

2000

Leger Construction Company v. Roberts, Inc. : Brief of Respondent

Utah Supreme Court

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John L. McCoy; Ryberg, McCoy and Halgren; Attorneys for Plaintiff-Appellant.

R. Mont McDowell; Roe and Fowler; Attorneys for Defendant-Respondent.

Recommended Citation

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IN THE SUPREME COURT FOR THE STATE OF UTAH

LEGER CONSTRUCTION COMPANY,

Plaintiff-Appellant,

vs.

ROBERTS, INC.,

Defendant-Respondent,

vs.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

Defendant-Added.

CASE NO. 13737

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BRYAN YOUNG UNIVERSITY
J. Reuben Clark Law School

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third Judicial
District Court of Salt Lake County
Honorable Bryant H. Croft, Judge

R. Mont McDowell
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Defendant-
Respondent

John L. McCoy
RYBERG, McCOY & HALGREN
325 South 300 East
Salt Lake City, Utah 84111
Attorneys for Plaintiff-
Appellant

FILED
NOV 4 1975

Clerk, Supreme Court, Utah

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vs.)	
UNITED STATES FIDELITY AND)	
GUARANTY COMPANY,)	
Defendant-Added.)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff-appellant, Leger Construction Company [Leger] commenced this action against defendant-respondent, Roberts, Inc. [Roberts], claiming \$2,782.00 allegedly due Leger from Roberts under the terms of a subcontract whereby Roberts had agreed to perform mechanical work on Utah State maintenance stations located at Salt Lake City and Manila, Utah. Roberts (1) counterclaimed for \$14,172.04 owed to it under the con-

tract, plus interest and attorney's fees; (2) joined Leger's surety, United States Fidelity and Guaranty Company [USF&G] as an added defendant; and (3) claimed \$3,249.77 due from Leger on other jobs.

DISPOSITION IN TRIAL COURT

The case was tried before the Honorable Bryant H. Croft, District Judge, who filed a memorandum decision. Thereafter findings of fact and conclusions of law were entered. A joint and several judgment was entered against plaintiff and its surety on defendant's first claim in the sum of \$8,494.95, and against plaintiff only on defendant's second claim for \$782.25. Motions were made by plaintiff and defendant to amend the findings and conclusions, make additional findings and conclusions and amend the judgment accordingly. Plaintiff's motions were denied and defendant's motion was granted to award it attorney's fees of \$2,607.50 against plaintiff and the surety on defendant's first claim.

RELIEF SOUGHT ON APPEAL

Defendant-respondent seeks affirmance of the judgment of the District Court.

It should be noted that plaintiff seeks a reversal ". . . for and on behalf of its surety . . ." (Appellant's Brief P. 2). However, USF&G has not filed a notice of

appeal and it is respondent's contention that the judgment against it is final. This matter will be treated in respondent's argument.

STATEMENT OF FACTS

The statement of facts in appellant's brief is not complete, failing to include much of the pertinent evidence upon which the trial court's decision was based. For that reason, respondent will state the facts as it sees them in the record.

Leger and Roberts entered into a contract entitled "Bid and Contract" dated August 9, 1971 (Exhibit 2-P), under which Roberts was to perform mechanical and plumbing work on maintenance stations at Salt Lake City and Manila, Utah. The contract price was \$70,591.00. The maintenance stations were owned by the Utah State Building Board and were to be used by the Utah State Highway Department (Exhibit 22-P). In connection with its contract with the Building Board, Leger, as principal, and USF&G, as surety, executed and delivered to the State of Utah a labor and material payment bond pursuant to the provisions of Title 14, Chapter 1, Section 5, U.C.A. 1953 (as amended). (Finding of Fact No. 5).

Although the agreement between Leger and Roberts was dated August 9, 1971, both George L. Leger, president of

Leger, and Larry P. Roberts, president of Roberts, agree that the document was actually signed a week or more after the ninth (Tr. 1st day, p. 7; Tr. 2nd day, p. 66).

Under the contract (Exhibit 2-P) Roberts agreed to:

. . . actually move onto the job, with all necessary tools, supplies and equipment, within (2) two working days after receiving written or oral notice and to start and carry on the work uninterrupted to completion of the stage directed by the general contractor.

Roberts commenced work on the Salt Lake maintenance station on August 4, 1971, five days prior to the date on the contract (Exhibit 17-P). The first work noted on Roberts' daily log (Exhibit 17-P) on the Manila maintenance station was September 7, 1971. Larry Roberts, however, testified that he took material to that job one day after Ned Oaks, Leger's foreman, requested the material in the latter part of August, 1971. George L. Leger testified that the Manila job was ready for installation of certain radiant heating pads on September 4, 1971 (a Saturday), that Roberts was "aware of that fact on the 4th" and that the work was not commenced until September 14, 1971 (Tr. 1st day, p. 50). As noted above, Roberts' daily log shows that its employees were on the Manila job on Tuesday, September 7, which was the first working day after September 4 since Monday, September 6 was Labor Day.

According to George L. Leger, the major portions of the work to be performed by Roberts consisted of the installation of underground piping and of radiant heating pads (Tr. 1st day, p. 10). Installation of the radiant heating pads was commenced at the Salt Lake job on October 9, 1971 (Finding of Fact No. 36). George Leger maintained that the Salt Lake project was ready for this pad on August 27, 1971, and that Roberts was so informed (Tr. 1st day, p. 10). The evidence shows that employees of Roberts spent 136.5 man hours on the Salt Lake job between August 27 and October 8, 1971 (Exhibit P-17). These radiant heating pads were complete by November 11, 1971, but primarily because of leaking valves the system was not finished until December 5, 1971 (Finding of Fact No. 36). These valves were specified in the plans and specifications furnished to Roberts (Finding of Fact No. 46).

