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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IN THE NEW MEXICO COURT OF APPEALS

BOBBY WINDHAM and VICKIE K. WINDHAM,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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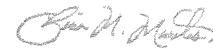

Plaintiffs,

v.

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 REPLY

ORAL ARGUMENT REQUESTED

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

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I. SUMMARY OF PROCEEDINGS

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

In the Answer Brief of Defendant / Defendant-in-Intervention / Appellee L.C.I.2., Inc. ("LCI2") (hereinafter referred to as "Answer"), LCI2 presents purported facts numbered 8, 10, 12, 13, and 16, which LCI2 admits were not presented in its Motion for Summary Judgment ("LCI2's MSJ") before the trial court. Therefore, this Court should disregard these facts (8, 10, 12, 13, and 16) and LCI2's inclusion of these facts in LCI2's argument. Alternatively, if the Court considers these five facts, facts 10 and 16 in particular raise genuine issues of material fact regarding whether LCI2 had a nondelegable duty to ensure the safety of all workers at the Project, as alleged in the Complaint, thereby precluding the Court from granting summary judgment in favor of LCI2. [*See also* Nationwide Mutual Insurance Company's ("Nationwide") BIC, pp. 5-7.]

II. ARGUMENT

In its Answer, LCI2 focuses on whether the claims against it arise out of Newt & Butch's performance of its operations, and whether LCI2 is an additional insured under the Policy. However, the driving issues in this appeal are (1) whether NMSA § 56-7-1 (2003) voids a provision in a contract that requires one party to provide a defense to another party for

injuries caused by or resulting from, in whole or in part, the negligence, act or omission of the purported indemnitee; and (2) whether NMSA § 56-7-1 (2003), therefore, precludes the requirement that Nationwide defend LCI2 pursuant to the Additional Insured Endorsement under the facts and circumstances of this case.

LCI2 argues that Nationwide does not deny that LCI2's liability arises out of the acts or omissions of Newt & Butch. (Answer, p. 17, ¶ 3.) On the contrary, it is Nationwide's position that the Complaints in this case allege only the negligence of LCI2 and that LCI2 breached its **nondelegable duty** to ensure safety at the jobsite. Nationwide, therefore, does not agree that the allegations in the Complaints against LCI2 arise out of Newt & Butch's performance of its operations.

A. Section 56-7-1 (2003) voids a provision in a construction contract that requires one party to provide a defense to another party for injuries caused by or resulting from, in whole or in part, the negligence, act or omission of the purported indemnitee.

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. Section 56-7-1(B) provides that 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. Section 56-7-1(B) specifically does not include a requirement that the indemnitor "defend" the purported indemnitee. Thus, the only logical interpretation is that, in order for an indemnitor to be liable for an indemnitee's attorney fees pursuant to § 56-7-1(B), a determination must first be made that claimant's damages were caused by, or arose out of, the acts or omissions of the indemnitor. In keeping with the preceding sections of the statute, § 56-7-1(E) does not allow for the "defense" of an indemnitee pursuant to an additional insured endorsement.

LCI2's argues that the terms "indemnify", "hold harmless", and "insure", as used in § 56-7-1(B), include the term "defend". LCI2 makes this argument even though § 56-7-1(A) uses the terms "indemnify", "hold harmless", "insure", and "defend". LCI2 seemingly argues (Answer, p. 24) that "indemnify" includes a "defense" because indemnify includes reimbursement of attorney fees. Nationwide does not dispute that indemnify includes reimbursement of attorney fees for the cost of a defense where appropriate, but this does not mean that "defend" is synonymous with "indemnify". As noted by this Court, the two terms apply to two distinct

and separate concepts in New Mexico, *i.e.*, the duty to defend and the duty to indemnify. *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-08, ¶ 31, 146 N.M. 717, 213 P.3d 1146. LCI2 also argues legislative intent. This Court need not consider legislative intent.

