1967

Jack B. Parson Construction Co. v. Utah : Petition for Rehearing

Utah Supreme Court

David L. Wilkinson; Attorney General; Leland D. Ford; Assistant Attorney General; Attorney for Respondent.

John P. Ashton; James A. Boevers; Prince, Yeates & Geldzahler; Attorneys for Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

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19673

JACK B. PARSON CONSTRUCTION CO., a Utah Corporation,

Plaintiff-Appellant,

v.

No. 19673

THE STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,

Defendant-Respondent.

THE STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,

Third-Party Plaintiff-Respondent,

v.

THE AETNA CASUALTY & SURETY CO.,

Third-Party Defendant-Appellant.

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RESPONSE TO PETITION FOR REHEARING
BY RESPONDENT

----ooOoo----

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PETER F. LEARY, JUDGE

----ooOoo----

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RESPONSE TO PETITION FOR REHEARING BY RESPONDENT

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Respondent accepts the statement of Issues Presented by the Appellants' Petition and hereafter responds to them.

Respondent has raised the issue as to whether the Court's decision to overturn the Lower Court's ruling as to Sheets 2B of the Plans and 44 of the Special Provisions is correct. Respondent submits as stated hereafter that the conclusion of the Trial Court is otherwise correct.

STATEMENT OF THE CASE

Respondent accepts Appellants' Statement for the purpose of this proceeding.

STATEMENT OF FACTS

Rather than challenge or alter the Statement of Facts set forth by Appellants, Respondent has elected to refer to pertinent facts as part of its argument. It is true as alleged by Appellants that the Court in a few instances has misstated factual matters. Any misstatements of facts in the Court's Opinion which are considered material are covered in argument herein. There is a comprehensive Statement of Facts in Respondent's Brief covering 21 pages. This is reproduced and included in an appendix to this Brief for reference. Any factual representations made in this Brief are believed to be covered in said Statement of Facts, including citations to the record.

SUMMARY OF ARGUMENT

In holding that UDOT's Plans and Specifications affirmatively misrepresented site conditions, this Court's April 1 Opinion is in error. The Court violates its own oft-repealed rule that it will not disturb factual determinations if there is evidence in the record to support the ruling of the Lower Court. [Thorn Construction Co. v. UDOT, 598 P.2d 365 (Utah 1979) being one such case.] Points cited by this Court in support of its ruling as to the misleading character of Sheet 2B of the Plans and Sheet 44 of the Special Provisions were all argued by counsel and fully considered by the Trial Court. There is substantial credible evidence to support the rulings of the Lower Court. The Court in its opinion recognizes the obligation of Appellant to conduct a reasonable, prudent site visit. This same standard should apply to Appellants' review of the Plans and

Specifications. The best that can be said in Appellants' behalf is that the Plans and Specifications are incomplete. This imposes a duty of inquiry on Appellants consistent with industry practice. Other bidders on the project were aware of local common knowledge or had firsthand experience in the area. Appellants would now have this Court penalize these contractors for this greater knowledge and experience which resulted in their higher bid prices due to anticipated problems which Appellants failed to perceive. The reliance of the Appellants on Thorn is misplaced. Verbal representations in this case are exactly contrary to those in Thorn. The Project Engineer assigned to the subject project and the Project Engineer on an earlier project both stated that Appellants were cautioned by them that gradation compliance had been a problem for earlier contractors. Appellants ignored these verbal warnings, whereas in Thorn the contractor was permitted to rely on an oblique verbal statement by a low-level employee that the material "could be used". The legal principles in Thorn do not apply otherwise in this case.

The Court's Opinion should be modified to make it consistent with the Trial Court's decision. The Trial Court was better placed to decide whether the Plans and Specifications were "misleading" in the context of the evidence. This determination requires a comprehensive understanding of the facts which the Trial Court possessed.

Respondent has not breached the contract. It provided written information which is factually correct. Information supplied describes two materials sources both used successfully

by other contractors along with selected data concerning the sites. The failure of the contractor to produce a satisfactory product was related to contract performance and lack of care, and not to information supplied by Respondent.

ARGUMENT

I.

THE INFORMATION SUPPLIED ON SHEET 2B OF THE PLANS AND SHEET 44 OF THE SPECIAL PROVISIONS IS NOT MISLEADING TO A COMPETENT CONTRACTOR

The law is clear that in order for a contractor to prevail on a theory of misrepresentation he must in essence prove two things: (1) that he was "acting reasonably and was misled by incorrect plans and specifications" as the California Court said in Souza & McCue Construction Co. v. Superior Court, 57 Cal.2d 508, 370 P.2d 338 (1962), to which this Court has in Thorn Construction Co. v. UDOT, supra, added that a pre-bid verbal representation can also be construed to mislead a contractor, and (2) that he has visited the site of the work and made a reasonable inspection and is accountable for anything which is obvious from such site visit. (Mojave Enterprises v. U.S., 3 Cl. Ct. 353,

The dispute in this case, unlike Thorn, involves primarily the adequacy of written information. Verbal information was related by UDOT's Engineer Mecham to Parson's agent Wilson of possible gradation problems. Wilson denied the warning, but the Trial Court apparently placed some reliance on Mecham's version of the telephone conversation. The conversation is exactly opposite to Thorn in that it warns of a possible problem. There was an earlier verbal warning to Wilson about the limestone pits on the San Rafael by Eldred Swapp, a retired UDOT

Project Engineer, whose testimony went unrefuted at trial and which also put Appellants on some duty of inquiry.

The fact that the tests in Pit 2 found on Sheet 2B of the Plans were mostly taken in 1969 in a location previously excavated apparently troubles the Court. Aerial photographs in evidence taken prior to construction in or around Pit 2 show an exposed rock mass. (It is within the right-of-way of the now existing I-70 freeway.) The 1969 tests were taken several hundred feet south of existing I-70 at points in this rock formation. The one subsequent test described on Sheet 2B was of the same rock mass north of the I-70 roadway but still within the right-of-way limit. The later test confirmed the 1969 tests, and they were included for information purposes. In a properly conducted site visit a competent contractor should recognize that the material where the 1969 tests were conducted had been removed. Later tests which the Court makes reference to as indicating that the material "might be marginal" were taken in a location west of the existing pit and would represent another "layer in the cake" which is apparent in photographs and testimony which was before the Trial Court.

