

1987

Moon Lake Electric Association, Inc., v.
Ultrasystems Western Constructrs, Inc., and
Industrial Indemnity Company : Brief of Appellant

Utah Court of Appeals

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BRIEF

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IN THE COURT OF APPEALS OF THE
STATE OF UTAH

MOON LAKE ELECTRIC)
ASSOCIATION, INC.,)

Plaintiff/Appellant,)

vs.)

ULTRASYSTEMS WESTERN)
CONSTRUCTRS, INC., and)
INDUSTRIAL INDEMNITY COMPANY,)

Case No. 870212

Defendant/Respondent.

BRIEF OF APPELLANT
[ARGUMENT PRIORITY CLASSIFICATION 14b]

Appeal from Judgment of the
Seventh Judicial District Court
Duchesne County, State of Utah

The Honorable Dennis L. Draney, Judge

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Court of Appeals

IN THE COURT OF APPEALS OF THE
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MOON LAKE ELECTRIC
ASSOCIATION, INC.,

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vs.

ULTRASYSTEMS WESTERN
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Case No. 870122

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**IN THE COURT OF APPEALS OF THE
STATE OF UTAH**

MOON LAKE ELECTRIC,)	
ASSOCIATION, INC.,)	
)	
Plaintiff/Appellant,)	BRIEF OF APPELLANT
)	[ARGUMENT PRIORITY
vs.)	CLASSIFICATION 14b]
)	
ULTRASYSTEMS WESTERN)	
CONSTRUCTORS, INC., and)	
INDUSTRIAL INDEMNITY COMPANY,)	Case No. 870122
)	
Defendant/Respondent.)	

JURISDICTION

The Court of Appeals has jurisdiction over this case pursuant to Rule 4(a) and (b), Rules of the Utah Court of Appeals.

NATURE OF PROCEEDING BELOW

This is an appeal from a final order in a civil case in the Seventh Judicial District Court in which the Court granted Summary Judgment in favor of the Defendants/Respondents.

STATUTORY PROVISIONS

Appellant believes the following rules are applicable to this case: Rules 56, 59, 61, URCP. However, Appellant is not arguing for a new or different interpretation of these rules.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

POINT I. WAS SUMMARY JUDGMENT PROPER?

A. WERE THERE CONTESTED ISSUES OF MATERIAL FACT?

B. WAS MOON LAKE UNDER A DUTY TO PROVIDE AFFIDAVITS?

C. WAS ULTRASYSTEMS ENTITLED TO JUDGMENT AS A MATTER OF LAW?

POINT II. WAS MOON LAKE'S ACCEPTANCE OF ULTRASYSTEMS' BID CONDITIONAL? WAS THERE A CONDITION PRECEDENT TO MOON LAKE'S ACCEPTANCE OF ULTRASYSTEMS' BID?

POINT III. DID MOON LAKE INCUR DAMAGES?

POINT IV. SHOULD THE DISTRICT COURT HAVE GRANTED MOON LAKE'S MOTION FOR A NEW TRIAL OR TO SET ASIDE THE SUMMARY JUDGMENT?

STATEMENT OF CASE

Plaintiff/Appellant Moon Lake, (hereafter "Moon Lake") brought suit against Defendants/Respondents Ultrasystems Western Constructors, Inc. (hereafter "Ultrasystems"), and Industrial Indemnity Company (hereafter "Industrial Indemnity"), seeking forfeiture of a bid bond written by Industrial Indemnity. Ultrasystems obtained bid specifications and was qualified by experience to bid a project being advertised by Moon Lake. After being determined to be the low bidder and being awarded the bid, Ultrasystems determined it could not perform in accordance with the bid it submitted to Moon Lake for the construction of an electrical substation.

Discovery, mainly in the form of depositions, was conducted. Then Ultrasystems moved for Summary Judgment. Industrial

Indemnity joined in the Ultrasystems' Motion. Moon Lake opposed their Motion, and also moved for Summary Judgment. After memorandums were submitted, Judge Richard C. Davidson granted Ultrasystems' and Industrial Indemnity's Motions for Summary Judgment. Moon Lake's Motion for Summary Judgment was denied on January 30, 1987. The Summary Judgment was granted against Moon Lake on the proposition that Moon Lake had failed to file opposing affidavits.