The weather conditions during this period hampered completion of the pads (Tr. 2nd day, p. 37). In fact, Tom Patterson, the mechanical inspector for the Utah State Building Board, even suggested that Roberts wait until the roof was on the building before completing the pads (Tr. 2nd day, p. 37). As of November 22, 1971, the structural steel upon which the roof was to be placed was complete (Tr. 1st

day, p. 65), but zero percent of the roof itself was complete on that date (Exhibit 12-D). According to the "Draw Request" submitted to the Utah State Building Board by Leger and signed by George L. Leger, no work had been done on the roofing and sheet metal, drywall, ceramic tile, floor covering, flat concrete, overhead doors, locker and toilet partitions, fence, landscaping, hoist, painting and calking as of November 22 (Exhibit 12-D). The electrical was 35% complete, hollow metal and hardware 10%, windows, glass and glazing 60%, pump equipment 40%, building material 60%, and carpenter labor 65% (Exhibit 12-D). Roberts' mechanical work was 70% complete (Exhibit 12-D). It was obvious at that time that the job was not going to be finished by November 30, 1971.

At trial, George L. Leger, on cross-examination, admitted that Roberts did not prevent the roof from being installed (Tr. 1st day, p. 65). He said that the rough plumbing, boiler, gas pump, water line, and toilet facilities, all installed by Roberts, did not hold up the job (Tr. 1st day, pp. 65-67). At that point the trial judge asked George Leger "Is it your claim the delay is based solely upon the heating pad?" To which Leger answered: "Yes, sir."

Appellant goes to great lengths in its brief in an attempt to show that Roberts did not diligently pursue its

work on the Salt Lake job from October 27, through the end of November, 1971. Appellant claims that the weather records show rain on only eleven days during this period - five of which were either Saturdays or Sundays (Appellant's Brief, p. 7). What appellant overlooks in his persual of the weather report (Exhibit 46-P) is that on October 27, 5.8 inches of snow fell and that snow continued to fall so that on the 28th day there were 6 inches on the ground; on the 29th, 2 inches; and on the 30th (Saturday), 2 inches. Again on October 31 (Sunday), 8.5 inches of snow fell so that on November 1, 7 inches were on the ground; 5 inches on the 2nd; 3 inches on the 3rd; and 2 inches on the 4th (Exhibit 46-P). In fact the records of the Utah State Building Board (Exhibit 48-P) show that only Roberts was on the job on October 28 and that the next work done by anyone was on November 8, 1971. Obviously there was sufficient evidence upon which the trial court could find that the weather delayed progress on the job during this period. Eliminating the first seven days of November, only 16 working days remained in the month and an examination of Exhibits 17-P (Roberts' records) and 48-P (the Building Board's record) shows that Roberts had men on the job for eight of those days, for a total of 64 man hours. Exhibit 48-P also

shows that no one worked on the job on Friday, November 26, the day after Thanksgiving. Four inches of snow fell on November 14 (Exhibit 46-P).

Although George Leger testified that the Salt Lake project was ready for installation of the radiant heating pads on August 27, 1971, (Tr. 1st day, p. 10), Larry Roberts testified that he took photographs of the site on October 10, 1971 (Exhibits 30-36D) and the earth was not in a condition which would enable Roberts to install its pipe at that time (Tr. 2nd day, p. 76). In fact, Roberts had to remove pipe which had already been installed in order for Leger to "get in and do the final grade." (Tr. 2nd day, p. 76).

Certain back charges were made by the Utah State Building Board against Leger on account of mechanical work at the Salt Lake shed. These included \$2,633.00 for a gas line which was installed by Mountain Fuel Supply and which was paid for by the Building Board (Finding of Fact No. 24, R. p. 33). A dispute existed as to who was responsible for installation of this line and two or three meetings with state officials did not resolve the dispute (Finding of Fact No. 27, R. p. 35). The trial court found that the gas line was Roberts' responsibility and allowed Leger an offset for

the cost (Finding of Fact No. 24, R. pp. 33-34).

Similarly, the installation of "plug valves" and a stack which did not meet specifications was taken into consideration by the trial court and offsets totaling \$584.22 against the balance due Roberts allowed (Findings of Fact Nos. 20 & 23, R. pp. 32 & 33).

When Roberts was not paid the balance of the contract price, it refused to do certain warranty work and the trial court allowed Leger to offset \$268.70 because of this (Finding of Fact No. 22, R. p. 33).

The radiant heating pad at Manila was complete on October 15, 1971 (Tr. 1st day, p. 50). Thereafter, Leger poured the concrete for the floors and then progress on the job ". . . pretty well stopped . . ." according to George Leger because of a bad snow storm (Tr. 1st day, p. 51). Very little was done on that job until December 1, 1971, at which time Leger commenced the framing of the office area (Tr. 1st day, pp. 51-52).

Respondent also claimed monies from Leger (but not from USF&G) on a number of other jobs. The trial court awarded \$782.25 on these claims (R. p. 26) and appellant apparently does not dispute this award.

ARGUMENT

I

THE LIQUIDATED DAMAGES PROVISION IN THE CONTRACT BETWEEN ROBERTS AND LEGER IS INVALID AS A PENALTY.

Paragraph "(p)" of the contract between plaintiff and defendant (see Ex. 3-P), provided:

The work shall be commenced upon written or oral order to proceed and completed within the time stated in this bid. If the work is not completed in accordance with the foregoing, it is understood that the general contractor will suffer damage and it being impractical and unfeasible to determine the amount of actual damage, it is agreed that I will pay on demand, to the general contractor, as fixed and liquidated damages and not as penalty, the sum of \$50.00 for each calendar day of delay until the work is completed and accepted. Extension of time shall be granted, when asked for in writing, when it is, in the judgment of the general contractor, not practical or impossible or because of unforeseeable causes beyond control and without fault or negligence on my behalf, to complete said work in the specified time. (Above causes including but not restricted to strikes, war, acts of God, acts of the Government, acts of the owner, acts of another contractor in the performance of a contract with the owner, and adverse weather conditions).

I recognize the general contractor has a completion date guarantee in his contract with the owner that calls for completion on or before Nov. 30, 1971.

In addition to the liquidated damages, I agree to pay the general contractor an amount equal to his cost in maintaining a field office and supervision over the work for each day beyond the specified completion date if it is determined that I caused this delay, because: I recognize

and agree that the general contractor's costs are directly proportional to the length of the construction period, and therefore shall reimburse the general contractor for all days beyond the specified completion date, whether an extension of time is granted or not.

