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The Admissibility in Tort Actions of Safety Provisions in Public Contracts

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Notes

THE ADMISSIBILITY IN TORT ACTIONS OF SAFETY PROVISIONS IN PUBLIC CONTRACTS

INTRODUCTION

Contracts between governmental bodies and private contractors often contain provisions or clauses which appear to provide for the safety of the public. The safety clauses may be considered by a court as influencing the standard of care owed by the contracting party to the public. Some courts grant plaintiffs the status of third party beneficiaries in the contract safety provisions. Others rule the provisions totally immaterial and inadmissible.

In *Summit County Development Corp. v. Bagnoli*,[1] the Colorado Supreme Court formulated a rule permitting the admissibility of contract safety provisions for the limited purpose of determining a standard of care not in excess of the common law standard. *Summit* stated:

> A public contractors' [sic] express agreement to take specific precautions is one of the attendant circumstances to be considered in determining the standard of care in a particular case providing the specific precautions required do not establish a higher duty of care than required by the common law.[2]

This Note will analyze the *Summit* decision and the admissibility and effect of contract safety provisions in other jurisdictions.

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1. 441 P.2d 658 (Colo. 1968).
2. *Id.* at 664.

The plaintiff in *Summit* sustained a fractured leg while boarding a chair lift under a ski instructor's direction. In a tort action, plaintiff alleged negligence on the part of the operators of the ski school and the Summit County Development Corporation, which operated the ski facility under a special use permit issued by the United States Forest Service. At the trial, provisions of the use permit were entered into evidence on the theory that they were designed for the benefit and protection of the public. The jury returned a verdict against all defendants.

On appeal the defendants' principle contention[3] was that the trial court committed prejudicial error in admitting paragraph 57 of the Special Use Permit which provided:

> The permittee is authorized to conduct a ski school with headquarters at Breckenridge. The head of the ski school authorized by this permit shall have passed the Ski Instructors' Qualification Test given by the Certified Ski Instructors, Inc. for the Southern Rocky Mountain Region or by any similar group for the National Ski Association. Other instructors in the ski school, if not certified, shall give instruction only under his immediate supervision.[4]

At the time of the plaintiff's injury one of the two operators of the ski school was qualified under paragraph 57; the other was not. Plaintiff's instructor had not passed a National Ski Association Test. He was, however, certified by the Norwegian Ski Federation.

The court held paragraph 57 to be irrelevant and immaterial to the alleged negligence of the defendants. It reasoned that the evidence showed no violation of paragraph 57 and added that because the clause lacked specificity regarding the precautions to be taken, no violation could have been shown. The court then stated that even if there had been a lack of compliance, it would have been abstract and remote to the issue of the defendants'

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3. On appeal the supreme court first dealt with the defendants' contention that the trial court should have instructed the jury on assumption of risk. They found no error in the lower court's refusal to give these instructions as there was no evidence to indicate the plaintiff had any knowledge or appreciation of the particular risk. The defendants also assigned error to the instruction that they must exercise the highest degree of care commensurate with the practical operation of the ski lift. The court felt it was not necessary to classify the defendant as a common carrier, but stated that a ski lift, like other transportation facilities, requires the exercise of the highest degree of care since the passenger completely surrenders himself to the care and custody of the carrier. The contention of prejudicial error was similarly rejected regarding the refusal of the lower court to admit into evidence the defendant's motion pictures of the lift in operation. The film was taken under ideal conditions showing skiers boarding the lift with ease. This could have been unduly prejudicial to the plaintiff, who had no experience in the use of the ski lift.

4. 441 P.2d 658, 662 (Colo. 1968).

alleged negligence since plaintiff had not established a causal connection between any alleged violation and her injury.[5]

After disposing of the issue in *Summit* by a decision based solely on the facts of the case, the court considered whether safety provisions in public contracts are *ever* admissible to establish a standard of care in tort actions brought against a contractor by a person not a party to the contract. Such provisions, according to the court, ". . . should be admissible along with other evidence in tort actions to assist in determining the standard of care."[6] To be admissible, however, these provisions must be specific, clearly itemized and unambiguous,[7] and they may not ". . . establish a higher duty of care than required by the common law."[8] The court recognized a split of authority concerning the admissibility of contract safety provisions but did not discuss the conflicting opinions. The reasoning given for its decision was simply that the result was ". . . the better-reasoned view, supported by the weight of recent authority."[9]

