Black's Law Dictionary 692 (5th ed. 1979].

Nationwide submits that § 56-7-1(B) and (E) only allow for recovery of attorney fees after a determination that any losses of the indemnitee were caused by the indemnitor, and only to the extent that such losses were caused by the indemnitor. Section 56-7-1 does not provide for a duty to defend the indemnitee.

b. Section 56-7-1 prohibits Nationwide from being required to defend LCI2 pursuant to the Additional Insured Endorsement, which was procured pursuant to the Construction Contract.

In the instant case, § 8 of the Construction Contract provides that Newt & Butch will "indemnify" and "save [LCI2] harmless" on account of any act or omission of Newt & Butch. Section 8 does not require that Newt & Butch defend LCI2. The amendment to the Construction Contract required that Newt & Butch add LCI2 as an additional insured to Newt & Butch's policy of insurance. The Additional Insured Endorsement to the Policy provides the following (emphasis added):

> A. Section II – Who Is an Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured **only with respect to liability arising out of your [Newt & Butch] on-going operations performed for that insured [LCI2]**. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

LCI2 was added as an additional insured to the Nationwide policy as a result of the Construction Contract entered into by Newt & Butch and LCI2. However, the additional insured endorsement, as well as the Construction Contract, is subject to terms of § 56-7-1, which precludes a defense and

indemnification for allegations that the indemnitee was negligent, in whole or in part.

In this case, Plaintiffs' Complaints only allege that LCI2 was negligent. There are no allegations contained in the Plaintiffs' Complaints that any act or omission by Newt & Butch contributed to or caused Plaintiffs' injuries and/or damages. (RP 753, ¶ 6, Tr. 7). Accordingly, LCI2, by demanding a defense under these circumstances, has placed Newt & Butch (and Nationwide) in the position of defending and, potentially, indemnifying, LCI2 for its own negligent acts and/or omissions. As discussed *supra*, the defense and indemnification of an entity for its own negligence, whether directly (through a contractual indemnity provision) or indirectly (through an additional insured provision) is strictly prohibited by § 56-7-1.

In the instant case, LCI2 is trying to get indirectly what it knows it can't get directly. In that regard, LCI2 is attempting to obtain a defense and indemnification (for allegations relating to its own negligence) by tendering the defense and indemnification of Plaintiffs' claims to Newt & Butch's insurer, Nationwide, as an additional insured under Newt & Butch's Policy. It is clear that such an "end-around" is prohibited under the express terms of §§ 56-7-1 (A), (B) and (E).

In accordance with the terms of § 56-7-1(E), a requirement to provide for the defense and/or indemnification of a party, as an additional insured, for that party's own negligence also violates New Mexico's anti-indemnity statute. Pursuant to New Mexico's "anti-indemnity statute", LCI2's demand for defense and/or indemnification from Newt & Butch in this case (whether under the Construction Contract or Policy) is unenforceable given that Plaintiffs' Complaints clearly allege that their damages were caused, in whole or in part, by LCI2's negligent acts and/or omissions. As such, in contrast to the facts and holding in *BPLW* (where BPLW was a party that was alleged to be negligent; where the contract was distinguishable from the relevant contract in the instant case' and the former version of § 56-7-1 applied), requiring Nationwide to defend LCI2 under these circumstances is violative of § 56-7-1 and the public policy set forth therein.

Other jurisdictions have found that a contractual requirement to add an entity as an additional insured is the same as a promise to defend and indemnify the entity for its own negligence. *See Walsh,* 76 P.3d at 164. (2003). In *Walsh,* the court addressed whether a subcontractor's insurer was obligated to defend a general contractor under the "additional insured" provision of the insurance policy, where there were no allegations that the subcontractor was negligent. *See Walsh*, 104 P.3d at 1147, fn. 1 (Oregon

Supreme Court adopting the Oregon Court of Appeal's decision nearly verbatim). The court held that the insurer was not obligated to defend the general contractor for the general contractor's own negligence. In so finding, the court reasoned that the evolution of the Oregon anti-indemnity statute suggested that the statute prohibited direct indemnity agreements (contractual) as well as indirect indemnity agreements (agreements to add another party as an additional insured). *Walsh*, 76 P.3d at 168. Specifically, the Oregon statute, ORS 30.140(1), which was amended in 1995, provided:

> (1) Except provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.
>
> (2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of the death or bodily injury to persons or damage to property to the extent that the death or bodily injury to person or damage to property arises out of the fault of the indemnitor....