The validity of a liquidated damage provision is dependent on whether the sum stipulated is deemed liquidated damages or a penalty. Parties are bound by a stipulation for liquidated damages, but a penalty is unenforceable, Russell v. Ogden Union Railroad & Depot Co., 122 Utah 107, 247 P.2d 257, 263 (1952), and the nondefaulting party is left to recovery of the actual damages he can prove. Use of the terms "liquidated damages" or "penalty" by the parties is not controlling, but the provision is to be construed by considering all the circumstances at the time the parties executed the contract. Croft v. Jensen, 86 Utah 13, 40 P.2d 198 (1935).

In Perkins v. Spencer, 141 Utah 468, 243 P.2d 446, 447 (1952), this court examined numerous Utah cases which considered the matter of liquidated damages and concluded:

. . .[I]n all cases where the stipulation for liquidated damages was enforced it bore some reasonable relation to the actual damages which could reasonably be anticipated at the time the contract was made and was not a forfeiture which would allow an unconscionable and exorbitant recovery. (Emphasis added).

This court also noted it's agreement with the view summar-

ized in the Restatement, Contracts, §339 (1932):

(1) An agreement made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

In the instant case, the contract provision for "liquidated damages" must be held void as a penalty. The actual damages caused by delay were capable of accurate calculation, and in fact the parties specifically provided for their calculation and payment in paragraph "(p)". At the time the parties entered into their agreement they anticipated that the damages occasioned by a delay in performance would amount to the general contractor's costs in maintaining a field office and providing supervision over the work for each day beyond the completion date. The parties agreed that if Roberts was at fault for the delay he would pay these additional costs and expenses. Using this information, a court could have easily calculated the amount of actual damage occasioned by any delay in performance. The provision for the additional payment of \$50.00 per day as "liquidated damages" does not contemplate any unforeseen

damages which would not be fully compensated by the payment of the general contractor's costs and expenses. Thus, in light of the circumstances and expectations of the parties, the "liquidated damages" provision must be construed as an additional "penalty" and as such should be held to be void and unenforceable.

It should be noted that the provisions of the first paragraph of paragraph "(p)" of the August 9, 1971, contract do not necessarily require any real delay by the subcontractor. The subcontractor is required to pay Fifty Dollars (\$50.00) per day regardless of the cause for delay if no extension is granted by the general contractor. Under the terms of the paragraph extensions of time shall be granted, ". . . when asked for in writing, when it is. . . not practical or impossible or because of unforeseeable causes beyond control and without fault or negligence on my behalf, to complete said work in the specified time." Then the contract indicates that such causes include strikes, war, acts of God, the Government, the owner, other contractors or the weather. The last paragraph of paragraph "(p)" provides that the subcontractor will pay actual costs of supervision and field office expenses if it is determined that he actually caused a delay regardless of whether an extension is granted. Thus, under this contract, a subcontractor is absolutely

liable for actual damages caused by his delay, regardless of any extension granted by the general contractor and, unless an extension is granted, he is also liable for Fifty Dollars (\$50.00) per day when delay is caused by acts of God, Government or other third parties. This clearly constitutes a penalty.

Paragraph "(q)" of the contract states: "Time required to complete this contract will be _____ working days." No number is inserted in the blank space. Paragraph "(p)" requires the work to be completed ". . . within the time stated . . ." and indicates that the general contractor had agreed to complete the job by November 30, 1971. There is no other time mentioned anywhere in the contract. Paragraph "(q)" is obviously included in the contract to provide the subcontractor with a maximum number of days in which to complete his work. Although the subcontractor has notice of the general contractors completion date, he must nevertheless be given some specified amount of time in which to complete his work. What, for example, would be the result if the general contractor did not notify the subcontractor to proceed until November 29, 1971? Would the subcontractor then be required to pay Fifty Dollars (\$50.00) unless a written extension was requested and received?

II

THE ERRORS ALLEGED BY THE APPELLANT ARE NOT SUFFICIENTLY SUBSTANTIAL OR PREJUDICIAL TO WARRANT A REVERSAL OF THE TRIAL COURT AND APPELLANT FAILED TO INTERPOSE TIMELY OBJECTIONS TO THE EVIDENCE AND FINDINGS.

The appellant has alleged that the trial judge committed numerous errors. Many of these alleged errors are contained in the Findings of Fact and Conclusions of Law filed by the Honorable Judge Croft. For example, appellant alleges error in findings 34 and 42 with respect to the extent of plaintiff's claim of delay, in finding 36 concerning the omission of fact as to when Roberts was told to start work on the Salt Lake shed, in finding 31 concerning the amount of precipitation which fell during the disputed period, in finding 45 concerning the commencement of work on the walls and roof of the sheds by Leger, and other such errors. In the interest of economy these errors in the findings will be considered together.

A. Appellant failed to interpose timely objection to the alleged errors.

After the entry of the original findings of fact and conclusions of law and judgments on March 19, 1974, (R. pp. 27 and 25) appellant filed a motion to amend the findings and conclusions and to enter an amended judgment (R. pp. 21-22). The only error mentioned in this motion, concerns

the amount of delay claimed by Leger (R. p. 21). With the exception of this one alleged error, the remaining errors which appellant now raises were never presented or brought to the trial court's attention.

This court, on numerous occasions, has held that a party must give the trial court an opportunity to correct alleged error before asking for and receiving a reversal in a reviewing court. E.g., Drummond v. Union Pac. R.R., 111 Utah 289, 177 P.2d 903, 909 (1947); Huber v. Newman, 106 Utah 363, 145 P.2d 780, 782-83 (1944); Porcupine Reservoir Co. v. Lloyd W. Keller Co., 15 Utah 2d 318, 392 P.2d 620, 621 (1964). If the objections urged on appeal were not urged in the trial court, this court has refused to consider them absent a showing of special circumstances. Steele v. Wilkinson, 10 Utah 2d 159, 349 P.2d 1117, 1119 (1960); Pettingill v. Perkins, 2 Utah 2d 266, 272 P.2d 185, 186 (1954).