CONTRACT THEORY

The admissibility of contract safety provisions in a tort action is closely related to the concept of third party beneficiary contracts. A third party beneficiary must ordinarily show that the contracting parties intended the contract to be for his benefit or for the benefit of a class to which he belongs. Even though a third party will be benefited if the performance occurs, or disappointed if it does not, he is an incidental beneficiary with no rights under the contract unless it was the primary intention of the contracting parties to benefit him when the contract was executed.[10] Most public contracts are construction contracts involving roads, bridges, public buildings and the like. Older cases were quite liberal in allowing a member of the public to claim third

5. *Id.* at 662.
6. *Id.* at 663.
7. *Id.* at 664: "It is basic and elementary . . . that before such a provision of a public contract can be received into evidence, the required precautions must be specific, clearly itemized and unambiguous."
8. *Id.* at 664.
9. *Id.* at 663. The court here cited Fluor Corp. v. Black, 338 F.2d 830 (9th Cir. 1964); Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967); Foster v. Herbison Constr. Co., 263 Minn. 63, 115 N.W.2d 915 (1962); Larson v. Heintz Constr. Co., 219 Ore. 25, 345 P.2d 835 (1959).
10. See 1 A. CORBIN, CONTRACTS §§ 776-77 (1952); L. SIMPSON, CONTRACTS § 116 (2d ed. 1965).

party beneficiary rights in an action on the contract.[11] Recent decisions indicate a more conservative attitude and in the absence of specific language to the contrary, most jurisdictions no longer consider public contracts as intending third party beneficiary rights.[12] Most jurisdictions do not consider these to be third party beneficiary contracts[13] in the absence of specific provisions.[14]

Whether a person should be able to bring an action as a third party beneficiary of a public contract must rest upon the facts of the case before the court. Many decisions have not clearly stated whether recovery was allowed under a contract right or under a tort duty imposed by the provisions of the contract.[15] Confusion

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11. In *Sullivan v. Staten Island E.R.R.*, 50 App. Div. 558, 64 N.Y.S. 91 (1900), a contractor agreed to leave streets and sidewalks in a safe and passable condition and to keep all dangerous places properly guarded and lighted at night. He was held liable for injuries sustained by a member of the public who stepped in an unguarded hole. Indicating this liberal approach, the court stated:

> [C]ontractors with the state or a municipal corporation who assume, for a consideration received from the granting power, by covenant, expressed or implied, to do certain things necessary for the safety or well-being of the public, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance.

Id. at 559; 64 N.Y.S. at 91. *See also* St. Paul Water Co. v. Ware, 83 U.S. (16 Wall) 566 (1873); Martin v. Farr Bros. Co., 211 Ill. App. 235 (1918); Phinney v. Boston E. Ry., 201 Mass. 286, 87 N.E. 490 (1909).

12. *See* Holland v. Phillips, 94 Ga. App. 361, 94 S.E.2d 503 (1956); Visintine & Co. v. New York, C. & S. L. R.R., 169 Ohio St. 505, 160 N.E.2d 311 (1959); Oman Constr. Co. v. Tennessee C. Ry., 211 Tenn. 556, 370 S.W.2d 563 (1963); Austin v. Schmedes, 270 S.W.2d 442 (Tex. Civ. App. 1954); Collins Constr. Co. v. Taylor, 372 S.W.2d 548 (Tex. Civ. App. 1963).

13. *Accord*, RESTATEMENT OF CONTRACTS § 145 (1932):

> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so. . . .

A leading case cited in many jurisdictions is Styles v. F.R. Long Co., 67 N.J.L. 413, 51 A. 710 (1902); *aff'd*, 70 N.J.L. 301, 57 A. 448 (1903). The defendant had contracted with the county to keep a bridge in good repair which would benefit those who wished to travel on it. The court found that the public was not intended to be the beneficiary of the contract, and it could maintain no action for its breach. The court stated that it was not enough that the plaintiff may have been benefited by the contract. He could maintain the action only if the contract was made for him.

14. If the contractor promises to pay damages to any person injured, the plaintiff can generally maintain an action on the contract. RESTATEMENT OF CONTRACTS § 145 (1932) cited in note 13 *supra* continues:

> . . . unless, (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . .

See Pennsylvania Cement Co. v. Bradley Contr. Co., 7 F.2d 822 (2d Cir. 1925); Freigy v. Gararo Co., 223 Ind. 342, 60 N.E.2d 288 (1945).

