

JULY 22, 1957

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Pursuant to a call by the Mayor, the City Council of the City of Idaho Falls, Idaho met in a Special Session on Monday, July 22, 1957 at the hour of 2:00 P.M. for the purpose of considering giving authority to the Mayor to execute an assignment of the City's rights to the American Surety Company of New York, the rights growing out of the judgment in the case of Ray Lundahl vs. the City of Idaho Falls, Idaho, plus any other business that might properly be presented. Present: John B. Rogers, Mayor; Councilmen Foote, Freeman, Johnson, and Petersen; also present: Roy C. Barnes, City Clerk; Arthur L. Smith, City Attorney.

**RESOLUTION (Resolution No. 1957-09)**

WHEREAS, two actions are now pending in the District Court of the Ninth Judicial District of the State of Idaho, in and for the County of Bonneville, namely: Ray E. Lundahl, Plaintiff, against City of Idaho Falls, a municipal corporation, defendant; and Ray E. Lundahl Company, a corporation, plaintiff, against City of Idaho Falls, a municipal corporation, defendant; and

WHEREAS, an agreement has been reached between the parties in both of said actions, which agreement, if performed, will finally determine both of said cases, which agreement has been reduced to writing in the form of a Stipulation, a true copy of which is appended hereto, designated "Stipulation", and made a part hereof; and

WHEREAS, American Surety Company of New York has offered to pay the City of Idaho Falls the amount required to satisfy the judgment against the City, to-wit: FIFTEEN THOUSAND AND NO/100 (\$15,000.00) DOLLARS, in return for a transfer to said surety company of all the rights of the City against R. W. Coleman, sometimes known as Ray W. Coleman and T. W. Coleman, and such others, doing business as Coleman Plumbing and Heating Company, in any manner rising out of the causes of action upon which said cases are based, a true copy of said instrument of transfer being appended hereon designated "Transfer of Rights", and made a part hereof.

NOW THEREFORE, BE IT RESOLVED, BY THE MAYOR AND CITY COUNCIL OF THE CITY OF IDAHO FALLS, as follows: that the Mayor and City Clerk be, and they are hereby, authorized and directed on behalf of the City of Idaho Falls to execute and deliver to American Surety Company of New York certain document designated herein as "Transfer of Rights"; and that the City Attorney be, and he is hereby, authorized and directed to execute on behalf of the City of Idaho Falls, and to deliver to Ray E. Lundahl that certain instrument designated herein "Stipulation".

PASSED BY THE COUNCIL AND APPROVED BY THE MAYOR this 22nd day of July, 1957.

ATTEST: s/ \_\_\_\_\_  
CITY CLERK

s/ \_\_\_\_\_  
MAYOR



3. That as required by law and said contract, said RAY W. COLEMAN and T. W. COLEMAN, dba COLEMAN PLUMBING AND HEATING COMPANY, duly furnished its contract bond No. 34-521-010, in favor of the CITY OF IDAHO FALLS, whereby said RAY W. COLEMAN and RAY W. COLEMAN and T. W. COLEMAN, dba COLEMAN PLUMBING AND HEATING COMPANY, as Principals, and the AMERICAN SURETY COMPANY OF NEW YORK, as Surety, guaranteed to "perform and fulfill all undertakings, covenants, terms, conditions and agreements of said contract."
4. That while engaged in the performance of the aforesaid contract, of constructing a sewer line for the Defendant, the CITY OF IDAHO FALLS, said RAY W. COLEMAN and RAY W. COLEMAN and T. W. COLEMAN, dba COLEMAN PLUMBING AND HEATING COMPANY, while excavating for the purpose of sewer construction in a public alley in the City of Idaho Falls, located south and adjoining certain property belonging to the Plaintiff, RAY E. LUNDAHL, upon which was located a garage building, did explode a quantity of explosives, without adequate precautions and proper means and methods, at a point in said alley approximately eight (8) feet from the south wall of Plaintiff's garage, of sufficient force to produce concussions and vibrations of the earth and air, which shook said land and building of the Plaintiff and caused injuries to the lava substrata underlying said land and damaged said building by cracking and breaking the same, both the superstructure and foundation of said building.
5. That based upon the appraisals of said damage by reason of said explosions, said building has been damaged in a value in excess of \$15,000.00.
6. That by reason of said explosions and damage, the Plaintiff, RAY E. LUNDAHL, duly filed his claim and demand for damages against the CITY OF IDAHO FALLS, which claim was duly rejected, and thereupon the Plaintiff, RAY E. LUNDAHL, brought the action herein against the CITY OF IDAHO FALLS to recover damages for the aforesaid injuries to his property.
7. That the Defendant, the CITY OF IDAHO FALLS, upon the filing of this action, duly made its demand pursuant to said contract and bond to RAY W. COLEMAN AND RAY W. COLEMAN AND T. W. COLEMAN dba COLEMAN PLUMBING AND HEATING COMPANY, failed, neglected and refused to satisfy said demand. That said legal proceedings in connection with this case were had herein. The Court sustained the General Demurrer of the Defendant, the CITY OF IDAHO FALLS. That the Plaintiff subsequently appealed said decision and Order of Dismissal of this case to the Supreme Court of the State of Idaho. That the Supreme Curt of Idaho on the 30<sup>th</sup> day of October, 1956 as Case

No. 8484, issued its opinion reserving the ruling of the lower court and remanding this cause to the trial court for further proceeding.