In New Mexico, "[s]tate statutes are to be given effect as written and, where they are free from ambiguity, there is no room for construction; where the meaning of statutory language is plain, and words used by the legislature are free from ambiguity, there is no basis for interpreting the statute. . . ." *Johnson v. Francke*, 105 N.M. 564, 566, 734 P.2d 804, 806 (Ct. App. 1987) (citation omitted); *see also, e.g., Perea v. Baca*, 94 N.M. 624, 627, 614 P.2d 541, 544 (1980) ("If there is any doubt as to the meaning of the words, we are permitted to interpret by looking to legislative intent, but otherwise, we should not."). In the instant case, the language of § 56-7-1 is clear and unambiguous and, therefore, this Court need refrain from further interpretation.

In its Answer, LCI2 did not address or distinguish its rationale from *Braegelmann v. Horizon Development Co.*, 371 N.W.2d 644, 646 (Minn. Ct. App. 1985); *Crawford v. Weather Shield Mfg., Inc.*, 44 Cal.4th 541, 187 P.3d 424 (Cal. 2008); Linda R. Beck, *Ethical Issues in Joint Representation Under Subcontract requirements for Defense and Additional Insured*

Status, THE CONSTRUCTION LAWYER, January 1995 at 25; and Samir B. Mehta, *Additional Insured Status in Construction Contracts and Moral Hazard* (BIC, pp. 13-14). These authorities also distinguish a "defense" from "indemnity", noting that the duty to defend does not arise until there is a determination that the indemnitor was at fault. Nationwide submits that this Court should follow the rationale of these authorities.

B. Section 56-7-1 prohibits Nationwide from being required to defend LCI2 pursuant to the Additional Insured Endorsement.

The additional insured endorsement, as well as the Construction Contract, is subject to terms of § 56-7-1. In the instant case, Plaintiffs' Complaints allege only that LCI2 was negligent. Newt & Butch is not a party to the lawsuit. 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. 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 LCI2's 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.

Therefore, 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*, requiring Nationwide to defend LCI2 under these circumstances violates § 56-7-1 and the public policy set forth therein.

In its Answer, LCI2 failed to distinguish *Walsh Construction Co. v. Mutual of Enumclaw,* 76 P.3d 189 Or.App. 400, 406, 76 P.3d 164, 167 (Or. App. 2003), *affirmed* 104 P.3d 1146 (2005); *Liberty Mut. Ins. Group v. Travelers Property Cas.,* 2002-Ohio-4280, 2002 WL 1933244 (Ohio Ct. App. 8 Dist. 2002); *Buckeye Union Ins. Co. v. Zavarella Brothers Construction Co.,* 699 N.E.2d 127 (Ohio 1997); and *Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.,* 27 P.3d 594 (Utah Ct. App. 2001) (BIC, pp. 17-18). The courts in these cases 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. Nationwide submits that this Court should follow the rationale of these courts and hold that allowing for the defense and indemnification of an

additional insured for its own negligence would circumvent the anti-indemnity statute.

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.

"[T]he duty to defend arises when the language of a complaint states a claim that falls within the terms of the contract." *BPLW*, 2009-NMCA-081, ¶ 11 (emphasis added). In the instant case, (1) LCI2's Complaints contain only allegations that the acts or omissions of the purported indemnitee, LCI2, caused the plaintiffs' injuries; (2) the purported indemnitor, Newt & Butch, is not a party to this suit; (3) no allegations of negligence were brought against Newt & Butch; and (4) there has been no finding that Newt and Butch 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.[1]

LCI2 contends, based upon *BPLW*, that the Court should determine that Nationwide had a duty to defend LCI2. LCI2 states that in *BPLW*, this Court held that even if allegations of direct negligence are made by the

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[1] LCI2 agrees that if its liability does not arise out of the acts or omissions of Newt & Butch, or if LCI2 were solely negligent, LCI2 could not be indemnified pursuant to the statute. (Answer, p. 29.)

plaintiff against the indemnitee, the public policy underlying the 2003 version of the anti-indemnity statute allows *defense* and indemnification, to the extent that the liability is caused by, or arises out of, the acts or omissions of the indemnitor. (Answer, p. 20, 1st full sentence.) Notably, this Court did not reference the word "defense" when it stated that both versions of the statute "have the same effect because both ensure that an indemnitor only has to *indemnify* for causes of action that arise from the indemnitor's own negligent conduct." *BPLW*, ¶ 19.