Indications of potential problems in crushing required materials are evident in the test results. One contractor stated that he anticipated "easy crushing" because the L.A. Rattler test results indicate soft material. Test results with a range of hardness between 30 and 39% should alert a contractor to expect to produce an excess of fine-sized materials. The pits were "limestone ledge rock" as contrasted with a typical alluvial

deposit and required blasting to remove material. Appellants' blasting left much harder, better rock in fragments too large for its crushing system which further reduced the quality of material produced. "Overburden" was an obvious problem not recognized by Appellants.

The pit evaluation report for an earlier Project which recommended that Pit 2 not be used for future road projects was fully explained by Eldred Swapp, the Engineer, who stated he knew of no available material any better than the two sources on Sheet 2B.

The State had substantial information covering two earlier projects and a foundational geological study in two large bound volumes. The question isn't that the State was "selective" in what it chose to display on Sheet 2B, as the Court notes, obviously it was. The question rather is, did the information on Sheet 2B accurately reflects the material in the pit? The conclusion of the contractors who testified, Eldred Swapp and Jerry Mecham, the UDOT Engineers who worked on Pit 2 projects, a Geologist employed by the Utah Geological & Mineral Survey, and materials engineers for UDOT, was in the affirmative.

Given the expressed attitude of the contractor as to the capability of its equipment to produce the desired product at the time it bid the project and the failure of Wilson and McDonald to recognize difficulties evident to other contractors and their own more experienced company personnel, it is highly questionable whether Appellants would have altered their bid had they seen and examined all available UDOT data concerning Pit 2.

The Court's Opinion discusses the misrepresentations concerning the "two designated prospects" and refers to the "suitability of the borrow" in the prospects. (To set the record straight only Prospect 2 is at issue. There was no evidence concerning Prospect 1 being anything other than as represented.) Prospects 1 and 2 are not "borrow pits". A "borrow pit" is a generic source of highway embankment or fill material, all of which is usable. Rather, Pit 2 is an "aggregate source" containing materials which had been tested and passed for use in the production of crushed rock to be later incorporated into a bituminous mixture. The source is "acceptable in general", a term commonly used in the construction industry, since not all materials in the pit can be used to produce "aggregate".

Respondent reiterates that its representations on Sheets 2B of the Plans and 44 of the Special Provisions are not misleading when properly interpreted as is expected from a reasonable, competent contractor.

Pit 1 was always available for use by Appellants, and the BLM property north of the right-of-way fence was made available to Appellants very early in the project. Evidence before the Court indicated Pit 1 to be a better quality source than Pit 2, and the BLM property contained the same formation successfully used by earlier contractors without the layer of "overburden".

Respondent respectfully submits that Sheet 2B is not misleading. It may be incomplete as Don Killmore, the Area Engineer for the Federal Highway Administration testified at

trial, in which case Appellant had a duty to inquire further and examine records referenced in the Special Provisions. Both Wilson and McDonald knew what records are kept, where they are kept, and how to obtain them.

The problem in this case is the contractor's inability to perform, not the alleged difficulties in the plans and specifications. Appellants are attempting to shift the contractor's responsibility to Respondent.

This Court has said in the case of Nielson v. Chin-Hsien Wang, 613 P.2d 515 (Utah, 1980), that "... the evidence and all inferences that fairly and reasonably might be drawn therefrom must be viewed in a light most favorable to the judgment entered." (Also citing Cheney v. Rucker, 14 U.2d 205, 381 P.2d 86 (1963); and Charlton v. Hackett, 11 U.2d 389, 360 P.2d 176 (1961). Legal conclusions by the Trial Court are heavily dependent on close issues of fact.

II.

PARSON CONSTRUCTION COMPANY FAILED TO PERFORM A COMPETENT PRE-BID SITE INVESTIGATION, AND THE COURT'S DECISION TO SUSTAIN THE TRIAL COURT IN THIS REGARD IS CORRECT.

Respondent agrees with Appellants as to their allegations in their Point III that the Court has partially based its decision on a site visit made following the opening of bids. This, however, actually strengthens the Court's decision and the fundamental contention made by Respondent that Appellants' approach to the project from bid preparation through performance lacked competence as explained hereafter.

There were two site visits by Appellants prior to the commencement of any construction operations. One performed prior to bidding by McDonald and Wilson who prepared Appellants' bid. McDonald's testimony was impeached at trial on whether Appellants in fact relied on Sheet 2B of the plans. (His Deposition statement was that they did not rely on Sheet 2B, whereas at trial his testimony was directly contrary.) Testimony concerning the first site visit is therefore questionable and self-serving. The first site visit was not accompanied by any UDOT employee, unlike other bidders on this project.

The second site visit occurred after the bid opening and was made by Jack Parson Sr., the company founder, and its chief materials superintendent. Jerry Mecham, UDOT's Project Engineer, accompanied this second visit which included Prospects 1 and 2. Mecham was asked if there were any restrictions on the depth of removal in Pit 2 since the rock formation which earlier contractors had worked in and which was evident on the north and east side of Pit 2 was visible under other material on the east side of the pit.

During this second site visit the unrefuted statement of Jack Parson Sr. to the materials superintendent was overheard by Mr. Mecham. The statement was that, "it looks like Mont has bought us another one", and was understood by Mr. Mecham to mean that Wilson had mistakenly bid the job.

The lack of competence with which Appellants conducted their first site visit is evident when the following evidence is considered, all of which was before the trial judge:

1. The warning by Eldred Swapp to Wilson that the limestone pits would generate an excess of fine material and had required use of a sand filler.

2. Parson (Wilson and McDonald) was unfamiliar with the area of the project and had never worked in that part of the State.

3. Parson never inquired who the contractors were that had used the pit on previous I-70 projects as referred to in Sheet 44 of the Special Provisions. (While there is no requirement to do this, all the other bidders knew who they were and were aware of conditions they encountered.)

4. No contact was made, even by telephone, with UDOT materials personnel prior to bidding.

5. Parsons elected not to do any drilling or excavation prior to bidding. The pit was already open, faces showing the material strata visible and the roadway cut paralleling the east part of the source could be viewed. No competent contractor could ask for better site information.