On February 7, 1987, Moon Lake made a Motion for New Trial or To Set Aside Summary Judgment. Judge Dennis L. Draney, who replaced Judge Richard C. Davidson as District Judge on February 1, 1987, denied Moon Lake's Motion on March 10, 1987.

FACTS

1. Ultrasystems is a construction company involved in various construction projects throughout the United States. (See Ultrasystems Memorandum, No. 1, p. 340.)

2. Moon Lake is a rural electric co-operative operating in Eastern Utah and Western Colorado.

3. In August, 1985, Moon Lake proposed to construct a substation near Rangely, Colorado, identified as the Rooks California Substation. Construction was to be done in three (3) phases. (See Hunt Deposition, pp. 3-4.)

4. Ultrasystems was acting as a contractor on a previous

phase of the Rooks California Substation that Moon Lake had advertised in the same manner as the phase in question. (See Winder Affidavit, para. 13, Record p. 452.)

5. Whenever REA funds are involved in a Moon Lake project, the REA Administrator must approve all contracts, bids, etc., involved. (See Winder Affidavit, para. 6, Record p. 450.)

6. There were no REA funds involved in the construction of the Rooks California Substation. (See Winder Affidavit, para. 6, Record, p. 450.)

7. Moon Lake advertised and solicited bids for the construction of the substation superstructure and above ground facilities. (Hunt Deposition, p. 6.)

8. In the solicitation to bid, each bidder was required to submit a bid bond with the bid. (See Record, p. 364.)

9. At Ultrasystems' request, a complete set of bid documents was provided to Ultrasystems, including blueprints and materials list. (See Hunt Deposition, pp. 11, 37; Armstead Affidavit, Record pp. 355-358.)

10. Ultrasystems submitted a bid for the advertised work on the Rooks California Substation. This bid was prepared by Richard Armstead and was accompanied with a bid bond. (See Armstead Affidavit, Record pp. 355-359.)

11. As Ultrasystems agent, Armstead read and interpreted

the documents provided by Moon Lake regarding how the conductors, bus bars and terminals were to be connected. (See Armstead Affidavit, Record pp. 355-359.)

12. Ultrasystems submitted the low bid. (See Hunt Deposition, pp. 18-19.)

13. Ultrasystems was informed by Moon Lake that its bid was comparatively very low in certain areas, and had Ultrasystems verify its bid. (See Hunt Deposition, pp. 24-24.)

14. At Moon Lake's request, Ultrasystems did verify its bid to Moon Lake. (See Record, p. 429.)

15. Moon Lake accepted Ultrasystems bid on September 18, 1985. (See Record, p. 430.)

16. Ultrasystems subsequently reviewed the documents it had been initially provided by Moon Lake and determined that Armstead had misunderstood, or ignored, part of the information concerning the connection of conductors, bus bars and terminals, and therefore, that Ultrasystems' bid was \$75,000.00 lower than it should have been. (See Armstead Affidavit, Record, pp. 355-358.)

17. On September 25, 1985, at a meeting with Ultrasystems, Moon Lake delivered its "formal" acceptance to Ultrasystems. On the same date, and after receiving Moon Lake's acceptance, Ultrasystems delivered a letter stating that it had made a mistake in its bid. (See Armstead Affidavit, Record, pp. 355-

358; Hunt Deposition, pp. 27-28; and Record, pp. 430 and 431.)

18. Moon Lake then awarded the bid to the next acceptable bidder and requested Ultrasystems to forfeit its bid bond. (Hunt Deposition, p.32.)

19. Ultrasystems refused to voluntarily surrender its bid bond. This action was brought to enforce Moon Lake's rights against the bid bond. (See Complaint, record p. 1-17.)

20. Discovery was conducted by Ultrasystems in the form of depositions of Moon Lake's employees. (See Record, pp. 514, 515.)

21. Ultrasystems moved for Summary Judgment on November 11, 1986. Industrial Indemnity joined in that Motion. (Record, pp. 336-338, 410-412.)

22. Moon Lake filed a response to Ultrasystems' Motion for Summary Judgment on December 10, 1986. At the same time, Moon Lake also moved for Summary Judgment. (Record, pp. 416-431.)

23. Ultrasystems responded to Moon Lake's Motion for Summary Judgment on December 17, 1986, and requested the court to Rule on existing Motions.¹ (See Affidavit of George E. Mangan,

¹ On this date, Moon Lake's General Counsel, George E. Mangan was in the Duchesne County Hospital having his left ankle fused, and was unable to fully supervise the filing of the response. Inasmuch as it appeared that the issues were primarily questions of law, no affidavits were thought to be necessary. However, there were several references in Moon Lake's response and Motion for Summary Judgment to the depositions which opposed

Record pp. 473-477.)