Furthermore, this case is readily distinguishable, factually and legally, from *BPLW,* where the Court held that the applicable contract did not violate the 1971 version of the anti-indemnity statute. In *BPLW*, BPLW was a named defendant. 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, and that BPLW had a duty to defend the City. *Id.* at ¶ 22.

In reaching its holding in *BPLW,* the Court relied upon exclusionary language in the contract, which tracked the language in the 1971 version of

the statute. 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.

Moreover, in this case, § 56-7-1(A), which does not allow an indemnitor to "defend" the indemnitee for bodily injury resulting in whole or in part from the negligence of the indemnitee, applies. In contrast, § 56-7-1(B), which LCI2 argues is applicable, 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.

Thus, based upon the facts and the distinguishing features of the amended statute, the holding in *BPLW* does not apply to this case.

LCI2 also contends that *Gilbane Building Co., et al. v. Keystone Structural Concrete, Ltd.*, 263 S.W.3d 291 (Ct. App. Tex. 1st Dist. 2007) and

Fisk Elec. Co. v. Constructors & Associates, 888 S.W.2d 813 (Tex. 1994) are inapplicable to this case because there purportedly is not a dispute that Nationwide owes LCI2 a duty to defend as an additional insured under the Nationwide Policy. (Answer, p. 31, ¶ 2.) On the contrary, it is Nationwide's position that no duty to defend exists (under the Construction Contract or the Policy) because there were no allegations in the Complaints that Newt & Butch was negligent, Newt & Butch was not named as a defendant and, furthermore, the allegations against LCI2 do not arise out of Newt & Butch's performance of its operations.

LCI2 also argues that *Gilbane* and *Fisk* are inapplicable because these Texas cases address the express negligence test, which requires that parties seeking to indemnify themselves for their own negligence express that intent in specific terms. Although *Gilbane* and *Fisk* do address the express negligence rule, the court's rationale is apposite to this matter: An indemnitor should not be liable for the defense costs of a purported indemnitee where there is no allocation of negligence on the part of the indemnitor. *Gilbane*, 263 S.W.3d at 297-98. Nationwide submits that this Court should follow the reasoning of the *Fisk* and *Gilbane* courts and interpret § 56-7-1 as precluding one party to a construction contract from being required to defend another party to the contract under the facts of

this case. 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.

D. The trial court erred in finding that there were no allegations that LCI2 was negligent and by basing its decision, regarding whether there was a duty to defend, on its grant of LCI2's MSJ on negligence.

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 (emphasis added). LCI2 concedes that the allegations in the Complaint were that LCI2 was negligent. (Answer, p. 32.) Nationwide contends that the trial court 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 grant of summary judgment in favor of LCI2, when such ruling was entered approximately two and one half years after Plaintiff's initial Complaint was filed. Such a ruling conflicts with *BPLW's* requirement that the duty to defend (if not precluded by § 56-7-1) arises from the allegations in the Complaint.

E. Whether LCI2 is an additional insured under the Nationwide Policy is a factual determination that is not supported by the Plaintiffs' Complaint. It was error for the trial court make such a factual determination for purposes of summary judgment.

Plaintiffs' Complaints clearly allege that LCI2 breached certain duties owed to Plaintiffs. 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.