This Court has earlier considered a contract requiring a site visit which charges a contractor with knowledge of conditions apparent from such visit and apparently approved such provision in the case of Allen-Howe Specialties v. U.S. Const. Inc., 611 P.2d 705 (Utah 1980).

The reason for requiring a prospective bidder to visit the site of the work prior to submitting a bid is to advise a bidder as to things which are already obvious. [See Mandel v. U.S., 424 F.2d 1252 (8th Cir. 1970)]. A bidder must be held to

the standard of that which a prudent bidder should customarily use in making a judgment regarding the quantity, quality, and methods of performing the particular work at the particular time and place. [See Charles T. Parker v. U.S., 433 F.2d 771 (Ct. Cl. 1970)].

There are a number of cases wherein contractors have been denied relief either under "changed conditions" provisions where contracts have contained them or in cases alleging misrepresentations by the owner based on conditions which were "unknown", "unusual", or "not recognized" at the time of bidding. The common thread running through these cases is that the bidder is expected to possess a certain level of knowledge, competence and experience and is not allowed to recover from an owner for the lack of such.

Some typical cases are as follows: In the Appeal of Call Construction Co., ASBCA 7627, 62 BCA 3590 (1962). Here, the board rejected a claim for difficulties caused by seepage at a job site in a reclaimed swamp area. The Board reasoned that soil and water characteristics were to be expected. In Husman Brothers, Inc., DOT CAB No. 71-15, 73-1 BCA ¶ 9889 (January 26, 1973), the board held that a contractor failed to realize the laws of nature and should have known "the type of soils, the climate and that 'pumping' or capillary action of water in that type of soils is a common problem." In Leal v. U.S., 276 F.2d 378 (Ct. Cl. 1960) the Court denied a claim and specifically noted that other contractors raised questions in the bid process

about certain water conditions. The Court felt with such evidence, conditions at the site and information provided to the bidders, it was reasonable to expect the encountered conditions. (The Court specifically found that furnished plan data would indicate to an experienced operator the existence of water. Such conclusion supports Respondent's contention that UDOT furnished data contained no surprises regarding difficulty in producing desired gradation of the aggregate to an experienced bidder since a high wear test (L.A. Rattler) percentage would indicate a high level of waste in fine sized material.)

Courts have also held that if conditions in the work are commonly known, and the contractor fails to inform himself of those conditions, he has not established a claim. [Biggers Construction Co. Ins., EBCA No. 46-4-79, 81-1 BCA ¶ 14,848 at 73,316 (Dec. 19, 1980)] (Soil make-up and compaction difficulties in soils west of Idaho Falls, Idaho, are not unknown or unusual and contractor failed to inform itself of these conditions.) Also, Husman Brothers, Inc., DOT CAB No. 71-15, 73-1 BCA ¶ 9889 (January 26, 1973), holds that the contractor is held to what is "common knowledge", and the Court stated as follows:

> We must consider pertinent climatological, hydrological and geological data and all other relevant and probative evidence about the geographical area involved. The contractor is held to a standard of knowledge of ordinary usual conditions in a particular geographical area.

Courts and Boards have held that such a contractor is chargeable with knowledge of local conditions at the job site which is readily obtainable from local contractors on request.

(Appeal of Daymar, Inc., DOT CAB 77-13, 78-1 BCA 12903 (1977). In this case, a Nebraska contractor was presumed to be aware of conditions in Montana that were matters of local common knowledge.

The problem of soft rock and excessive waste in gravel pits in Southeastern Utah is common knowledge to contractors and residents in that area. The behavior of limestone and its tendency to reduce to a fine consistency when handled and subjected to crushing is "common knowledge" in the industry according to trial testimony. The inherent difficulty in handling materials which have been blasted, such as in Pit 2, was explained by expert testimony at trial.

Appellants are responsible for their lack of knowledge as to local conditions and the consequences of their aggregate production operations.

III.

APPELLANTS ELECTED TO DEFAULT THE CONTRACT AND ARE LIABLE FOR THE CONSEQUENCES OF SUCH DECISION

Appellants argue in their Petition for Rehearing that the Court's Opinion is a determination that UDOT breached the construction contract. Appellants cite the case of Admiral Plastics Corp. v. Trueblood, Inc., 436 F.2d 1335 (6th Cir. 1971) as authority for the proposition that where both parties have breached the contract, neither party is allowed to recover contract damages. The ruling of the Court is actually much narrower than Appellants represent. The central issue in the case was, who was at fault for ordering a wrong component part

for a machine? The Court did not decide who was at fault, but found both parties did not act in good faith and that as a result there was a mutual rescission of the contract. This case is not in point since the good faith of Respondent is obvious in its attempts to resolve the dispute between the parties. When Respondent could not agree to meet the excessive demands of Appellants, the Appellants elected to default the contract. Assuming Respondent had in fact breached the contract, Respondent could have elected to perform and recover its damages later. By electing to default the contract, Appellants assume responsibility for Respondent's increased costs if it cannot prove that Respondent materially breached the contract. The law does not favor allowing a party to fail to perform a contract, see Green v. Palfreyman, 109 U. 291, 166 P.2d 215 (1946). This Court has held in the case of R.C. Tolman Constr. Co. v. Myton Water Association, 563 P.2d 780 (Utah, 1977), that deficient plans and specifications entitle a contractor to recover extra cost if conditions are different than represented or reasonably to be anticipated. This does not justify Appellants' default in performance and Respondent should be entitled to recover its damages in any event.

Appellants further argue that their unilateral mistake of fact as to the quality of the material in the pits was affirmatively caused by Respondent. It was Appellants' own negligence or lack of competence which caused it to be mistaken as is glaringly evident in the contrast between the two

contractor site visits prior to construction. Material quality in the pit was adequate, unfortunately, Appellants lacked the ability to perform.

CONCLUSION

The Court's decision to sustain the Trial Court is correct. Appellants simply did not act reasonably in the conduct of its pre-bid site visit or competently in its performance of the work.