15. *See, e.g.*, Alameda County v. Tiealau, 44 Cal. App. 332, 186 P. 398 (1919). The contractor was found liable to a motorcyclist who collided

has resulted by extending third party beneficiary concepts into tort actions. Such extension is undesirable for obvious reasons: Tort actions require allegations different from those necessary in contract, a breach of contract is not necessarily evidence of negligence, and a good defense in tort is of little avail in an action on a contract.

The above reasons apply only to prevent mixture of contract and tort *principles*, not to prevent *joinder* of tort and contract actions in the same suit. In the proper factual setting, the plaintiff should be free to seek recovery under both contract and tort theories, and in many jurisdictions it is now possible to bring both actions in the same suit.[16] For the sake of expediency and convenience joinder of actions is acceptable practice, but even if brought jointly the causes of action are separate and distinct. If, in accordance with the law of contracts, plaintiff is able to prove his rights and defendant's failure to comply under the contract, he should be able to recover for a breach of his contractual rights. If, on the other hand, he is unsuccessful in proving a right under the contract, his case must rest solely upon the principles of negligence.[17]

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with an unlighted gravel pile. The contract, which required the contractor to maintain guards and lights, had been admitted into evidence without objection. The opinion did not indicate whether the recovery was based on the failure of the defendant to meet the provisions of the contract or whether the liability arose out of the contractor's negligence independently of the contractual stipulations.

16. *See, e.g.*, Kane v. Mendenhall, 5 Cal. 2d 749, 56 P.2d 498 (1936); Craft Refrig. Mach. Co. v. Quinnipiac Brewing Co., 63 Conn. 551, 29 A. 76 (1893); Cockrell v. Henderson, 81 Kan. 335, 105 P. 443 (1909); Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942); Tate v. Bates, 118 N.C. 287, 24 S.E. 482 (1896); Stark County v. Mischel, 33 N.D. 432, 156 N.W. 931 (1916); Aylesbury Mercantile Co. v. Fitch, 22 Okla. 475, 99 P. 1089 (1908); Pollack v. Carolina Interstate Bldg. & L. Ass'n., 48 S.C. 65, 25 S.E. 977 (1896); McHard v. Williams, 8 S.D. 381, 66 N.W. 930 (1896); Littlefield v. Bowen, 90 Wash. 286, 155 P. 1053 (1916); Emerson v. Nash, 124 Wis. 369, 102 N.W. 921 (1905).

17. In Styles v. F.R. Long Co., 67 N.J.L. 413, 51 A. 710 (1902), *aff'd*, 70 N.J.L. 301, 57 A. 448 (1904), the defendant was held not liable to the plaintiff injured by its failure to light a bridge during construction as required by the contract. The court said:

> The effect of the charge was to confine the attention of the jury to the contract alone, both as imposing a duty on the defendant and as defining what that duty was; so that they were constrained to find the defendant guilty of actionable negligence if it failed to sufficiently light the bridge. . . .

Id. at 416, 51 A. at 712.

> [T]he rule that no one can sue upon a contract unless he is a party to it cannot be evaded by bringing what is really an action for breach of contract in the form of an action of tort.

Id. at 419, 51 A. at 713.

The remainder of this Note will deal exclusively with tort actions. It will consider the admissibility of safety provisions in public contracts and the effect of such provisions upon the alleged standard of care.

There is a minority view characterized by the Utah case, *Metcalf v. Mellen*,[18] which holds that safety provisions in the contract create a duty and a responsibility to a third party greater than that required by the common law.[19] Montana[20] and Nevada[21] decisions currently conform with *Metcalf*. Wisconsin appears to be the most liberal jurisdiction regarding the use of contracts in tort actions. In *Presser v. Siesel Construction Co.*,[22] the Wisconsin Supreme Court rejected the rationale "that the contract is only one factor bearing on the question of ordinary care under the circumstances" and stated:

> It imposes the standard of care and the obligation to the plaintiff. A general contractor by contract may assume a duty of care for the benefit of others than the promisee over and above such common law liability for negligence which would otherwise be applicable to the facts. The contract . . . obligated the contractor to comply with all pertinent provisions . . . in order to provide for the safety of the employees and other persons.[23]

This decision could be construed to render a contractor liable for any violation, however slight, of safety provisions in the contract. This minority view appears to give plaintiffs identical rights in tort as a legitimate third party beneficiary in a contract action. The main question of fact for the jury to decide is not whether a defendant was negligent, but whether he failed to perform the specific contract duties. In order for a third party to be able to recover in an action on a contract, he should have to prove that it was the intent of the parties to make the contract for his benefit. In a tort action, plaintiff should have to prove negligence. The *Presser* holding could permit recovery even if plaintiff has proved neither the intent of the parties nor negligence. Only Wisconsin follows this reasoning although several other courts have yet to overrule their previous decisions which permit the provisions of a contract to increase the defendant's standard of care to some de-

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18. 57 Utah 44, 192 P. 676 (1920).