F. Because LCI2 has not shown any prejudice, Nationwide is not estopped from relying upon § 56-7-1 as grounds for its position that, pursuant to § 56-7-1, Nationwide (and Newt & Butch) are not required to defend LCI2 in the underlying lawsuit.

In its Answer, LCI2 contends that Nationwide is estopped from relying upon NMSA § 56-7-1 (2003) as grounds for Nationwide's MSJ because Nationwide purportedly did not rely upon § 56-7-1 as a basis for Nationwide's January 30, 2007 reservation of rights letter. The trial court did not make any rulings on the issue of estoppel. However, LCI2 raises this issue in its Answer, citing *Moffat v. Branch*, 2002-NMCA-067, ¶ 12, 132 N.M. 412, 49 P.3d 673, for the proposition that this the Appellate Court will affirm the trial court if the trial court is right for any reason and affirmance is

not unfair to the appellant. *Moffat* does not apply in the instant appeal because Nationwide did not, and does not, have a duty to defend LCI2 in the underlying lawsuit, and requiring Nationwide to do so in the absence of any duty to defend violates § 56-7-1, and it is unfair to Nationwide. Moreover, estoppel does not apply in the instant case because Nationwide properly reserved its rights, and LCI2 has not shown any prejudice. Nationwide's reservation of rights letter was clearly based upon the substantive provisions of § 56-7-1.

The only time an insurer would be precluded from asserting an additional defense and/or reason for denying coverage is when the insurer initially failed to put the insured on notice that the insurer was reserving its rights to deny coverage. Specifically, our Supreme Court has held:

> ...[A] liability insurance carrier that assumes the defense in an action against its insured with knowledge of possible grounds for noncoverage and that does not reserve its right to later deny coverage is precluded from later asserting that no coverage exists." (Citation omitted.) "The insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert the defense of noncoverage."

American General Fire and Cas. Co. v. Progressive Cas. Co., 110 N.M. 741, 745, 799 P.2d 1113, 1117 (1990) (no attempt to reserve rights) (quoting *Pendleton v. Pan Am. Fire & Cas. Co.*, 317 F.2d 96 (10th Cir. 1963) (applying NM law) (same)). Contrary to LCI2's contention, *American*

General and *Pendleton* are distinguishable from the instant case because no reservations were made in those cases, and a nonlimiting reservation of rights was made in the instant matter.

Because Nationwide properly reserved its rights, and LCI2 has not demonstrated any prejudice by Nationwide's failure to specifically cite § 56-7-1 in Nationwide's reservation of rights letter, the doctrine of estoppel does not apply to this case.

Furthermore, if providing a defense to LCI2 under the circumstances of this case violates § 56-7-1, then this Court should rule that Nationwide did not and does not have a duty to defend LCI2 in regard to the allegations Plaintiffs bring against LCI2 in the underlying matter regardless of whether the doctrine of estoppel applies.

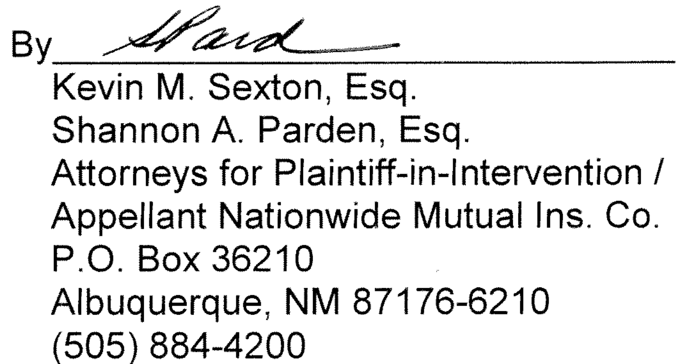
III. CONCLUSION

WHEREFORE, 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.

Respectfully submitted,

Montgomery & Andrews, P.A.



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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; Maureen A. Sanders, Esq., Sanders & Westbrook, P.C., 102 Granite Ave., NW, Albuquerque, NM 87102; 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 4th day of May, 2010.

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