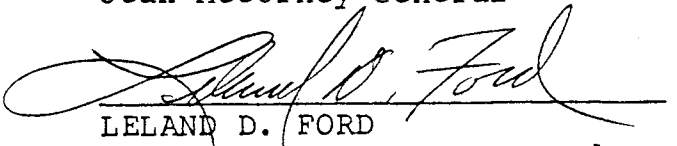
Sheet 2B of the Plans and 44 of the Special Provisions are not misleading to a reasonable, prudent, and "competent" contractor. "Competent" in this instance means a contractor possessed of "local common knowledge" of the area, of conditions to be expected in a limestone pit, and it also means a contractor possessed of adequate know-how and equipment to produce a product.

Respondent does not agree that this Court's holding in Thorn is applicable to this case. To the extent that it may apply, the facts would appear to require its use against Appellants on the issue of reliance. UDOT's verbal representations are opposite to that which the Court found in Thorn.

If the Court elects to change its Opinion of April 1, it should be confined to an affirmation of the trial Court's Conclusion that the Plans and Specifications do not misrepresent site conditions.

Respectfully submitted this 7th day of July, 1986.

DAVID L. WILKINSON
Utah Attorney General



LELAND D. FORD
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that two copies each of the foregoing Response to Petition for Rehearing by Respondent were personally delivered to the following this 8th day of July, 1986:

John P. Ashton
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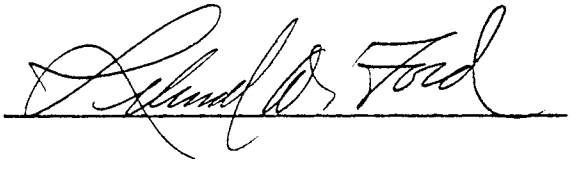

APPENDIX

STATEMENT OF THE NATURE OF THE CASE

Appellant, Jack B. Parson Construction Co. ("Parson"), a general contractor, failed to produce bituminous surface course (asphalt) in accordance with contract requirements on a project situated on Interstate Highway 70 in Emery County. Parson alleged its failure was caused by an inadequate materials source and that the Utah Department of Transportation (UDOT) had misrepresented said materials source. Parson demanded that UDOT issue a supplemental agreement to compensate for its added costs. After a period of negotiations it became clear that no resolution was possible due to demands by Parson considered as unreasonable by UDOT. UDOT then ordered Parson to proceed to perform the contract under threat of default. Parson failed to proceed and UDOT declared the contract in default. Parson then sued UDOT alleging its faiulre to issue a supplemental agreement was a breach of contract and UDOT counterclaimed alleging Parson to be in default. UDOT also filed a third party action against Parson's surety under its performance and payment bonds. Each of the parties sought a determination by the lower Court of its legal position and alternatively an award of damages.

DISPOSITION IN LOWER COURT

Following a trial to the Court in excess of three weeks duration, with numerous witnesses and over 200 exhibits, the trial judge found in favor of Respondent and ruled that Parson had defaulted the contract and was liable to UDOT for damages. The Court also ruled that the Aetna Casualty and Surety Co. ("Aetna"), who had issued payment and performance bonds, was, together with Parson, liable to UDOT for its damages to be determined in a later hearing. *

RELIEF SOUGHT ON APPEAL

Respondent seeks an Order affirming the District Court Judgment which it believes to be well founded in both factual determinations made by the Honorable Peter F. Leary and the legal determinations based thereon.

STATEMENT OF FACTS

This case involves close questions of construction contract law which turn on a careful analysis of specific

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* Note: The Court's Memorandum Decision is dated September 11, 1980. Written Findings of Fact, Conclusions of Law and a Formal Judgment were signed and filed of record on March 24, 1981. UDOT thereafter relet the construction contract to another contractor selected by competitive bid on the 7th day of July, 1981. Construction was completed in late 1982 and further action by UDOT to recover damages awaits the outcome of this appeal.

facts. Appellant's Statement of Facts contains inaccuracies, irrelevant material and requires this supplement to make certain that the Court clearly understands the strong factual as well as legal basis of the trial Court's ruling.

One key provision often found in construction cases is a "differing site conditions" provision which determines what happens when actual site conditions encountered are other than represented. The contract involved herein ("contract") does not contain such a provision contrary to Appellant's assumption. Under UDOT specifications, a contractor is allowed relief only when there is a "change in the plans or in the character of construction" which is directed by the engineer. (Ex. 1-P, Section 104.02(4), Tr. 1201-1202) No change of this nature was recognized by UDOT in this case.

The contract required the placement of 5" of bituminous surface course (asphalt) with at least 2 1/2" to be placed by October 15, 1978. Liquidated damages of $300.00 per calendar day are specified for failure to meet said date. (Ex. 3-P)

Prospective bidders are not obligated to use either material site on Sheet 2B, and test data shown is also subject to a disclaimer provision. (Ex. 1-P, Sec. 106.02)

Prospects 1 and 2 were previously determined to be acceptable in accordance with UDOT's requirements for this project and for earlier projects and were used successfully by other contractors. (Tr. 1020-1023, Sheet 2B, Ex. 2-P)

PRE-BID ACTIVITIES AND BID

Contract provisions charge Appellant with knowledge of anything apparent from a site visit. The contractor by submitting a bid warrants that he has "satisfied himself of actual conditions to be encountered." (Ex. 1-P, Sec. 102.05) UDOT merely stated that the "quality" of materials was suitable "in general" and warned that furnished information was only "representative" and that "variations" should be considered "usual" and are to be "expected." (Ex. 1-P, Sec. 106.02) A federal engineer familiar with UDOT specifications, this contract in particular, and how other States provide pre-bid information stated that UDOT's information regarding Pit 2 was "fairly minimal." (Tr. 1256, 1257) He stated that Appellant "should have sought more information." (Tr. 1262) The phrase "acceptable in general" is not a guarantee and does not require UDOT to "bear the risk" of a contractor's failure to successfully use the described material. (Appellant's "Facts," P. 3) Appellant's pre-bid examination of the project was negligent and superficial. This was recognized in conversation by its