In Keller v. Wixom, 123 Utah 103, 255 P.2d 118 (1953) defendant appealed from an adverse judgment in a partnership dissolution and accounting contest contending that the court had erred in not particularly specifying certain items in its findings of fact. The defendant proposed certain amendments to the findings but advanced different

exceptions on appeal. In refusing to review the appellant's new exceptions this court stated:

If these items had been brought to the attention of the trial court at the proper time, a proper correction, if called for, would no doubt have been made. Defendant, however, not only made no objections to the findings before they were signed, but he raised none of these questions in his motion for a new trial. Hence, he cannot now be permitted to criticize the findings for ambiguity, inexplicity, or uncertainty. [citations omitted]. Such objections, now made on appeal, come too late. 255 P.2d at 119.

Similarly, in Westerfield v. Coop, 6 Utah 2d 262, 311 P.2d 787, 787-88 (1957) where appeal was from a judgment for back alimony and support money which had been awarded in a California divorce decree, this court announced:

The Utah court took it upon itself to make findings apportioning the California judgment among the plaintiff and 3 children equally, though the California court had awarded an unapportioned monthly lump sum. There was no seasonable objection directed toward said finding, and we will not entertain such objection for the first time on appeal.

The only recognized exception to this rule is where the appellant had no opportunity to make an objection or amendment at the trial level. In the instant case, appellant not only had the opportunity to object, but specifically filed a motion to amend the court's findings. In

light of these facts, appellant has waived any right to seek a reversal in this court on grounds which were not properly raised or presented in the trial court.

B. Failure to move for new trial precludes review of the errors.

A second ground necessitating a refusal to review appellant's alleged errors is the failure of appellant to seek a new trial in the lower court. Pursuant to Rule 59, Utah Rules of Civil Procedure, a party may seek a new trial by filing a motion within 10 days after the entry of judgment. In an action tried without a jury, the court may open the judgment, take additional testimony, amend findings of fact and conclusions of law, make new findings and direct the entry of a new judgment. Among other grounds, Rule 59 specifically recognizes "insufficiency of the evidence to justify a decision" and "error in law," as sufficient cause for the granting of a new trial. The rule serves an important policy; it enables the trial court to review the evidence and his conclusions with respect thereto, when the evidence is still fresh, thus providing a more accurate and meaningful evaluation of the facts. Moreover, the motion preserves the integrity of the trial court by encouraging a self-induced correction of error.

In Brigham v. Moon Lake Elec. Ass'n., 24 Utah 2d 292, 470 P.2d 393, 396-97 (1970) this court held that plaintiff's failure to move for a new trial, so that the trial court could correct the verdict rendered by the jury, precluded a review of the verdict in the appellate court. In so holding, this court saw the scope of its review in examining the sufficiency of the evidence to support the verdict as one to review the actions of the trial court, not the jury, and to review only those issues raised below. While appellate courts are usually more willing to review decisions of the trier of fact when that function is occupied by a judge rather than by a jury, the reviewing court should not pass judgment on the evidence when the alleged error has not been called to the judge's attention by a proper motion. The trial judge is in a preferred position to weigh the facts, and determinations concerning the evidence should be presented to the trial court before a reviewing court is called on to make its evaluation of the evidence. Many of Utah's neighboring jurisdictions have recognized this aspect of judicial restraint and have refused to review questions concerning the sufficiency of evidence to support findings of fact absent a motion for new trial in the court below. E.g., Andrews v. Hand, 190 Kan. 109, 372 P.2d 559, 562

cert. denied, 371 U.S. 880 (1962); Hyre v. Pratt, 382 P.2d 18, 21 (Okla. 1963); Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834, 837 (1963); Bushard v. Washoe County, 68 Nev. 217, 229 P.2d 156, 157 (1951). Since the appellant made no motion for new trial and gave the trial court no opportunity to correct the alleged errors, this court should not seek to review the sufficiency of the evidence to support the findings.

C. The decision of the trial court on the evidence should be sustained.

Even if this court should determine that a review of the evidence and findings is proper, an examination of the evidence will lead this court to the conclusion that the findings of fact and conclusions of law were not erroneous. Previously, this court had announced the rule that because of the trial court's advantaged position, substantial deference must be given to its findings with respect to the evidence. E.g., First Sec. Bank v. Hall, 29 Utah 2d 24, 504 P.2d 995, 996 (1972); Elton v. Utah State Retirement Bd., 28 Utah 2d 368, 503 P.2d 137 (1972); Peterson v. Holloway, 8 Utah 2d 328, 334 P.2d 559, 561-62 (1959). In Nokes v. Continental Min. & Milling Co., 6 Utah 2d 177, 308 P.2d 954, 954-55 (1957) this court was called upon to review a question of fact in an equity matter. In doing so,

this court said:

Where there is a conflict in the evidence, the finding of the trial court will not be disturbed if the evidence preponderates in favor of the finding; nor, if the evidence thereon is evenly balanced or if is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of the trial court, but it will be overturned and another finding made only if the evidence clearly preponderates against his finding.

The rule just stated is based upon the sound reasoning that some credit should be indulged in favor of the findings of the trial court because of the advantages peculiar to his position in immediate contact with the trial. It is indeed often true that, "the manner hath more eloquence than naked words portend." There are intangibles of expression and attitude which give color and meaning not apparent from words alone. The trial judge feels the impact of the personalities of the parties and the witnesses: He is able to observe their appearance and behavior; their forthrightness or hesitancy in answering; their frankness and candor, or lack of it. Similarly revealing to him are indications of surprise, anger, resentment or vindictiveness, pleasure or other emotions which may be discerned from expressions of the countenance or voice. He also has some advantage in appraising their abilities to understand and their capacities to remember. Furthermore, he is in a position to question the witness himself to clarify doubtful points or verify his impressions on the matters just mentioned. All of this combines to afford him better insight as to the truthfulness of the testimony offered than does a perusal of the cold record. It is a sound and well recognized policy of the law to repose some confidence in the verity of the actions of the trial court, and not to interfere with them unless it clearly appears that he is in error.