19. *See also* Karle v. Reed, 1 Cal. App. 2d 144, 36 P.2d 150 (1934). New York Pneumatic Service Co. v. P.T. Fox Contr. Co., 201 App. Div. 33, 193 N.Y.S. 655 (1922), *aff'd*, 235 N.Y. 567, 139 N.E. 737 (1923), is often cited in illustration of this proposition, but apparently it has not been followed in its own jurisdiction.

20. Ulmen v. Schwieger, 91 Mont. 331, 12 P.2d 856 (1932).

21. Fredrickson & Watson Constr. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940).

22. 19 Wis. 2d 54, 119 N.W.2d 405 (1963).

23. *Id.* at 59, 119 N.W.2d at 408.

gree above his common law duty.[24]

Another view, finding support in the older cases, generally denies the admission of the contract for any purpose in an action in tort.[25] Under this view, if the plaintiff is not a third party beneficiary, he can make no use of the contract.[26] Of those older cases that involve the question of admissibility of the contract safety provisions in tort actions, none covers the precise point raised in *Summit*—whether the provisions may be used to assist in determining the standard of care so long as they do not increase the defendant's common law duty. *Wymer-Harris Construction Co. v. Glass*,[27] a leading Ohio case, holds that contract safety provisions cannot be used to impose a higher degree of duty on the contractor than is required by statute or law. The *Summit* view of using the provisions as some evidence of the standard of care was not considered.

In the older cases, safety provisions were usually held inadmissible without any discussion of their bearing on the standard of care.[28] In 1928, however, the Supreme Court of Colorado, in *Lewis v. La Nier*,[29] stated:

> This is an action based on negligence; it is pleaded as such; it was tried and submitted to the jury as such. The measure of the defendants' duty in this case is to be determined by the law governing negligence cases, not by the provisions of the contract.[30]

The court prefaced these remarks by stating, "If the contention is that the defendants are liable in this action for a failure to do the things specified in the contract . . . regardless of whether or not such failure constituted negligence, the contention cannot be main-

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24. *See, e.g.*, cases cited in notes 20 and 21 *supra*.

25. *See, e.g.*, Lewis v. La Nier, 84 Colo. 376, 270 P. 656 (1928); Lydecker v. Passaic County, 91 N.J.L 622, 103 A. 251 (1918); Styles v. F.R. Long Co., 67 N.J.L 413, 51 A. 710 (1902); Wymer-Harris Constr. Co. v. Glass, 122 Ohio St. 398, 171 N.E. 857 (1930); Oliver v. Lettaconsett Constr. Co., 36 R.I. 477, 90 A. 764 (1914); Davis v. Mellen, 55 Utah 9, 182 P. 920 (1919).

26. See cases cited note 25 *supra*. These cases reasoned that a plaintiff in a negligence action who bases his suit upon the theory of a duty owed to him by the defendant as a result of a contract must be a party or privy to the contract or else he fails to establish a duty toward himself owed by the defendant, and fails to show any wrong done to himself.

27. 122 Ohio St. 398, 171 N.E. 857 (1930).

28. *See, e.g.*, Lydecker v. Passaic County, 91 N.J.L 622, 103 A. 251 (1918); Oliver v. Lettaconsett Constr. Co., 36 R.I. 477, 90 A. 764 (1914); Davis v. Mellen, 55 Utah 9, 182 P. 920 (1919).

29. 84 Colo. 376, 270 P. 656 (1928).