The court determined that the above language stated a general prohibition of indemnification subject only to the exception in paragraph 2. The court found that section (1) was the sole section that applied to the case before it, and that the provision in the contract that required the subcontractor to provide insurance for the contractor was void. The court found that the

statute prohibited not only "direct" indemnity agreements, but also "additional insured" arrangements by which one party is obligated to procure insurance for losses arising, in whole or in part, from the other's fault. *Walsh*, 76 P.3d at 168. Because the contractual provision requiring the subcontractor to add the contractor as an additional insured was void as against the anti-indemnity statute, the general contractor was not a legally cognizable "additional insured" under the endorsement the insurer had issued to the subcontractor. Therefore, the insurer had no duty to defend or to indemnify the contractor. *Id.* at 166-168.

In *Liberty Mut. Ins. Group v. Travelers Property Cas.,* 2002-Ohio-4280, 2002 WL 1933244 (Ohio Ct. App. 8 Dist. 2002), the court held that the anti-indemnity statute, R.C. § 2305.31, not only prohibited direct indemnity agreements, but also indirect indemnity agreements. In so finding the court reasoned that allowing a party to be insured against its own negligence under an additional insured endorsement would circumvent the intent of R.C. § 2305.31. *Id. at *3; see also Buckeye Union Ins. Co. v. Zavarella Brothers Construction Co.,* 699 N.E.2d 127 (Ohio 1997); *see also Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.,* 27 P.3d 594 (Utah Ct. App. 2001).

Similar to the statute at issue in *Walsh*, New Mexico's anti-indemnity statute provides for a general prohibition of indemnification subject to certain exceptions (*i.e.*, indemnification for the indemnitor's negligence). As articulated in *Liberty,* allowing for the defense and indemnification of an additional insured for its own negligence would circumvent the anti-indemnity statute. Under any reasonable reading of § 56-7-1, LCI2 is not entitled to a defense or indemnification by Newt & Butch (or Nationwide) for the claims being asserted by Plaintiffs in the underlying lawsuit.

c. Even assuming a duty to defend exists under certain circumstances, a duty to defend does not exist when the purported indemnitor is not a party to the lawsuit and is not alleged to be negligent.

Other jurisdictions have addressed the issue, under facts analogous to the underlying lawsuit, of whether the indemnitor is required to defend the indemnitee when the indemnitor is not a party and there are no allegations of negligence against the indemnitor.

In *Gilbane Building Co., et al. v. Keystone Structural Concrete, Ltd.*, 263 S.W.3d 291 (Ct. App. Tex. 1st Dist. 2007), an analogous case, Victor Nava, an employee of Keystone (subcontractor), suffered an injury and brought suit alleging only negligence against Gilbane (general contractor). Nava received workers compensation benefits from Keystone. Admiral Insurance, Keystone's insurer, provided a defense to Gilbane. Nava settled

his suit against Gilbane, with Admiral and Zurich American Insurance Company, Gilbane's insurer, splitting the cost of the settlement. After the settlement was funded, Gilbane and Zurich filed suit seeking to recover the million dollars Zurich paid to settle Nava's claim.

As in the instant case, Gilbane argued that the injury was actually caused by Keystone's sole negligence, and that an indemnity clause in the contract between Gilbane and Keystone specifically held Gilbane harmless from any claims or damages due to negligence on the part of Keystone or its employees. The appellate court, relying upon *Fisk Elec. Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994), ruled that any evidence that Keystone may have been negligent was immaterial to the question of whether the indemnity agreement applied to a suit that had mentioned only Gilbane's negligence. It stated that the determination of sole negligence on the part of Keystone was to be based only upon the allegations of the employee's complaint. *Gilbane*, 263 S.W.2d at 297-98.