24. On or about January 13th or 14th, 1987, Moon Lake's counsel contacted the secretary to the District Judge to determine the status of the Motions and was assured that the court had not yet ruled in this matter. Judge Richard C. Davidson was not available since he was in Salt Lake City for a meeting of the new Appellate Court Judges. A request was made to have the secretary ask the court not to rule until the plaintiff's Affidavits were filed.²

25. In a Minute Entry dated January 15, 1987, District Judge Davidson granted Ultrasystems and Industrial Indemnity's Motion for Summary Judgment. (Record, pp. 468-470.)

26. On January 23, 1987, Moon Lake submitted Affidavits of Bruce LeGrand Hunt and Kenneth A. Winder in support of plaintiff's Motion for Summary Judgment. (See Record, 449-467.)

27. On January 30, 1987, Judge Davidson signed the Summary Judgment as prepared by Ultrasystems' counsel.³ (Record, pp.

Ultrasystems' allegations of what was fact. (See Record, pp. 473-477.)

² George E. Mangan was still recuperating from surgery and was trying to catch up with the backlog that had accumulated during hospitalization and bed rest. (See Affidavit of George E. Mangan, Record 473-477.)

³ Said Judgment also specified that it was being entered because Moon Lake had not filed opposing affidavits.

468-470.)

28. As of February 1, 1987, Richard C. Davidson ceased to function as a Seventh Judicial District Judge. Thereafter, Dennis L. Draney became the new District Judge.

29. On February 7, 1987, Moon Lake filed a Motion for either a New Trial or to Set Aside Summary Judgment, supported by a Memorandum of Points and Authorities. (See Record, p. 478-479.)

30. On or about February 12, 1987, Industrial Indemnity responded to Moon Lake's Motion for New Trial or to Set Aside Summary Judgment. Moon Lake filed a reply on February 18, 1987. (See Record, pp. 482-488.)

31. On February 18, 1987, Ultrasystems responded to Moon Lake's pending Motion. (See Record, p. 490.)

32. In a Ruling dated March 10, 1987, District Judge Dennis L. Draney denied Moon Lake's motions. The order was subsequently reduced to a writing on March 27, 1987. (See Record p. 504.)

ARGUMENT

POINT I. WAS SUMMARY JUDGMENT PROPER?

Summary Judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is

entitled to judgment as a matter of law. Geneva Pipe Co. v. S&H Ins. Co., Utah, 714 P.2d 648 (1986), Snyder & Merkley, Utah, 693 P.2d 64 (1984). The facts are to be liberally construed in favor of the party opposing the motion and that party is to be given the benefit of all inferences which might be reasonably drawn from the evidence. Payne v. Myers, 64 Utah Adv. Rep. 3, at 4, (8-18-87); Atlas Corp. v. The Clovis Nat'l Bank, Utah, 737 P.2d 225 (1987). The moving party must show that, as a matter of law, all reasonable possibility that the non-moving party could win if given a trial, is precluded. Judkins v. Toone, 27 Utah 2d 17, 492 P.2d 980 (1972), Reliable Furn. Co. v. Fidelity & Guar. Ins. Underwriters, 16 Utah 2d 211, 398 P.2d 685 (1965). Where the parties are not in complete conflict as to the facts, but the understanding, intention and consequences of those facts are vigorously disputed, summary judgment is not appropriate. Sandberg v. Klein, Utah, 576 P.2d 129 (1978).

On review, the appellate court is obliged to review the record in the light most favorable to the party against whom the motion was granted. Geneva Pipe Co. v. S&H Ins. Co., Utah, 714 P.2d 648 (1986). The trial court must not weigh evidence or assess creditability and it must be obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. Mountain States Telephone & Telegraph Co.

v. Atkin, Wright & Miles, Chartered, Utah, 681 P.2d 1258 (1984).

In an action involving a contract, summary judgment is proper only when the contract terms are complete, clear and unambiguous. If the evidence of the terms of an agreement is in conflict, the intent of the parties as to the terms is to be determined by a jury. Colonial Leasing Co. v. Larsen Bros. Constr. Co., Utah, 731 P.2d 483 (1986). Summary Judgment is appropriate only in the most clear cut negligence cases. Ingram v. Salt Lake City, Utah, 51 Utah Adv. Rep 6 (Jan. 1987) Williams v. Melby, Utah, 699 P.2d 723 (1986).