30. *Id.* at 383, 270 P. at 658-59.

tained."[31] Reflecting a change in their view forty years later, the same court in *Summit* referred to *Lewis* as follows:

> The trial court's refusal to admit the provisions of the contract was upheld against the plaintiff's contention that the contract established her right to sue as a third party beneficiary, and that the contract provisions *established* defendants' duty of care. We there held only that plaintiff had a statutory right to sue independent of the contract, and that the "measure of the defendants' duty in this case is to be determined by the law governing negligence cases, not by the provisions of the contract." This holding consequently does not answer the question presented in the instant case, namely, whether the contract's safety provisions, though not supplanting the common law standard of due care, would be admissible as *evidence of what the standard of care would be* under the circumstances shown.[32]

By extremely narrowing the scope of the *Lewis* decision, the court was able to decide *Summit* as a case of first impression and adopt a rule permitting the use of safety provisions *as some evidence of the standard of care* in tort actions if this does not increase the common law standard of care.[33]

The current trend is toward the reasoning of *Summit*.[34] In that opinion, the court cited four recent cases[35] after stating, "the better-reasoned view, supported by the weight of recent authority, is that safety provisions in public contracts should be admissible along with other evidence in tort actions to assist in determining the standard of care."[36] In *Larson v. Heintz Construction Co.*,[37] the Oregon Supreme Court stated:

> In spite of the lack of local precedent we think that a construction contract which requires the use of warning signals is, by the weight of reason and authority, admissible in evidence against the contractor. We prefer not to ground our decision on a ruling that we have here a third party beneficiary contract and that the standard of care imposed by the contract supersedes that required by the common law. This is an action for damages arising out of negligence, and the contractor's duty even in the face of such a contract remains a duty to use reasonable care.

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31. *Id.*
32. 441 P.2d 658, 663 (Colo. 1968). (Italics added).
33. *Id.* at 664.
34. *Accord*, Williams v. Tillett Bros. Constr. Co., 319 F.2d 300 (6th Cir 1963); Stuart v. Berry, 107 Ga. App. 531, 130 S.E.2d 838 (1963); Dornack v. Barton Constr. Co., 272 Minn. 307, 137 N.E.2d 536 (1965); Briscoe v. Worley, 208 Okla, 60, 253 P.2d 145 (1952).
35. Fluor Corp. v. Black, 338 F.2d 830 (9th Cir. 1964); Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967); Foster v. Herbison Constr. Co., 263 Minn. 63, 115 N.W.2d 915 (1962); Larson v. Heintz Constr. Co., 219 Ore. 25, 345 P.2d 835 (1959).
36. 441 P.2d 658, 663 (Colo. 1968).
37. 219 Ore. 25, 345 P.2d 835 (1959).

> But reasonableness depends on the circumstances, and here the contract was a circumstance.[38]

In deciding *Foster v. Herbison Construction Co.*,[39] the Minnesota Supreme Court had local precedent holding that the provisions of a public contract could be used to determine due care.[40] After discussing both sides of the question, the court affirmed its position on admissibility by stating:

> Without getting into the peripheral area of rights acquired by the traveling public under such contract provisions, it would seem that when a contractor undertakes to maintain a road under construction . . . in such a way as to insure the safety of those traveling over the construction zone, such agreement has some evidentiary value in establishing what is due care.
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> . . . .
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> [T]he contract should be admissible—not to establish that defendant owes a duty to plaintiff, but to help establish what the already existing duty is.[41]

These recent cases indicate that in those jurisdictions that have ruled on the use of contract safety provisions as evidence in tort actions, there is a discernible trend toward admissibility. The older decisions holding that safety provisions in public contracts are not admissible are gradually being limited to their specific factual situations, overlooked or overruled.[42]

Summit stated that safety provisions in public contracts should be admissible in tort actions along with other evidence to assist in determining the standard of care provided the provisions are specific, clearly itemized and unambiguous and that they do not

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38. *Id.* at 52-53, 345 P.2d at 848.

39. 263 Minn. 63, 115 N.W.2d 915 (1962).

40. In Rengstorf v. Winston Bros. Co., 167 Minn. 290, 208 N.W. 995 (1926), the court held:

> The contract was between defendant and the state. The deceased was not a party thereto, and his personal representative cannot predicate any right thereon. To that extent the rule of Winterbottom v. Wright, 10 M. & W. 107 and Heaven v. Pender, L.R. 9 Q.B.Div. 302, remains undoubted law.
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> The only duty of defendant with which plaintiff is not concerned was to execute the work with due care to prevent injury to those lawfully using it pending its construction. The provisions of the contract are therefore material only to the extent that they impose obligations for the benefit of users of the road, and so may have something to say to the question of due care. Otherwise the contract is immaterial. It is not the basis of liability but merely a fact for consideration.