Applying this principal, this court has upheld the trial court findings unless clearly against the weight of the evi-

dence, Harthy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28, 29 (1972), where they were supported by clear, satisfactory, and convincing proof, Lynch v. MacDonald, 12 Utah 2d 427, 367 P.2d 464, 468 (1962); Martin v. Martin, 29 Utah 2d 413, 510 P.2d 1102, 1103 (1973), where bolstered by substantial evidence and reasonable inference, Jensen v. Eddy, 30 Utah 2d 154, 514 P.2d 1142, 1145 (1973), and where they were founded on competent evidence, Dockstader v. Walker, 29 Utah 2d 370, 510 P.2d 526, 527 (1973).

These same standards for review have also been applied in situations involving contract disputes. In Casey v. Nelson Bros. Const. Co., 24 Utah 2d 14, 465 P.2d 173, 174 (1970) where plaintiff recovered a judgment for the balance due on a subcontract with the defendant, the defendant sought to attack the judgment on grounds that the evidence did not support the court's findings. Responding to this contention this court said:

The answers to the defendant's contentions are found in the so-often repeated rule: that where there is dispute in the evidence we assume that the trial court believed those aspects of the evidence, and drew the inferences which could fairly and reasonably be drawn therefrom, which tend to support the findings and judgment; and that upon our review of the record in that light, if there is a reasonable basis in the evidence to support them they will not be disturbed.

In Super Tire Market, Inc. v. Rollins, *infra*, defendant con-

tended that the evidence "compelled" a finding for the defendant on his claim of breach of warranty. In rejecting this contention this court said:

[I]t would not be sufficient that there is merely some evidence which would support such a finding. Only if the evidence is such that all reasonable minds would be so persuaded would we reverse the trial court and rule as a matter of law that a warranty was given and breached. Conversely, if there is any basis in the evidence upon which the trial court could fairly and reasonably remain unconvinced of those facts, the refusal to so find must be sustained.

This court chose not to look at select testimony in isolation but instead chose to "survey it in composite with all of the evidence in the case". 417 P.2d at 135. In light of all the evidence, the court found the defendant's position to be unsupported.

Finally in Staples Excavation & Erection Co. v. Wehyer Const. Co., 26 Utah 2d 387, 490 P.2d 330, 333 (1971) where plaintiff sought to recover the value of labor and materials furnished in the construction of an office building, the trial court made findings in which it concluded that plaintiff had failed to prove that its costs were reasonable and so it dismissed the complaint. Both plaintiff and defendant sought review and the appellant contended that the court had erred in disregarding uncontested testimony and that the re-

cord did not support the findings of the court. In considering these contentions this court recognized that it was "asked to review issues of fact rather than issues of law", but concluded that the trial court could reasonably and fairly have been convinced in its findings and so refused to upset the lower court's findings unless they were "arbitrary" or without any "basis in the record". Because the evidence was in conflict the Staples court held: "The decision of the trial court having been made upon disputed and contradictory evidence, it would appear that the rule we have un-
unciated in numerous cases, that the trial court being in an advantaged position from having heard the testimony of the witnesses and observed their demeanor is better able to determine issues of fact than is this court upon a written record." In like fashion, this court should uphold the findings of the trial court below, because at worst the evidence is in dispute.

There was substantial evidence introduced at trial to support the findings of the trial court.

Even if appellant should be permitted to raise objections on appeal which were not raised in the court below, and even if this court should permit a review of those objections, despite appellant's failure to move for a new trial

and permit correction at the trial level, this court must conclude that the evidence produced at trial, when evaluated in light of the standards and preferences established by this court, was sufficient to sustain the trial court's findings and conclusions.

In finding number 44, the court below found that Leger had failed to establish by a preponderance of the evidence that the failure to complete the work within the time specified was due to the fault or negligence of the defendant. Appellant contends that this was error because the "fault or negligence" standard went to the criteria for determining an extension of time and not to the issue of breach of contract. Again, this argument misses the point. Admittedly, the failure to perform a binding contractual promise results in a breach of contract, I Restatement, Contracts §1 (1932), but the words of the agreement must be interpreted to uncover the promises which are exchanged and bargained for. The words of the whole agreement reflect the intentions of the private bargaining parties; it is this intention which a court of law must search out and enforce. By the terms of the agreement between the parties in the instant case, it was agreed that any delays which were not due to the fault or negligence of Roberts would warrant an extension of time. The parties in their agreement contemplated that innocent

delay would not cause injury to either party and would be permissible. When the trial court found that Leger had not proved that the delay was due to the fault or negligence of Roberts, it was, in essence, finding that any delay attributable to Roberts was of a kind which the parties had previously agreed to as being permissible. Leger could not, on the one hand, claim that innocent delay was justification for damages, and on the other hand, admit by the terms of its own agreement that the same innocent delay would have warranted an extension of time. Therefore, the finding of the trial court was not error but was extremely meaningful and material in light of the nature of the agreement between the parties.

Appellant contends that Finding of Fact number 39 (R. p. 38) is irrelevant and incompetent. This finding was based upon the testimony of George Leger to the effect that the installation of radiant heating pads at plaintiff's road shed job in Lehi took the same amount of time as defendant's installation at Salt Lake and Manila. Appellant's argument overlooks the fact that plaintiff elicited testimony from George Leger based upon his "experience" as to how long it should have taken to install the radiant heating pads in question (Tr. 1st day, p. 11-12). Thus, the basis of his expertise was a legitimate subject of cross-examination and

the time required on other jobs, a legitimate subject of inquiry.

George Leger's testimony demonstrates that construction of the heating pads at the Lehi shed, which was identical or substantially similar to the Manila and Salt Lake sheds, did not progress at a faster pace than did the construction at Manila and Salt Lake. The testimony was within the scope of the witness's "expertise" and it illuminated the questions of delay and responsibility for the delay.