9. That in its opinion, the Supreme Court of the State of Idaho held the following to be the law of this case:
  - a. That in constructing a sewer line and system, a municipal corporation is acting in a proprietary and not a governmental capacity.
  - b. That blasting in a populated area and in vicinity of buildings is dangerous and hazardous, and if not done with adequate precautions and with proper means and methods becomes a nuisance.
  - c. That a municipal corporation, where a nuisance is created by blasting in a populated area on City property or property under control of a municipal corporation, cannot escape liability upon the ground that said work creating a nuisance was being done by a prime tort feisor who was an independent contractor.
10. That RAY W. COLEMAN, COLEMAN PLUMBING AND HEATING COMPANY, and RAY W. COLEMAN AND T. W. COLEMAN, and such others, dba COLEMAN PLUMBING AND HEATING COMPANY, were the prime tort feisors, the conduct of the CITY OF IDAHO FALLS being purely passive.
11. IT IS FURTHER STIPULATED by and between the parties that in the event judgment is entered herein against the Defendant, pursuant to this Stipulation, that in consideration of the payment required there under, and as a part hereof, that said RAY E. LUNDAHL will cause the cause of RAY E. LUNDAHL COMPANY, a corporation, vs. the CITY OF IDAHO FALLS, which is a companion case growing out of the same transaction involved herein, to be dismissed with prejudice.
12. RAY E. LUNDAHL agrees and represents that neither he nor any or all other person or persons, companies or corporations who may have an interest in this action through him, by insurance or otherwise, have done and will do nothing to prejudice the rights of the American Surety Company of New York to recover from RAY W. COLEMAN, COLEMAN PLUMBING AND HEATING COMPANY, and RAY W. COLEMAN AND T. W. COLEMAN, and such others, dba COLEMAN PLUMBING AND HEATING COMPANY, any sums that it may pay and expense as a result of any judgment entered in this action.
13. Findings of Fact and Conclusions of Law are hereby, expressly waived.

JULY 22, 1957

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DATED: July 22, 1957.

s/ A. L. Smith  
Attorney for Defendant

s/ John Ferebauer  
Attorney for Plaintiff

**TRANSFER OF RIGHTS**  
(Attached to Resolution)

KNOW ALL MEN BY THESE PRESENTS THAT:

WHEREAS, suit was commenced by RAY E. LUNDAHL against the CITY OF IDAHO FALLS, a municipal corporation, in the District of the State of Idaho, in and for the County of Bonneville, and thereafter judgment was made and entered in said cause on or about July 22, 1957, in the sum of FIFTEEN THOUSAND DOLLARS (\$15,000.00), in favor of RAY E. LUNDAHL and against said CITY OF IDAHO FALLS; and

WHEREAS, although said judgment was rendered against said CITY OF IDAHO FALLS, its conduct was merely passive and the active and prime tort feasons, upon the actions on whom said judgment was based, were R. W. COLEMAN, sometimes known as Ray W. Coleman, COLEMAN PLUMBING AND HEATING COMPANY, and RAY W. COLEMAN AND T. W. COLEMAN, and such others, doing business as COLEMAN PLUMBING AND HEATING COMPANY; and

WHEREAS, the AMERICAN SURETY COMPANY OF NEW YORK had executed a Faithful Performance Bond for said COLEMAN'S mentioned, guaranteeing the performance of said COLEMANS of all undertakings, covenants, terms, conditions, and agreements of said COLEMANS under their contract with the CITY OF IDAHO FALLS, including their agreement to assume all liabilities for and protect the CITY OF IDAHO FALLS from damages or claims in connection with said contract and the performance by said COLEMANS there under ; and

WHEREAS, the CITY OF IDAHO FALLS has paid said Judgment and now has a cause of action over against said prime tort feasons for the amount of Judgment, together with all costs and expenses; and

WHEREAS, said AMERICAN SURETY COMPANY OF NEW YORK has paid the CITY OF IDAHO FALLS, the sum of FIFTEEN THOUSAND DOLLARS (\$15,000.00), receipt whereof is hereby acknowledged, under and pursuant to said performance bond, and is entitled to all of the rights of the CITY OF IDAHO FALLS against said prime tort feasons;

NOW THEREFORE IN CONSIDERATION OF THE PREMISES, the CITY OF IDAHO FALLS does hereby transfer, set over and assign to said AMERICAN SURETY COMPANY OF

JULY 22, 1957

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NEW YORK all and every of its rights under and by virtue of said Judgment and the cause of action over for reimbursement and to recover from said RAY W. COLEMAN, COLEMAN PLUMBING AND HEATING COMPANY, and RAY W. COLEMAN and T. W. COLEMAN, and such others, doing business as COLEMAN PLUMBING AND HEATING COMPANY; and THIS INSTRUMENT shall evidence the subrogation of said AMERICAN SURETY COMPANY OF NEW YORK to the rights of the CITY OF IDAHO FALLS against said COLEMANS, as well as assignee of said CITY OF IDAHO FALLS (said AMERICAN SURETY COMPANY OF NEW YORK indemnifying the CITY OF IDAHO FALLS against costs and expenses) or in its own name.

DATED July 22, 1957.

ATTEST: \_\_\_\_\_  
CITY CLERK

s \_\_\_\_\_  
MAYOR

It was moved by Councilman Foote, seconded by Freeman, that the Mayor be authorized to sign the above resolution and to execute the assignment called "Transfer of Rights", attached to the resolution. Roll call as follows: Ayes, Foote, Freeman, Johnson, Petersen. No, None; carried.

It was moved by Councilman Johnson, seconded by Petersen, that the Council adjourn. Carried.

ATTEST: s/ Roy C. Barnes  
CITY CLERK

s/ John B. Rogers  
MAYOR

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