founder Jack B. Parson, Sr. while talking to Duane Kern and overheard by UDOT's Engineer Jerry Mecham ("Mecham") prior to any work. (Tr. 1290-1292) Appellant's General Manager and Vice President John Mont Wilson ("Wilson") did not inquire who "previous contractors" were that had used Prospects 1 and 2 referred to in UDOT documents, or inquire as to previous problems or experience with these pits. (Tr. 414). Wilson and Appellant's Materials Engineer Dean McDonald ("McDonald") visited the construction site prior to bidding but did not request that Mecham be present during their site visit, a practice often followed. (Tr. 444-445) Appellant had never worked in the project area before, (Tr. 418) and Wilson likewise lacked experience in or knowledge of the area. (Tr. 418-419) Wilson had been specifically warned of difficulties with Prospects 1 and 2 approximately a year earlier by Eldred Swapp, a retired UDOT Engineer. Swapp said the pits would require adding a supplementary material according to his unrebutted testimony. (Tr. 1467-1468) Mecham said he informed Wilson by telephone prior to bid opening that previous contractors had to blend sandy "filler" material into the aggregate to meet specifications. (Tr. 1285-1287, 1293) Wilson denied that Mecham so informed him and claimed he first learned of it at the pre-construction conference. (Tr. 1752-1753) Wilson admitted that he registered no objection or protest about this

crucial point at the said conference. (Tr. 1782-1785 & Ex. 133-D) Both Wilson and McDonald were former UDOT employees, knew the type of UDOT records available, where they could be obtained, and that the contract invited a bidder to inspect them. (Tr. 417 - Wilson and 635-639 - McDonald & Ex. 3-P, Spec. Provision, "Bidding Requirements & Conditions, Sec. 102.05 as changed therein.) Two contractors previously used Prospect 2, one used Prospect 1 and their records were available in Price and Salt Lake City. Appellant's superficial pre-bid investigation is evident in the testimony of McDonald. He stated there was "much discussion" concerning the test results on Sheet 2B with Wilson and what they meant. (Tr. 517) McDonald said he tried calling Respondent's District Materials Engineer Al Spensko ("Spensko") but failed to reach him. He neither identified himself nor requested Spensko to return his telephone call. He admitted he knew Spensko would have information concerning the pits and area geology. Although unfamiliar with the area, he apparently was not seeking geologic information. He said he knew that Prospect 2 was located in the Moenkopi geologic formation which is well known to geologists. (Tr. 634-642) Published geologic data of the area described this formation in detail. (Ex. 147-D) Available UDOT publications detailed it as well. (Ex. 191-P and 192-P) Said publications describe one of the members of

that formation as the "Sinbad limestone." Spensko and Swapp who are both graduate geologists confirmed that Pit 2 was primarily made up of the "Sinbad limestone." (Tr. 1090, 1472-1480) Variations in this geologic layer were explained by another geologist. (Tr. 1720-1721) McDonald, although a geologist, did not discover this available information or its implications.

McDonald claimed at trial that Appellant relied on Sheet 2B and the gradations shown thereon. His testimony in a prior deposition was, however, directly contrary to this and indicated an almost total disregard for this information. (Tr. 541, 666-667) Appellant's Statement of Facts App. - Facts) claims "heavy reliance" on UDOT's representation in Sheet 44 (Ex. 3-P) that Pit 2 was "acceptable in general" and then asserts that other contractors also relied on such representation. (Tr. 1604) The reference to the transcript by Appellant is a qualified statement by an experienced engineer executive concerning the type of tests a contractor relies upon and those which they do not rely upon. (See Tr. 1600-1604) Other contractors who testified indicated little, if any, reliance on the said gradation information. Altogether they show how misplaced and incompetent Appellant's claimed reliance on such information was. (Tr. 1580-1586; 1632; 1892-1893) Spensko explained that UDOT does not make an effort to present

information concerning gradation results which a contractor can necessarily correlate to. (Tr. 1529-1531)

Appellant correctly points out that its bid was less than five percent below the next low bidder (Tr. 238), but neglects to add that it was approximately 11% under the engineer's estimate, or that the contractor who previously used Pit 2 to pave the highway originally was the highest of six bidders. Its bid was more than $650,000 higher than Appellant. (Ex. 6-P)

Appellant lacked experience with limestone ledge rock pits. (Tr. 629-630) Such pits often create excess minus 200 material; [Minus 200 material is extremely fine grained like flour. The material will pass a screen with 200 openings per lineal inch, hence the reference to "minus 200."]; limestones vary in grade and in hardness. (Tr. 1720-1721, 1090)

Appellant erroneously assumed that neither Pit 1 nor Pit 2 contained sufficient material for the entire job (P. 7, App. - Facts), but were told before commencing operations in Pit 2 that Pit 1 could be expanded to obtain all material from said pit. (Exs. 132-D & 133-D, Tr. 470-471)

PERFORMANCE BY CONTRACTOR

A required UDOT test to determine acceptability of

asphalt aggregate is the Los Angeles Wear Test, or "L.A. Rattler Test." This standardized test measures the percentage of breakdown in an aggregate sample using a special machine. It is an indicator of how asphalt gravel may "wear." UDOT's upper wear limit is 40%. (Ex. 1-P, Sec. 403.03) The L.A. Rattler Test does not measure compliance by a contractor. (Tr. 1592-1593)

Contract provisions require separation of aggregate material into at least two separate piles. All material has had to pass through a 3/4" screen (referred to as "3/4 inch minus"). When two piles are used, the material in one aggregate pile must pass through a number 4 screen (4 openings per lineal inch) and material in the other pile will be retained. (This allows for variation in the size of material fed into the hot mix plant and assists in meeting a gradation specification.)