Proof of the existence of other facts, the occurrence of other events, or acts or conduct upon other occasions which have a relevant and material bearing upon the fact in issue is admissable, Firlotte v. Jessee, 172 P.2d 710, 76 C.A.2d 207 (1946), and the admission of such evidence is a matter which rests largely in the trial court's discretion. Coyswell v. C. C. Anderson Stores Co., 68 Idaho 205, 192 P.2d 383, 389 (1948); See, Panitz v. Orange, 518 P.2d 726, 10 Wash.App. 317 (1973). A trial judge's determination should not be reversed absent a showing of abuse of discretion. Frame v. Bauman, 449 P.2d 525, 530, 202 Kan. 461 (1969).

In a related context, this court has allowed testimony of a sales manager concerning the warranty policy of a tire

seller as having probative value on the issue of the existence of a warranty in a particular sale. Super Tire Market, Inc. v. Rollins, 18 Utah 2d 122, 417 P.2d 132, 135 (1966). In other contexts, this court has allowed the introduction of evidence concerning the value of reasonably comparable or sufficiently similar property when the value of other property is in dispute. E.g., Sweeny v. Happy Valley, Inc., 18 Utah 2d 113, 417 P.2d 126, 129-30 (1966); Salt Lake City v. Lewis, 30 Utah 2d 462, 519 P.2d 1344, 1345 (1974); see, Salt Lake County v. Kazura, 22 Utah 2d 313, 452 P.2d 869, 870-71 (1969). Even if testimony concerning work at the Lehi shed was circumstantial, such testimony can be used alone or with direct evidence to support a judgment. E.g., Rothman v. North Am. Life & Cas. Co., 7 Wash.App. 453, 500 P.2d 1288, 1290 (1972); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900, 917 (Oka. 1965). It should be noted that no objection was made at trial to this testimony (Tr. 1st day, pp. 58-59). Appellant should not be allowed to raise his objection to the admission of evidence for the first time at this stage in the proceedings. Rule 4, Utah Rules of Evidence, specifically provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the

evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding. However, the court in its discretion, and in the interests of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated. (Emphasis added).

The appellant neither objected to the introduction of the evidence nor sought to amend the findings of fact with respect thereto. Even if a timely objection had been raised, the error, if any, would at most be harmless. See Startin v. Madsen, 130 Utah 631, 237 P.2d 834, 836 (1951).

In the interest of conserving time and space, respondent will briefly indicate the portions of the record which support the Findings of Fact which appellant disputes.

Finding of Fact number 34 - Transcript 1st day, pp. 67-68.

Finding of Fact number 35 - Transcript 1st day, pp. 50.

Finding of Fact number 36 - Transcript 2nd day, pp. 42-43, 46; pp. 74-76.

Finding of Fact number 37 - Exhibits, 17-P, 18-P and 19-P.

Finding of Fact number 41 - Exhibit 46-P; Transcript 2nd day, pp. 37-38.

Finding of Fact number 42 - Transcript 1st day, pp. 64-67.

Finding of Fact number 43 - Transcript 1st day, p. 50, p. 12.

Finding of Fact number 45 - Exhibit 12-D, Transcript 1st day, pp. 64-68.

Finding of Fact number 46 - Transcript 2nd day, pp. 42-43, 46, 74-75.

Finding of Fact number 47 states that "Leger did not establish the number of calendar days of delay, if any, caused by Roberts on the Salt Lake road shed." A review of the record shows a lack of evidence on this point.

III

IT WAS NOT ERROR FOR THE TRIAL COURT TO AWARD ATTORNEY'S FEES.

In its amended judgment, the trial court awarded Roberts the amount of \$2,607.50 for attorney's fees. The fees were assessed pursuant to U.C.A. §14-1-8 which provides:

In any action brought upon either of the bonds provided herein, or against the public body failing to obtain the delivery of the payment bond, the prevailing party, upon each separate cause of action, shall recover a reasonable attorney's fee to be taxed as costs. (Emphasis added).

As found by the court, the instant action fell within the scope of §14-1-8 and since Roberts was the prevailing party, the court awarded it reasonable attorney's fees.

Appellant does not dispute the applicability of this statute nor the reasonableness of the fee assessed. The only contentions of the appellant are (1) that the fee was improperly assessed as part of the judgment rather than as a cost of suit, and (2) that the court made no finding that Roberts was the "prevailing" party.

The obvious intent of the legislature in enacting Section 14-1-8 was to provide adequate compensation to a successful party who was forced to sue for the recovery of payments due under a prime contract. Without the recovery of attorney's fees, the successful subcontractor would only recover an amount equal to his contract price less his attorney's fees, thereby substantially reducing the value of his bargain under the contract.

Since the purpose of Section 14-1-8 is to provide "just compensation", it should make little difference whether attorney's fees are assessed as part of the judgment or as costs. In either event, the fee must be paid by the losing party to fully compensate the subcontractor. To rely on

meaningless distinctions between "costs" and "judgments" in the instant case would serve no useful purpose. The only meaningful question is the reasonableness of such fee which appellant does not dispute.

Appellant has relied on Rule 54(d)(2), Utah Rules of Civil Procedure, in support of its proposition that, as costs, the fees were not included in defendant's memorandum of costs and should be disallowed. In Walker Bank and Trust Co. v. New York Terminal Warehouse Co., 10 Utah 2d 210, 350 P.2d 626, 630-31 (1960), this court disallowed costs to a plaintiff who failed to file a "verified" memorandum of costs within five (5) days as required by the rule. In the instant case, the defendant filed his verified memorandum of costs on March 19, 1975 (R. pp. 42-43), the same day judgment was entered (R. pp. 25-26). The findings of fact and conclusions of law were amended to include attorney's fees on May 23, 1974 (R. pp. 15-16), when the amended judgment was also entered (R. pp. 8-10). The amended judgment was rendered after hearing pursuant to defendant's motion (R. pp. 23-24) requesting a finding and judgment relating to attorney's fees. Defendant claimed that the court had overlooked the provisions of Section 41-1-8 and the court agreed. Testimony and an exhibit regarding attorney's fees was presented at the trial (Tr. 2nd day, p. 129, Tr. 3rd day, pp. 1-5; Ex. 43-D).