Id. at 292, 208 N.W. at 996.

41. 263 Minn. at 69-70, 115 N.W.2d at 919.

42. *Contra*, Visintine & Co. v. New York C. & S. L. R.R., 169 Ohio St. 505, 160 N.E.2d 311 (1959) indicating that Wymer-Harris is still controlling.

establish a duty higher than that required by common law.[43] It is not as important, however, that the duty be specific and unambiguous as it is that the failure to perform be clear. The *Foster* and *Larson* cases provide good examples of this distinction.[44] In *Foster*, the provision of the contract used by the plaintiff required the defendant to conduct his construction so as to minimize the inconvenience to traffic and provide a smooth and drained roadway. The plaintiff's truck encountered a water-filled chuckhole which provided sufficient evidence to show that the defendant failed to meet the specifications of the contract. The safety clause in *Larson* read as follows:

> BARRICADES, WARNING SIGNS AND FLAGMEN. The contractor shall at his expense and without further or other order provide, erect and maintain at all times during the progress or temporary suspension of the work suitable barricades, fences, signs or other adequate protection, and shall provide, keep and maintain such danger lights, signals and flagmen as may be necessary or may be ordered by the engineer to insure the safety of the public as well as those engaged in connection with the work. All barricades and obstructions shall be protected at night by signal lights which shall be suitably distributed across the roadway. . .[45]

Such language as "suitable barricades . . . or other adequate protection" and "as may be necessary" can hardly be described as specific, clear or unambiguous. In such a situation, however, it is difficult to envision how safety specifications could be drawn to meet the requirements of the *Summit* holding in this regard. The *Summit* court stated that the phrase, "under his immediate supervision," was ambiguous and therefore inadmissible. It is not realistic to expect construction contracts to be written with the precision demanded by *Summit*. It is therefore suggested that the court should have held that plaintiff failed as a matter of law to prove specifically and clearly that defendant had failed to perform as required by the contract. Since the general policy invoked by *Summit* is in keeping with *Larson*, *Foster* and other similar decisions the Colorado court will probably limit the *Summit* requirement of unambiguity to the specific facts of that case or to the

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43. 441 P.2d 658, 664 (Colo. 1968):

> The duty in negligence actions remains one of exercising due care, and due care depends upon the attendant circumstances. A public contractors' [sic] express agreement to take specific precautions is one of the attendant circumstances to be considered in determining the standard of care in a particular case providing the specific precautions required do not establish a higher duty of care than required by the common law. It is basic and elementary, however, that before such a provision of a public contract can be received into evidence, the required precautions must be specific, clearly itemized and unambiguous.

44. *See also* Fluor Corp. v. Black, 338 F.2d 830 (9th Cir. 1964); Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967).

45. 219 Ore. at 37, 345 P.2d at 840-41.

particular type of contract in question.

An objection to the admissibility of specific and unambiguous provisions is derived from the apparent attempt of the parties to establish a standard of care among themselves. This reasoning has been extended to hold that an agreement by a contractor to take specific precautions is not to be used as the standard of care owed by the contractor to a third party.[46] Accordingly, the court in *State Construction Co. v. Johnson*[47] stated:

> [T]he fact that the defendant agreed with the State Highway Department as to the particular method to be used in warning the public is not binding upon third persons who are members of the public not parties to the contract. . . . [T]he defendant . . . owed the public a duty to exercise ordinary care to warn passers-by . . . and it would be contrary to public policy to permit the parties to a contract to establish by agreement among themselves what specific acts by either of them would constitute ordinary care as to third persons. . . . In consequence, whether or not the barricade contracted to be erected should have been erected by the defendant in the exercise of ordinary care for the protection of the members of the public remained an issue of fact for the determination of the jury. . . .[48]

This argument, however, is applicable only to those cases such as *Presser v. Siesel Construction Co.*[49] which permit the contract to impose the standard of care.[50] It becomes practically meaningless when considered in conjunction with the second requirement of *Summit* which admits safety provisions *only* if they do not increase the standard of care above the common law requirement. Thus, the specifications are not admissible if the parties have contracted for a duty above the common law standard. Conversely, if the provisions described a lower standard, plaintiff will not attempt to use the contract.