A. WERE THERE CONTESTED ISSUES OF MATERIAL FACT?

In this case, Ultrasystems had its employee, Richard Armstead, prepare its bid. In his affidavit attached to Ultrasystems' Motion for Summary Judgment (Record pp. 355-358), Armstead alleges that he made a mistake in preparing Ultrasystems' bid. Armstead alleges that when he subsequently reviewed the bid information provided by Moon Lake, he found that he made an error in preparing the bid. (See Armstead Affidavit, paragraph 10, Record p. 357.) Moon Lake argued that this constituted an error of law or negligence on the part of Ultrasystems. Ultrasystems claimed that this was a mistake of fact made in good faith, and that equity should relieve against forfeiture of its bid bond. Either scenario presents a contested

issue of fact that ought to be resolved by the trier of fact.

B. WAS MOON LAKE UNDER A DUTY TO PROVIDE AFFIDAVITS?

Rule 56(c), URCP, provides as follows:

"When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Utah Supreme Court has held that allegations or denials in the pleadings are not a sufficient basis for opposing summary judgment. See Hall v. Fitzgerald, Utah, 671 P.2d 224 (1983). In Franklin Financial v. New Empire Development Co., Utah, 659 P.2d 1040 at 1044 (1983), the Court stated that "when a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment." Also see Cowen & Co. v. Atlas Stock Transfer Co., Utah, 695 P.2d 109 (1984).

The judgment dated January 30, 1987, entered in this matter

(Record pp. 468-470), states as follows: "Defendant, Ultrasonics' Memorandum in support of its Motion for Summary Judgment has set forth undisputed facts, which facts are supported by the pleadings, the depositions of Kenneth A. Winder and Bruce L. Hunt and the affidavits. The plaintiff has not submitted any affidavits or other documents showing any dispute as it relates to those facts. (Emphasis added.) The Court therefore finds that the facts, as listed, are undisputed." The Court apparently followed the reasoning in the cases cited above and the argument made by Ultrasonics (Record, pp. 434-440), in this part of its decision.

In this case, discovery was conducted before Ultrasonics' Motion for Summary Judgment was made. The depositions of Kenneth A. Winder and Bruce L. Hunt were filed with the Court, relied upon by all parties and were part of the record. Numerous exhibits were also part of the record. There was evidence in the materials in the record, recognized by Rule 56(e) to support Moon Lake's position. The clearest indication of this evidence is Moon Lake's bid acceptance dated September 18, 1985 (Record p. 409).

Also, Moon Lake submitted affidavits of Winder and Hunt on January 23, 1987, before the Court signed the judgment in this case. Those affidavits clearly put at issue (a) whether REA

approval was necessary, and therefore, whether Moon Lake's acceptance was conditional, and Ultrasystems' knowledge of those facts (Winder Affidavit, paragraphs 6 & 13, Record p. 450 + 452.); (b) the date Moon Lake notified Ultrasystems that its bid had been accepted (Winder Affidavit, paragraph 15, Record p. 452.); and (c) whether Armstead's error in preparing Ultrasystem's bid constituted negligence.

If the facts as asserted by Moon Lake are true, then as a matter of law, the bid bond, by its term, would forfeit. (See bid bond, Record p. 405.) It was not the intent of the parties for the bond to be meaningless. Clearly, the bid bond provides that Ultrasystems shall enter into a contract for the completion of the Rooks California Substation. If not, then the bond would be paid to Moon Lake.

If Moon Lake accepted Ultrasystems' bid, and the bid bond is not forfeited, it was clearly a pointless exercise to require that a bid bond be submitted with the bid. It was not the intent of the parties for the bond to be meaningless. The only plausible way for Ultrasystems to escape being liable on its bid bond is if the Court finds that Armstead's negligence was excusable. Otherwise, there would be a question of fact and Summary Judgment would not lie.