The purpose of Rule 54(d)(2) is twofold: (1) to relieve the trial court of the burden of taking testimony from all parties in every case as to those items customarily awarded as costs, viz., filing fees, costs of service of complaints, subpoenas, etc., and (2) to give the party against whom costs are awarded an opportunity to have those items presented to the court under oath and subject to challenge. It is customary for those entitled to and seeking attorney's fees in Utah courts to present their claim at trial by way of sworn testimony as was done in this case. Appellant was entitled to and did cross examine defendant's witness. Appellant would then have this testimony repeated in the memorandum of costs. This procedure would unduly burden the trial court and burden the record on appeal with duplicate written and oral testimony.

As a second ground for the denial of attorney's fees, appellant contends that the trial court made no finding that the defendant was the "prevailing party" under Section 14-1-8, and that, since certain offsets were awarded to the appellant, both parties were "prevailing parties". In support of this position, appellant relies on the decision of Shupe v. Menlove, 18 Utah 2d 130, 417 P.2d 246 (1966) where this court refused to reverse the decision of the trial judge with respect to the award of attorney's fees

under U.C.A. §§38-1-17 to 18. This court in Shupe, however, did not base its decision on the fact that plaintiff was not a prevailing party, but instead said: "Viewing the overall picture of this case in the light most favorable to the facts as found by the jury and to the verdict and judgment, we cannot say that the trial court abused its discretion in rejecting defendant's contentions." (Emphasis added). Id. 417 P.2d at 249.

A finding that defendant was the prevailing party is certainly implicit in finding of fact number 52 (R. p. 16) which indicates that defendant was entitled to attorney's fees under the provisions of §14-1-8.

The decision to award attorney's fees pursuant to an authorizing statute is one which lies in the sound discretion of the trial court. This court has refused to reverse the trial court's decision with respect to a reasonable attorney's fee in the absence of abuse of that discretion. In re Smith's Estate, 162 P.2d 105, 111 108 Utah 537 (1945). Costs and attorney's fees are assumed to be reasonable unless there is clear evidence to the contrary. See Jenkins v. Jenkins, 153 P.2d 262, 264-65, 107 Utah 239 (1944). In the case below, the defendant was awarded judgment on its first claim contained in the counterclaim, while plaintiff's claim

was denied. Even though certain set-offs were awarded to the plaintiff, it was in the trial court's sound discretion to hold that, as a whole, the defendant was the prevailing party. The fact that defendant was not entitled to recover the full amount of its claim does not preclude the trial court from finding that it had nevertheless prevailed.

Appellant relies on the decision of Malvo v. J.C. Penney Co., 512 P.2d 575 (Alaska 1973) for the proposition that fees should not be awarded where to do so would result in a penalty. The Malvo court, however, did not say that the award of attorney's fees should be voided as a penalty, but only that the automatic award of attorney's fees to the prevailing party is "manifestly unreasonable". Id. at 587. In fact, the Malvo court reiterated that "a party does not have to prevail on all of the issues in the case to be a 'prevailing party'" [citations omitted] Id. at 586. The court also bolstered its prior rulings which recognized the wide discretion of the trial judge in the award of attorney's fees. Id. The main concern of the Malvo court was to insure that when attorney's fees are awarded they are "reasonable" and properly awarded as "partial compensation" to the prevailing party. While holding that the fees awarded in the lower court were

not compensatory, the court did state that:

Where there is evidence that a losing party did not have a good faith claim or defense, and all the fees incurred by the prevailing party were justified, a judge might well choose to award the full amount of the fees requested. 512 P.2d at 588.

It is clear that in the case below, the award of attorney's fees was justified as partial compensation for the recovery of the payments due to the defendant. These fees were reasonable, just and undisputed; they should be allowed in accordance with the statute under which they were assessed.

IV

UNITED STATES FIDELITY AND GUARANTY COMPANY DID NOT FILE A NOTICE OF APPEAL WITHIN THE REQUIRED TIME AND MANNER PRESCRIBED BY LAW AND IS NOT BEFORE THIS COURT AS A PARTY APPELLANT.

The appellant represents that those parties seeking relief in this proceeding are "[p]laintiff and plaintiff for and on behalf of its surety." (Appellant's brief, p. 2). Yet, the only party that has preserved its right to appeal is Leger Construction Company, for only Leger has filed a notice of appeal.

Rule 73(a), Utah Rules of Civil Procedure, establishes the procedure for taking an appeal. This rule permits an appeal "from a district court to the Supreme Court" within

"one month from the entry of judgment or order appealed from." (Emphasis added). The only exception from compliance with this time limitation is "a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment." (Emphasis added). The rule goes on to say that "a party may appeal from a judgment by filing with the district court a notice of appeal . . . and depositing therewith the fee required for docketing the appeal in the Supreme Court." (Emphasis added). Subpart (b) of Rule 73 sets forth the requirements of the notice which "shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall designate that the appeal is taken to the Supreme Court" (Emphasis added). Notification of the filing by serving a copy thereof "on all the parties to the judgment" is also required. This rule serves to inform the court and an adverse party of the pendency of an appeal and, in particular, of those parties that are making the appeal.

The judgment of the district court was "joint and several" as against Leger Construction Company and its surety United States Fidelity & Guaranty Corporation (USF&G). Each party had an opportunity to appeal the judgment by complying with the Utah Rules of Civil Procedure. The notice of appeal

which was filed by Leger on June 25, 1974, states in full:

COMES NOW the plaintiff, Leger Construction, Inc., and hereby appeals to the Utah Supreme Court the Amended Judgment entered herein on the 23rd day of May, 1974, and all proceedings thereafter up to the filing of this Notice of Appeal.

The verb tense of this notice is in the singular and clearly indicates that only one party sought appeal. Even the caption of the notice fails to designate United States Fidelity and Guaranty Company as an appellant. This notice fails to indicate that any other party, except Leger, was making an appeal.