The requirement that the safety provisions, to be admissible, must not increase the common law standard of care seems, at first glance, an impossibility. For example, if a plaintiff could recover under the common law standard of care, then the safety provisions are not necessary for his case and there is no reason for their admission. If liability, however, would not be imposed except for the provisions, they obviously increase the common law duty. This

46. *See, e.g.*, Stafford v. Thornton, 420 S.W.2d 153, 158 (Tex. Civ. App. 1967).
47. 88 Ga. App. 651, 77 S.E.2d 240 (1953).
48. *Id.* at 657, 77 S.E.2d at 244-45.
49. 19 Wis. 2d 54, 119 N.W.2d 405 (1963).
50. For a discussion of these cases, see text accompanying notes 18-27 *supra.*

logic, however, is not necessarily sound. There may be cases where the jury would be at a loss to determine exactly what specific acts on the part of the defendant would constitute the requisite common law standard of care. It is in this determination that the contract becomes important. Plaintiff's counsel will argue that the defendant's act or failure to act was negligence. The defendant will try to convince the jury that he did everything that could have been reasonably expected of him under the circumstances. A good indication of the requisite degree of care may well be found in the safety provisions of the contract. If the parties stated when they entered into the contract that a particular thing should be done to protect the public, it is reasonable to assume that the parties felt such precautions were required in exercising reasonable care. Granted, such specifications cannot be used to fix the defendant's duty, but they do define particular hazards and recommend particular precautions and can, therefore, be a valuable aid in determining what precautions are demanded by the common law standard of care. This reasoning is reflected in the following portion of the *Foster* opinion:

> Both contracting parties have agreed on a course of conduct deemed essential for the protection of those using the highway. It is unnecessary to hold that those injured as a result of the contractor's failure to do that which he agreed with the state he would do have any rights under the contract. A recognition by the contracting parties that certain acts should be done to protect the traveling public—followed by a failure to perform such acts—does however have some bearing on the establishment of negligence. The ultimate question still is: What would an ordinarily prudent person have done under the same or similar circumstances? But here we might well say that an ordinarily prudent person, having agreed to perform certain acts for the protection of the public, would have recognized the necessity of complying therewith and that, when injury results from a condition which develops due to the failure to perform according to the contract, it could be found that the failure to perform constitutes a lack of due care.[51]

Although the court in *Summit* did not declare the defendant to be a common carrier, it nevertheless required the exercise of the highest degree of care commensurate with the practical operation of the ski lift facility.[52] Since the defendants' employee was instructing the plaintiff in the use of the lift, this duty was imputed to him by ordinary agency doctrines. His qualifications as an instructor were, therefore, material. Paragraph 57 of the Special Use Permit required that he be properly certified or be under the "immediate supervision" of his employer, who was so certi-

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51. 263 Minn. at 69, 115 N.W.2d at 919.
52. 441 P.2d 658, 664 (Colo. 1968).

fied.[53] Because of the required duty of the highest degree of care, the specifications would not serve to increase the common law standard and would therefore be admissible. Suppose, however, the plaintiff had not been injured on the lift, but rather while she was receiving skiing lessons from the instructor. Under these circumstances, the defendants would have a duty of merely ordinary care in conducting the instruction. Their specific duty would be to provide an instructor with the same qualifications as would be furnished by a reasonably prudent like facility under the same or similar circumstances. Under these conditions, the contract requirement that the instructor be specifically certified could possibly indicate a higher standard of care for the defendant than required by the common law. On the other hand, it may only be a precaution required by ordinary care. This is a determination to be made by the court in passing on the admissibility of the contract provisions. The reasonableness of the contract is a matter of law.[54]

Conclusion

It is extremely difficult to determine exactly what effect the admissibility of the contract safety provisions will have. There will certainly be cases granting recovery where the jury would not find the defendant liable in the absence of the safety requirements. The defendant, however, should be well aware of these requirements which the parties apparently felt were necessary for the safe prosecution of the work. They are some indication of the appropriate care under the circumstances. When injury occurs, the safety provisions can serve as a form of expert testimony of exactly what should or should not have been done, and as such, should be admissible. The burden is on the court to insure that the provisions do not exceed the requisite degree of care and are relevant and material to the issue of the defendant's alleged negligence. It is then for the jury to weigh these provisions along with all other evidence to determine the specific requirements of the defendant's common law duty to the plaintiff and to establish if he has met this standard of care.

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53. *See* note 3 *supra.*
54. McClendon v. T. L. James & Co., 231 F.2d 802, 805 (5th Cir. 1956). *See also* Larson v. Heintz Constr. Co., 219 Ore. 25, 345 P.2d 835 (1959).