C. WAS ULTRASYSTEMS ENTITLED TO JUDGMENT AS A MATTER OF LAW?

Both 52 ALR2d 792 and 2 ALR4th 991, distinguish between a

mistake of fact and a mistake of law or judgment. Under some circumstances, most courts allow a bidder to rescind his bid, and not forfeit his bond, if a mistake of fact has been made by the bidder. 2 ALR4th 991, defines a mistake of fact as "a state of mind or belief that is not in accord with the facts". 2 ALR4th at 995. Mathematical mistakes and clerical errors in transcribing figures, omitting figures or transposing figures are listed as mistakes of fact.

The Utah Supreme Court in Harlin vs. Campbell, 45 U.A.R. 4 (Oct. 28, 1986) pointed out that mistakes of law are not the equivalent to mistakes of facts when determining whether or not equitable relief should be granted. The court cited 27 Am. Jur. 2d, Equity § 29 and 36 (1966).

27 Am Jur. 2d, Equity, § 39 states that "(a)n equity court will not ordinarily grant relief from the consequences of writing or the effect thereof on a party's rights...the misconstruction of a contract as written is not a mistake of fact, but one of law." (citations omitted.)

Black's Legal Dictionary, 5th Edition, 1979, p. 903, defines mistake of law as "a mistaken opinion or interference, arising from an imperfect or incorrect exercise of judgment, upon (the) facts". (Citations omitted.) In 2 ALR4th 991, a

misinterpretation of the specifications upon which the bid was based is classified as a mistake of law.

Although a bid, once opened and declared, is considered in the nature of an irrevocable option or contract right of which the contracting authority cannot be deprived without its consent, rescission may still be had for a material and inadvertent mistake of fact.

In Boise Junior College District v. Mattefs Const. Co., 92 Idaho 757, 450 P.2d 604 (1969), the Idaho Supreme Court adopted the substantially same test as the Utah Supreme Court did in State v. Union Construction Co., 9 Utah 2d 107, 339 P.2d 421 (1959), i.e., that equity will relieve against forfeiture of a bid bond if the bidder acted in (a) good faith, (b) without negligence, or the mistake occurred regardless of the exercise of ordinary care, (c) if he was reasonably prompt in giving notice of the error in the bid to the other party, (d) if the bidder will suffer substantial detriment by forfeiture, and (e) if the other party's status has not been greatly changed, and relief from forfeiture will work no substantial hardship on him. (Citations omitted.) However, in Boise Junior College, the Idaho Court went on to point out that not all mistakes entitle a bidder to equitable recession. Equitable recession is allowed for "mechanical or clerical errors", i.e., those made tabulating or

transcribing figures, but denied in cases involving "errors of judgment", i.e., underestimating the cost of labor or materials. Also see Calamari, The Law of Contracts, 2d Ed. P. 308 (1977). Moon Lake urges that Ultrasystems' "mistake" was clearly an error of judgment, namely, assuming the "specs" did not require what they said they required.

The Court, in State v. Union, 339 P.2d 421, cited 52 ALR 2d 792 in support of its position. That article states as follows:

"The term 'negligence,' or its equivalent, in this connection generally means ordinary negligence, which will not necessarily bar granting equitable relief. Otherwise qualified, it generally means carelessness or lack of good faith in calculation which violates a positive duty in making up a bid, so as to amount to gross negligence, or willful negligence, when it takes on a sinister meaning and will furnish cause, if established, for holding a mistake of the offending bidder to be one not remediable in equity. It is thus distinguished from a clerical or inadvertent error in handling items of a bid, either through setting them down or transcription." p. 794, footnote 4.

In this case, even Ultrasystems, however reluctantly, admits that the blueprints and materials list supplied the facts necessary to draw the conclusion that Moon Lake required the superstructure's conductors, bus bars and terminals to be aluminum welded. (See Ultrasystems' Memorandum, Undisputed Facts, No. 10, Record p. 341.) Ultrasystems also admits that Mr.

Armstead, who is "not familiar with welding" determined or interpreted that "it was up to the bidder as to the type of coupling to be used". (Ultrasystems' Memorandum, Undisputed Fact, No. 17, p. 5, Record p. 343.) The unescapable conclusion is that Ultrasystems had all the facts necessary for it to determine that Moon Lake required the superstructure be joined by aluminum welding. But, Armstead failed to make that determination because he lacked expertise and familiarity with welding, and in particular, aluminum welding.