Appellant erroneously asserts Respondent was responsible for its "choice of crushing equipment and its arrangement and organization, etc." (App. - Facts) The evidence Appellant cites (Tr. 216-218, 257) is Wilson's testimony and is his visual impressions and descriptions of photographic exhibits. There is nothing therein which points to any direction in Sheet 2B of the "Plans" (Ex. 2-P) or Special Provision Sheet 44, (Ex. 3-P) regarding equipment selection, usage of equipment, choice of either pit,

direction of removal of material in a pit or a requirement to even use either Pit 1 or 2. Appellant can use any source it selects, subject only to UDOT's right to test material for its suitability. (Sec. 106.02, Ex. 1-P)

Appellant was late moving its crushing equipment on site and in commencing to pave. (Ex. 133-D, Tr. 263) The first pavement was placed October 5, 1978. (Tr. 263) Contract provisions restrict paving after October 15. (Ex. 3-P, Sec. 403.11) Appellant sought and received permission to extend this deadline under certain conditions. (Exs. 12-P and 14-P) Appellant failed to meet contract requirements both as to gradation of material and asphalt content based on random samples of in place material. (Exs. 37-P and 38-P) Appellant's main difficulty was a deficiency of aggregate which would pass a number 16 screen (16 openings per inch) and be retained on a 50 screen (50 openings per inch) or in an excess of material passing the 200 screen. (Exs. 37-P and 38-P) If adjustments were made to reduce the minus 200 material it threw the material between the 16 and 50 screen out and vice versa. (Ex. 37-P and 38-P) This resulted in reduced payment for the item under contract formula which allows the contractor the option to remove and replace the material or to accept payment at a reduced unit price if the calculated pay reduction is not more than 30% of the full unit price. If the calculated reduction is over

30% and less than 50%, the "engineer" has the option to order removal of the product or allow it to remain in place. (Ex. 3-P, Special Provision Sheets 30-40)

The average of individual tests of material in stockpile indicated a possibility of achieving specification gradation requirements. (Ex. 41-P) However large amounts of material with high amounts of fine sized material, represented by individual samples in both piles, which exceeded the overall average could not have been expected to combine successfully. (Tr. 455, 1303-1313, Exs. 201-D, 204-D) Mecham warned Appellant of adverse problems to be expected later in recombining the stockpiles due to their borderline make-up. (Tr. 1306-1309, 1320, 1321) Wilson admitted that Appellant intentionally builds borderline stockpiles to maximize production and that this limits the capability to recombine the stockpiles and achieve gradation specifications. (Tr. 419-422) Appellant's stockpiles were not uniform in their make-up. There is over a 9 percentage point variation in the percent of minus 200 material passing the finest and most critical screen as revealed by individual stockpile tests. (Tr. 1440-1442, Ex. 204-D) This is further illustrated by comparing a graphic plot of Parson's tests with those of two adjoining projects constructed at the same time by other contractors where uniformity is clearly evident. [Ex. 219-D (Parson), Ex. 220-D & 221-D,

Tr. 1440-1445 for detailed explanation.] Part of this lack of uniformity was caused by the manner in which the stockpiles were constructed, which resulted in degradation and segregation. (Tr. 1108-1111, 1391-1398) Appellant's stockpiles were so borderline in their make-up due to lack of care by Appellant in their construction that they were into the limits of deviation allowed for contract compliance without any further breakdown of material normally caused by handling in mixing, hauling, placing and partially compacting, all of which occurs before compliance testing. (Tr. 1306-1309, 1353) Appellant's Fact Statement complains of "as much as 50% waste." Wilson's testimony to the contrary was that the overall average waste was 35 to 40 percent. (Tr. 439) Waste amounts as high as 50% are normal in District 4 (Southeastern Utah) according to Spensko. (Tr. 1520) Contractors experienced in that area of the State confirm this. (Tr. 1625, 1635, 1866-1868) The previous contractor using Pit 2 experienced 25% waste with very careful control. (Tr. 1626-1627) Appellant claims to have expended "elaborate and costly" attempts to achieve compliance. (App. - Facts) Unfortunately none of these things worked, but Wilson admitted to a number of techniques that would probably have worked. (Tr. 457-459) UDOT suggested a blend sand, but Appellant's lack of know-how was again demonstrated. (Tr. 460-463, 1333-1342, Ex. 208-D).

Appellant's whole crushing operation suffered from lack of know-how. For instance, the reject system they designed to achieve a better product resulted in rejection of material of which 63% would have been in compliance. (Tr. 1322-1329, Ex. 205-D) On production days 5, 6, and 7, a mathematical analysis of the material put into the plant results in an expected product with 12.5% minus 200 which is what actual test results revealed, but which is unfortunately well above specification limits. (Tr. 1342-1343, Ex. 143-P) Contrary to Appellant's assertions this would indicate no breakdown. (App. - Facts) Appellant was within compliance on production days 4 and 5 but made further adjustments and was again out of compliance. (Ex. 38-P)

Appellant refers to two problems, "excessive waste" and "breakdown" of material. (App. - Facts) As pointed out above, "waste" was probably normal for the area and "breakdown" was either not occurring or it was being controlled by Appellant's efforts.

Appellant operated a total of 7 days in two weeks trying to produce an acceptable paving product. It shut down operations on October 20, 1978.

Appellant's demand for a Supplemental Agreement of October 17, 1978 (Ex. 15-P) was not answered in writing until February 1, 1979. (Ex. 16-P) Frequent discussion occurred during the interim. (Tr. 1343) Respondent's

offers and concessions during the Winter of 1978-1979 were all attempts at compromise without jeopardy to the public or other bidders as explained by Bert Taylor ("Taylor"). (Tr. 1171-1174, Ex. 105-P, Ex. 22-P)

One of UDOT's concessions was to core drill Prospect 2 to determine its make-up. Appellant refers to the presence of 35 feet of overburden as revealed by these cores, but fails to mention that they were obtained some 400 feet east of the existing face of the pit. (Tr. 1064-1065, Ex. 40-P) Appellant's Superintendent knew where the "good material" existed before any work commenced since it was then visible. He further must have known that it might be necessary to go as deep as 36 feet "to obtain better rock." (Tr. 1298, Ex. 111-P) Appellant's drilling company was apparently instructed to drill to this level as well. (Tr. 1301, 1302) Testimony and photographic exhibits established that material in Pit 2 was deposited in layers and that additional layers of material are encountered as removal proceeds to the east and that the general trend of all the layers is a dip to the northeast which together with the added layers accounts for increasing amounts of unknown material over the identified harder material as operations moved eastward. (Tr. 1080-1081) Photographs in evidence show a considerable quantity of large rocky material in waste piles which Appellant's crushing system would not

handle. (Tr. 1437, 1438, Exs. 216-D, 217-D) This material was not reduced sufficiently by blasting and was apparently similar to the material in the north face of Prospect 2. (Ex. 124-P) Investigation showed that material with low wear test results began at a depth of about 15 feet in Pit No. 2 as the face existed after Appellant shut down operations in October 1978, and this became the basis of Respondent's offer to assist the Appellant by voluntarily paying for removal of the top 15 feet of material. (Tr. 920-924, 1047-1050, 1052, 1154-1156, Exs. 82-P, 114-P, 185-D)