The timely filing of an appeal is a jurisdictional prerequisite, E.g., Allen v. Garner, 45 Utah 39, 143 P.228 (1914); Sorenson v. Korsgaard, 83 Utah 177, 27 P.2d 439 (1933), as is the filing of a proper and sufficient notice of appeal, E.g. Johnston v. Geary, 84 Utah 47, 33 P.2d 757 (1934); Anderson v. Halthusen Mercantile Co., 30 Utah 31, 83 P. 560 (1906). In this case USF&G has not filed a notice of appeal and is bound by the judgment below. This court has no jurisdiction to rule with respect to USF&G's liability to Roberts. [See, 9 Moore's Federal Practice, ¶203.09 for discussion of the requirement of filing notice as jurisdictional and mandatory to preserve appeal].

While there is apparently no Utah decision which dis-

cusses the precise question now before the court, this court's language in Allen v. Garner, supra, is illuminating and should serve as a guide for decision. In Allen, the appellant failed to serve notice on a joint maker and defendant of a note upon which judgment was rendered. This court held there that the notice of appeal requirement was jurisdictional, and said:

The question that confronts us here, however, is, Can parties confer jurisdiction upon this court to hear appeals by waiving notice of appeal or by entering their appearance at any time after the time for an appeal has expired? If the question is one merely of regularity or jurisdiction over the person, then, of course, we might permit an omitted party to enter his appearance at any time before the case is finally submitted, but if it is jurisdictional in the sense that it affects the power of this court to hear and determine the appeal, then, as a matter of course, the parties cannot confer jurisdiction by consent. We think the question is jurisdictional in the sense just stated. 143 P.2d at 229.

Other state courts that have examined the jurisdictional issue of a party's failure to file a notice of appeal agree that such a failure precludes an appellate court's jurisdiction. In Hayes v. Hagemuir, 75 N.M.70, 400 P.2d 945 (1963) a minor and her mother were denied relief in an action for personal injuries. Only the minor filed a notice of appeal which was singular in form and only mentioned the minor as appellant. The court held that it did not have jurisdiction

to hear the appeal as it applied to the mother. In Sloan v. Sheridan, 161 Kan. 425, 168 P.2d 545 (1946) one of two defendants filed a notice of appeal, but judgment was rendered against both of them, and plaintiff caused the judgment to be executed against the defendant who did not file notice of appeal. The court held that the notice was not sufficient to constitute a notice of appeal for both defendants, and that the plaintiff was authorized in his attempt to execute the judgment against the defendant who had not filed notice.

The Federal courts are also in agreement with this position. In Cook and Sons Equipment, Inc. v. Killen, 277 F.2d 607, 609 (9th Cir. 1960), where only the corporate defendant and not the individual defendants filed a notice of appeal, the court refused to grant the individual defendant's motion to have their names added to the notice of appeal on the ground that the omission was a "clerical error". The court said:

The omission here was much more than a clerical error. It was a failure of the individual defendants to appeal. We have no authority to amend a notice of appeal so as to bring in additional parties. Appellant relies on Rule 75(h) of the Federal Rules of Civil Procedure, 28 U.S.C.A. That rule has no application in the instant situation. It applies to errors in the contents of a record. Rule 73(b) requires that the notice of appeal specify the parties taking the appeal. Only the parties named in the notice of appeal are

brought within the appellate court's jurisdiction. VII Moore, Federal Practice (2d ed. 1955) §§73.13, 73.14. The harmless error doctrine has no application of failure to name parties in a notice of appeal. Penwell v. Newland, 9 Cir., 1950, 180 F.2d 551. The motion to amend the notice of appeal so as to include additional parties is denied.

In Van Hoose v. Edison, 450 F.2d 746, 747 (6th Cir. 1971), where a group of students appealed from an order denying them relief from a suspension for violations of the school "Student and Employee Hair Code," the Notice of Appeal was entitled "Floyd Van Hoose, et al.". The court refused to recognize any other party other than Van Hoose as properly before the court saying,

We are satisfied that the only appellant in this case is Floyd Van Hoose. Rule 3(c), Rules of Appellate Procedure, requires in part: "The notice of appeal shall specify the party or parties taking the appeal." The only party specified in the notice of appeal filed in this case was Floyd Van Hoose. The term "et al" does not inform any other party or any court as to which of the plaintiffs desire to appeal in this case. This is more than a clerical error. Cook and Soons Equipment, Inc. v. Killen, 277 F.2d 607 (9th Cir., 1960); Penwell v. Newland, 180 F.2d 551 (9th Cir., 1950); 9 Moore's Federal Practice (2nd Ed. 1970) Section 203.17.

And, in McKinney v. Debord, 507 F.2d 501 (9th Cir. 1974) a group of defendants appealed from an adverse summary judgment but only one defendant, McKinney, actually signed the notice of appeal. The court dismissed the appeal with

respect to the other defendants because they had not signed.

Finally, it is too late for plaintiff to seek the joinder of USF&G under Rule 74(a), U.R.C.P.. That rule applies only to parties who have otherwise taken steps to preserve their appeal. The Compiler's Notes to Rule 74(a) indicate that the rule was patterned after Rule 74 of the Federal Rules, now Rule 3(b) of the Federal Rules of Appellate Procedure. In commenting on Rule 3(b), Moore states:

Only a party who has filed a timely notice of appeal may join in the appeal of another. . . . Rule 3(b) does not permit one who has not filed a timely notice of appeal to become an appellant by joining in appeal with one who has filed a timely notice.

9, Moore's Federal Practice, ¶203.13 (1974).

Only Leger Construction Company is a proper party before this court and the judgment of the district court with respect to the liability of USF&G is binding. This court is without jurisdiction to upset that judgment as it applies to USF&G. Only Leger has satisfied the jurisdictional requirement of filing a proper notice of appeal.

CONCLUSION

It is respectfully submitted that the Findings of Fact entered by the trial court are fully supported by competent evidence and that the decision of the trial court should be affirmed. The appellant failed to raise substantially

all of the issues before the trial court which it seeks to present here and under well-established principles of law these matters should not be brought before this court for the first time on appeal. It is further submitted that added defendant United States Fidelity & Guaranty Company has not appealed from the judgment of the trial court and that the judgment heretofore entered against it is final in all respects.

Respectfully Submitted,

R. Mont McDowell
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Defendant-
Respondent