In *Fisk,* the court, addressing an analogous issue, noted that if the plaintiff in the underlying case were successful in its suit against the indemnitee, then the indemnitor would not be obligated to pay anything to the indemnitee. Yet the indemnitee would impose upon the indemnitor a duty to bear the costs of defense. *Fisk*, 888 SW.2d at 815-16. It noted that

requiring the indemnitor to pay defense expenses would leave indemnitors liable for a cost resulting from a claim of negligence which indemnitors did not agree to bear. *Id.* at 815. "Significantly, it would also leave indemnitors vulnerable to indemnitees who might settle their cases, without admitting negligence, leaving the indemnitor to pay the costs of settlement and defense." *Id.* The *Fisk* court, therefore, found that, even though the indemnitee contractor was not found to be negligent, the subcontractor had no duty to indemnify the indemnitee for expenses resulting from defending itself against claims of negligence.

Nationwide submits that this Court should follow the reasoning of the *Fisk* and *Gilbane* courts and to interpret § 56-7-1 as precluding one party to a construction contract from being required to defend another party to the contract when: (1) the complaint only contains allegations that the indemnitee's acts or omissions caused the plaintiff's injuries; (2) the indemnitor is not a party to suit; (3) no allegations of negligence were brought against the indemnitor; and (4) there has been no finding that the indemnitor was negligent. To find that § 56-7-1 requires a defense by the indemnitor under these circumstances would violate New Mexico's public policy, which precludes an entity from being liable for the negligence of another entity.

This case is readily distinguishable from this Court's recent holding in *BPLW,* 2009-NMCA-081. In *BPLW,* the Court held that the contract in that case did not violate the 1971 version of the anti-indemnity statute. In reaching its holding in *BPLW,* the Court relied upon exclusionary language in the contract, which stated that the agreement to indemnify would not extend to the liability and damages arising out the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee. This exclusionary language tracked the language in the 1971 version of the statute. In 2003, the statute was amended. The 2003 version of the anti-indemnity statute does not contain the exclusionary language that the Court relied upon in *BPLW* to find that the intent of the contract was "for [the indemnitor] to defend the [indemnitee] from any lawsuit alleging that the [indemnitee] itself was negligent, as long as the cause of action arises from [the indemnitor's] **alleged** negligence, unless the claim arises from the [indemnitee's] negligent approval or preparation of a design or specification." *BPLW,* ¶ 18 (emphasis added); *see also id.*, at ¶ 19. The absence of such exclusionary language, in addition to the new/revised provisions in § 56-7-1, makes the instant case distinguishable from *BPLW*, where this Court found that a duty to defend existed.

Moreover, in this case, § 56-7-1(A) applies. Section 56-7-1(A) is distinguishable from § 56-7-1(B)(1) in that § 56-7-1(A) does not allow an indemnitor to "defend" the indemnitee for bodily injury resulting **in whole or in part** from the negligence of the indemnitee. Section 56-7-1(B) does not address the duty to "defend". Furthermore, the 1971 version of the anti-indemnity statute relied upon by this Court in *BPLW* does not include the reference to adding an entity as an additional insured, as was incorporated into the 2003 amendment of the statute.

d. The trial court erred in finding that there were no allegations that LCI2 was negligent and by basing its decision, regarding Newt & Butch's (and Nationwide's) duty to defend, on its grant of LCI2's MSJ on negligence, which was entered two and one half years after the initial complaint was filed.

At the March 2, 2010 hearing on the parties' motions for summary judgment, the Court stated as follows:

> Now, if there was some allegation that LCI had done something on their own that was negligent and Summary Judgment [for LCI2 on Plaintiffs' claims] wasn't granted, I think probably the case would be appropriate to proceed."