Appellant's reference to an inadequate quantity of material in Prospect 1 has been earlier referred to as erroneous since it was discussed in the preconstruction conference. (Exs. 132-D and 133-D) One bidding contractor planned to use Prospect 1 for all the material. (Tr. 1580-1586)

Appellant criticizes UDOT for lack of testing in the BLM property adjoining Prospect 2 on the North. (App. - Facts) Spensko explained why it was not necessary. (Tr. 1080) Taylor concurred in this decision. * Appellant further cites delay in its availability. (Ex. 29-P) It

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* UDOT subsequently let a contract to another contractor who completed this project in 1981 and 1982 and the "BLM" Property was successfully used by that contractor to complete the work.

is clear that Appellant could have used the "BLM Property" if they had so desired prior to formal written permission. (Ex. 30-P) Formal permission was received before Appellant walked off the job (Ex. 32-P), but Appellant wanted a guarantee as to the quality of the material which Respondent refused to provide. (Exs. 31-P, 33-P, Tr. 386)

Appellant alleges the Respondent refused to"budge" and grant a Supplemental Agreement. The evidence is to the contrary and shows Appellant to be the one who wouldn't "budge," but instead consistently held out for more and more concessions. Taylor's testimony clearly illustrates this. (Tr. 1150-1193) See also Exhibits 13-P, 15-P, 16-P, 18-P, 20-P, 21-P, 22-P, 23-P, 25-P, 26-P, 28-P, 29-P, 30-P, 31-P, 32-P and 33-P)

INFORMATION NOT REVIEWED BY APPELLANT

Appellant alleges undisclosed information in possession of UDOT contradicted Sheets 2B and 44. Specifically Appellant alleges undisclosed test data which reveal high wear percentages on the L. A. Rattler Tests. UDOT had complete records of two previous contracts which utilized Prospect 2 and additional investigatory tests of the pit and of the nearby "west area." (Ex. 77-P) The location of this information was disclosed to bidders. (Ex. 3-P, Spec. Provission Sec. 102.05) Wilson and McDonald admitted they

knew it existed but chose to ignore it. (Tr. 417, 635-639) Pit 2 as viewed by Appellant was located on the north side of the highway. Earlier contractors started several hundred feet south and moved north and removed an exposed rocky material. (Tr. 855, 856, 862, 934, 1458, Ex. 76-P) Appellant now refers to isolated test results in a large mass of available information which Appellant earlier chose to ignore which show L. A. Rattler results with a wear percentage greater than 40%. Pit 2 had already demonstrated that it can produce specification material. (Ex. 22-P) It was established that L.A. Wear test results of the same sample of material can vary by as much as 3%. (Tr. 927-930, Ex. 81-P, 184-D) It was also shown that since Sheet 2B disclosed an L.A. Rattler wear percentage as high as 39%, it was reasonable to assume the pit contained material with a wear in excess of 40%. (Tr. 1260, 1531, 1599-1601) A high wear percentage is considered an advantage since it indicates "easy crushing." (Tr. 1591-1593, 1624) It does, however, require care in crushing the material. (Tr. 1594-1596) Spensko explained why Pits 1 and 2 were designated by Respondent and that there was no known alternative. (Tr. 1012-1016) Swapp's report concerning Pit 2, which Appellant refers to, was available on request to anyone and Wilson and McDonald knew State procedures required its preparation. (Ex. 89-P) Sheet 2B and its high L.A. Rattler percentages

meant essentially the same as Swapp's comments in his report to UDOT to a knowledgeable contractor since W.W. Clyde elected to avoid Pit 2 and planned to get all material out of Pit 1. (Tr. 1583-1587) Wear factors shown on Sheet 2B for Pit 1 are not as high as Pit 2. UDOT's 1975 tests showing a high quantity of minus 200 material which Appellant complains about were taken some 800 to 1000 feet west of Appellant's work area and of the location of Test 1A. (Tr. 1007) The 1975 tests do not indicate that they were "crushed ledge rock" as Test 1A does. (Ex. 77-P) Test 1A, according to McDonald, matches the average of Tests 1, 2, 3 and 4 on Sheet 2B. (Tr. 543) Spensko testified his intention was to show information on Sheet 2B which would illustrate what the contractor could expect to get from material in the exposed rock faces on the north and east. The 1969 tests and the one 1978 test are consistent and Spensko's decision not to do further testing as required by UDOT's materials manual for a new pit is realistic. (Ex. 92-P, Tr. 1000-1013, 1021-1022) Spensko further explained the problem with displaying historical information was in part due to a specification change which would affect its value. (Tr. 1028-1029) The "good" material was the exposed rock ledges which is obvious from photographs. (Tr. 808-811, Exs. 174-D, 175-D, 177-D)

Appellant raises concern over a wear test with a result

of 46.7% taken from its stockpile by the State and dated September 22, 1978. The State employee who performed this test explained that he performed it for his own information and that no one else was informed of the result since the test was not performed according to UDOT's prescribed procedure. (Ex. 80-P, 187-D, Tr. 883-901, 936-937) The said test result is marked "cleaned with air," and it was established that samples cleaned in this manner show higher percentages of breakdown than those performed according to prescribed procedures. (As much as 4.5%+) (Tr. 1493-1495, Exs. 189-D, 190-D) This information also explains why Appellant's test results conducted by an independent laboratory yielded higher percentages than State results on comparable material and served to invalidate them insofar as comparing results with State test results. (Ex. 16-P, Tr. 1537-1538)