(Tr. 26). The trial court clearly erred in finding that there were no **allegations** that LCI2 was negligent. Additionally, the trial court erred in basing its decision, regarding Newt & Butch's (and Nationwide's) duty to defend, upon its ruling that LCI2 was not negligent, when such ruling was

entered approximately two and one half years after Plaintiff's initial Complaint was filed.

Plaintiffs' Complaints clearly allege that LCI2 breached certain duties owed to Plaintiffs. In Plaintiff's First Amended Complaint, Plaintiff alleges that LCI2, as the general contractor, was responsible for the safety conditions on the Project to create a safety program, which should have included the covering of the cutout spaces until the skylights were installed. In Plaintiffs' Second Amended Complaint, Plaintiffs allege that LCI2, as the general contractor, had a duty to protect the lives, health, and safety of other persons and to comply with all federal and state safety regulations, and to ensure that no worker worked in conditions that are hazardous or dangerous to his health and safety. Based upon the foregoing, it is apparent that the trial court erred in ruling that there were no **allegations** that LCI2 was negligent, and in impliedly ruling that the allegations against LCI2 arose solely from the acts and/or omissions of Newt & Butch. *See Valdez v. Cillessen & Son, Inc.* 105 N.M. 575, 579, 734 P.2d 1258, 1262 (1987) (when a general contractor retains control over the work on a project, general contractor has a duty to keep worksite safe); *Fresquez v. Southwestern Industrial Contractors and Riggers, Inc.,* 89 N.M. 525, 554 P.2d 986 (Ct. App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976) (same).

As discussed *infra,* a factual determination should have been made as to whether the allegations against LCI2 arose from the acts or omissions of Newt & Butch, so as to give rise to any purported duty to indemnify. Such a factual determination would also resolve any issue as to whether any purported liability or losses on the part of LCI2 "arose out of" Newt & Butch's operations.

In both insurance contracts and other contracts (*i.e.*, construction services contracts), "... the duty to defend is a contractual obligation that the parties have bargained for as a part of their agreement." *BPLW*, 2009-NMCA-081, ¶ 11. "... [R]egardless of the type of contract containing it, the duty to defend arises when the language of a complaint states a claim that falls within the terms of the contract." *Id.* In *BPLW*, the relevant clause in the construction contract provided that the duty to defend applied to all suits against the City arising out of a negligent act, error, or omission of BPLW arising out of the performance of the agreement. *BPLW*, ¶ 15. In contrast to the underlying lawsuit, where Newt & Butch was not a named party, BPLW was a named defendant. In *BPLW*, this Court ruled that BPLW had a duty to defend the indemnitee (the City), only if the indemnitee was alleged to be negligent, and the cause of action arose from the alleged negligent act, error, or omission of BPLW. *Id.* In *BPLW,* this Court found

that, "[t]he gist of [Plaintiff's] complaint against all defendants was that the design of the curb and surrounding area was dangerous; [Plaintiff] also alleged that BPLW designed the site." *Id.* at ¶ 16. Based upon the foregoing, this Court concluded that the claims against the indemnitee arose from BPLW's negligent performance of its contract with the indemnitee. *Id.* at ¶ 22. Therefore, after addressing additional issues concerning NMSA 1978, Section 56-7-1 (1971) (amended 2003 and 2005), this Court held that BPLW had a duty to defend the indemnitee, the City. *Id.* at ¶ 30.

BPLW provides, in pertinent part, that "... the duty to defend arises when the language of a complaint states a claim that falls within the terms of the contract." *Id.* at ¶ 11. Accordingly, in the instant case, the trial court erred when it based its decision, regarding Newt & Butch's (and Nationwide's) duty to defend, upon its grant of summary judgment in favor of LCI2 on the issue of negligence, when such ruling was made two and one half years after the initial Complaint was filed.

e. It was error for the trial court to make a factual determination that the allegations against LCI2 arose solely from the acts and/or omissions of Newt & Butch.