Appellant refers to Taylor's letter of February 7, 1979 to FHWA as an admission by UDOT that Sheets 2B and 44 "incorrectly identified" materials in Prospect 2. (App. "C") Taylor explained this conclusion was made before he was fully informed. Taylor further explained that UDOT had really "not identified" the material in question and that the term "incorrectly identified" was really not accurate. (Tr. 1173-1174, 1186, 1205-1210, Ex. 101-P) FHWA's letter to Taylor commenting on this matter was acknowledged as

correct by Taylor and it in essence points out the need for further pre-bid investigation by the contractor. (Ex. 102-P) UDOT had made no effort to analyze the east face of Pit 2 except for one test (1A, Sheet 2B) since it was not known what a contractor might elect to do in Pit 2 or whether Pit 1 would be selected. UDOT had correctly identified Pit 2 as a whole and did not identify any one part of the pit or any part not readily capable of visual observation. (Tr. 966-1000)

Appellant's reference to Spensko's investigation of Pit 2 as "sloppy test procedures" (App. - Facts) is hypocritical. This was the third project to use Pit 2. Spensko selected an area to test, and the results confirmed previous test results of similar formations (Tr. 1029); two contractors had already successfully used Pit 2, and there was extensive information available to anyone interested in viewing it. Additional tests would have been superfluous. Appellant chose to ignore UDOT's invitation to examine other available written information and ignored direct verbal communication warning of potential difficulties. (Tr. 1467-1468, Spec. Prov. amending Sec. 102.05 of Standard Spec. - Ex. 3-P) Appellant's lack of care in its pre-bid examination is the "sloppy procedure," if there is one. (Tr. 799-802)

Appellant's claim that Spensko failed to mention that

Prospect 2 contained silt stone and sandstone assumes that there was a duty to do so. Since this material was easily visible and in addition is described in published geologic literature, Appellant could easily have acquired that knowledge. (Tr. 1090, 1092, 1095-1096, 1720, 1721, Exs. 191-P and 192-P; 180-D and 195-D)

Appellant presented two geologists who viewed the site after it was blasted and considerable material had been removed. (Waggoner & Osborne) Their statements concerning "drastic changes in quality in a short distance" and a "possible fault" contrast with Respondent's geologist witnesses; Swapp who worked the previous contract and who is well acquainted with the San Rafael area (Tr. 1455, 1465); Al Spensko who has worked in the area for years (Tr. 1092-1095, Ex. 176-D); and William Lund, who did not view the pit but had extensive experience in quarry operations with limestone rock. (Tr. 1723-1727) These geologists saw little evidence of any "drastic change," or faulting. Waggoner was reluctant to admit the obvious presence of a well marked and defined layer of rock obvious in two different photographs since it contradicted his "drastic change in quality" and "possible fault" theory. (Exs. 222-D and 231-D, Tr. 1811-1813) There was also some question concerning the exact geologic strata Pit 2 was located in. Powell (a UDOT geologist in charge of the core drilling)

mistakenly labeled the limestone as Kaibab. (Ex. 40-P) Spensko identified it as the Sinbad limestone member of the Moenkopi (Tr. 1083, 1090, 1092), Swapp confirmed Spensko's conclusion. (Tr. 1465-1466, 1471-1475) A careful analysis of all this geologic testimony and documentary evidence merely establishes that the same material used by previous contractors to successfully construct two previous projects existed in the area of the pit that Appellant chose to work in but that it was covered by added layers of different material which Appellant made no effort to dispose of or adequately deal with in its crushing operation. (Tr. 1461-1464.) These added layers were equally visible to both parties. (Tr. 1298-1302, Ex. 111-P)

Pit 2 contained suitable material but required careful quality control in aggregate production. Appellant's manner of operation is not the responsibility of Respondent. Johnson by contrast was careful and selective in the material and methods it used and succeeded where Appellant failed. (Tr. 1460-1461, 1464)

Pit 2 was "acceptable in general" as Respondent states in Sheet 44. Appellant is responsible for producing an acceptable product if it elects to use said source, and Respondent has specifically disclaimed any responsibility for Appellant's decisions based on such information. Facts in evidence support the specific findings of the

District Court that information supplied was accurate and that Appellant's problems were related to its methods of production, handling and storing of aggregate material.

ARGUMENT

I

APPELLANT'S CLAIMED RIGHT TO RELY ON PRE-BID REPRESENTATIONS IS UNREASONABLE BOTH LEGALLY AND FACTUALLY.

A. RESPONDENT'S DISCLAIMER IS VALID

Appellant asserts that this case is controlled by this Court's decision in Thorn Construction Co. Inc. v. UDOT, 598 P.2d 365 (Utah 1979). Appellant refers to language therein quoted and which originates in a leading case on pre-bid reliance upon written information which is Souza & McCue Construction Co. v. Superior Court of San Benito County, 57 Cal.2d 508, 20 Cal. Reptr. 634, 370 P.2d 338, 339 (1962). The general proposition Appellant relies upon is that:

> A contractor of public works who, acting resonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result submits a bid which is lower than he would have otherwise made, may recover in a contract action for extra work or expenses necessitated by the conditions being other than represented.... (Emphasis added)

This exact language is quoted by this Court with approval in the case of Schocker Constr. Co. v. State of Utah, 619 P.2d 1378 (1980).

The facts of this case show that Respondent in its

solicitation for bids provided certain "minimal information" (Ex. 2-P, Sheet 2B and Ex. 3-P, Sheet 44, Tr. 1256-1257) regarding two materials prospects often referred to as Pits 1 & 2. Appellant's Vice President and General Manager Mont Wilson selected Pit 2 after a site visit and a brief conversation with Respondent's engineer in charge of the project, Jerry Mecham. (Tr. 223-232)

Appellant seeks to place the entire responsibility for its failure to produce a specification product upon Respondent when its choice of Pit 2 was its own, the direction of material removal was its own, the selection of equipment and method of removal of material was its own, all without any control or direction of Respondent. (Sec. 106.02, Ex. 1-P, Spec. Prov., Sec. 102.05, Ex. 3-P)

Respondent's written representations on Sheet 2B specifically refer to Section 106.02 of its Standard Specifications entitled "Local Material Sources." (Ex. 1-P) This provision is referred to as a "disclaimer" and puts a contractor on notice that while the materials in a "designated source" may be "acceptable in general," the contractor shall "determine for himself the amount of equipment and work required to produce a material meeting specifications." It further qualifies sample information and warns that variations are both "usual" and "are to be expected."