In their Complaints, Plaintiffs made no allegation that their damages arose, in whole or in part, from the acts and/or omissions of Newt & Butch.

Notwithstanding the foregoing, the trial court, in order to avoid the effect of § 56-7-1 (*i.e.*, voiding any contractual provision that requires an indemnitor to defend or insure an indemnitee against claims arising, in whole or in part, out of the indemnitee's own negligence), necessarily found that Plaintiffs' damages arose solely from the acts and/or omissions of Newt & Butch (a non-party to the litigation).

It was error for the trial court to assume, for purposes of summary judgment, that Newt & Butch (a non-party to the litigation) was 100% liable for Plaintiffs' damages. New Mexico is a pure comparative fault jurisdiction. *Scott v Rizzo*, 96 N.M. 682, 683, 634 P.2d 1234, 1235 (1981). Under New Mexico law, the allocation of comparative fault is a fact issue for the finder of fact – in this case a jury. *See Guitard v. Gulf Oil Co.*, 100 N.M. 358, 360, 670 P.2d 969, 971 (Ct. App. 1987) (indemnitee cannot contract away liability for his own percentage of negligence). *See also Fisk*, 888 S.W.2d at 815 (indemnitor's obligation to pay attorney fees arises out of duty to indemnify); *BPLW*, 2009-NMCA-08, ¶ 31 (duty to defend is distinct from duty to indemnify). In particular, as discussed *supra, w*here there is no duty to defend, such an allocation must be made by the factfinder before there is duty to indemnify.

This case is distinguishable from *BPLW* in that § 56-7-1 (2003), amended after the relevant contract in *BPLW* was entered into, does not allow for a duty to defend when the negligence of the indemnitee is alleged, in whole or in part. When the negligence of the indemnitee is alleged, the indemnitor has no duty to defend. § 56-7-1(A).

CONCLUSION

Based upon the above, Nationwide respectfully requests that this Court find, as a matter of law, that Nationwide did not have any duty to defend or to indemnify LCI2 in the underlying lawsuit. Specifically, Nationwide respectfully requests that this Court: (1) reverse the trial court's granting of LCI2's Motion for Summary Judgment on the Complaint-In-Intervention; (2) reverse the trial court's denial of Nationwide's Motion for Summary Judgment; (3) grant Nationwide's Motion for Summary Judgment; and (4) for any further relief this Court deems proper.

ORAL ARGUMENT

Nationwide respectfully submits that the Court's determination of this appeal will have a significant, broad ranging impact on the construction and insurance industries, including contractors, subcontractors, and insurers. Additionally, the interpretation of the current anti-indemnity statute implicates the State's public policy in preventing construction-related

accidents. Nationwide, therefore, submits that oral argument would be helpful to the Court. Nationwide respectfully requests that this Court set this matter for oral argument.

Respectfully submitted,

Montgomery & Andrews, P.A.

By _____

Kevin M. Sexton, Esq.
Shannon A. Parden, Esq.
Attorneys for Plaintiff-in-Intervention / Appellant Nationwide Mutual Ins. Co.
P.O. Box 36210
Albuquerque, NM 87176-6210
(505) 884-4200

Certificate of Service

I hereby certify that a copy of the foregoing was sent, via U.S. mail, to Paul S. Grand, Esq., 453-D Cerrillos Road, Santa Fe, NM 87501; Honorable Michael E. Vigil, P.O. Box 2268, Santa Fe, NM 87504-2268; Bernabe P. Struck, Taos County Court Clerk, Taos County Courthouse, 105 Albright St. #H, Taos, NM 87571; Carmela McAlister, P.O. Box 2268, Santa Fe, NM 87504-2268; David Houliston, Esq., Will Ferguson & Associates, 1780 Louisiana Blvd. NE, Suite 100, Albuquerque, NM 87110; and Josh A. Harris, Esq., Beall & Biehler, 6715 Academy Rd. NE, Albuquerque, NM 87109-3365, on this 3rd day of February, 2010.

_____

Shannon A. Parden, Esq.