Ultrasystems assigned one man, Armstead, to prepare the bid. After the fact, Armstead and Ultrasystems claimed that Armstead lacked the expertise in welding, and therefore, lacked the knowledge to correctly determine Moon Lake's welding requirements from the blueprints and materials list. Ultrasystems did have personnel who could and did determine the welding requirements, and the cost thereof. Moon Lake does not dispute that Armstead did the best he could, based on his knowledge and expertise. But, if Armstead's Affidavit is correct, then Ultrasystems acted in bad faith and/or was negligent as a matter of law by assigning the preparation of the bid to a person of limited expertise without assigning other people with the necessary welding expertise to assist Armstead in preparation of the bid.

Therefore, the mistake was a mistake of law and does not fall

within the purview of the cases which allow a bidder to rescind his bid without forfeiting his bond. Moon Lake ought not to be held to answer for Ultrasystems' admitted negligence.

POINT II: WAS MOON LAKE'S ACCEPTANCE OF ULTRASYSTEMS' BID CONDITIONAL? WAS THERE CONDITIONS PRECEDENT TO MOON LAKE'S ACCEPTANCE OF ULTRASYSTEMS' BID?

Ultrasystems claimed that acceptance of the bid by Moon Lake was conditional on the approval of the REA administrator.

Most public contracts are subject to special provisions respecting manner of execution and requirements as to validity. Most of them are required to be in writing. Consequently, "acceptance" as used in most of the cases does not mean the formation of a contract as in the law of private contracts, but is simply descriptive of some act indicative of approval or award, with the intent of subsequently executing a formal contract. 52 ALR2nd 792 at 793.

Ultrasystems knew that no Rural Electric Association funds were being used on this project. Ultrasystems knew that the same acceptance form had been used by Moon Lake when Ultrasystems bid and was awarded an earlier phase of this project. Ultrasystems knew that Moon Lake was a Rural Electric Association Cooperative and used Rural Electric Association approval forms in connection with its bidding procedures. Ultrasystems knew that Moon Lake did not have to obtain REA approval before awarding Ultrasystems

the bid on the first phase of the project. Ultrasystems also knew when it made the bid in question and had received from Mr. Hunt the "Acceptance" that the REA Administrator would not be involved in either approving or notifying Ultrasystems to proceed. Ultrasystems had been down that path with Moon Lake before and knew how the system worked. To now grasp at straws and claim that Ultrasystems was expecting the REA Administrator to approve the bid before it could be accepted, would be to belie the actual facts.

Inasmuch as no REA funds were involved in this project, the Rural Electric Association could not disapprove any contract Moon Lake entered into concerning the project. (See Deposition of Kenneth Winder, paragraph 6, Record, p. 450.) Further, Moon Lake annually submits a work plan to Rural Electric Association which outlines all work that will be done on Moon Lake's system during the coming year. The administrator reviews and then accepts or rejects the same. Moon Lake's plan for 1985, which included the subject project, was approved by the REA Administrator. Ultrasystems knew that no REA approval was required or contemplated by law and none had been given to Ultrasystems in the earlier phase that Ultrasystems had been awarded. The bidding, etc., followed by Moon Lake and Ultrasystems in the first phase utilized the exact procedures that were followed in

this phase.

This argument also applies to Ultrasystem's claim that the bond was not in effect until evidence had been provided that financing had been committed to cover the entire cost of the project. Ultrasystems knew financing had been committed and such a claim was without merit as a matter of law.

POINT III. DAMAGES

Ultrasystems argues that Moon Lake sustained no damages because Chevron reimbursed Moon Lake for all the additional costs caused by Ultrasystems' withdrawal of its bid. Using that logic, few businesses would ever sustain damages as most, if not all, losses and costs are passed on to the consumers of goods and services produced by the business. That Moon Lake will be "reimbursed" for any damages by its consumers⁴, does not mean that Moon Lake did not incur damage. Even if Moon Lake anticipates the full amount of damage, and recovers that amount from its consumers even before Moon Lake actually incurs or pays the cost of the damages, the fact is that the damage still occurs. That Moon Lake will pass on its damages to a consumer or consumers does not make the damages disappear. As a regulated, non-profit public utility, Moon Lake has no alternative but to "pass on" all of its costs of doing business to its consumer-members.

In any case, the bid bond is in the nature of a liquidated damages provision, and should operate as such.

⁴ In this case, the substation was in a remote area of the Rangely Oil Field. It would serve the only consumer in the area. That is why the entire cost of the substation was passed on to that one consumer.

**POINT IV. SHOULD THE DISTRICT COURT HAVE GRANTED MOON LAKE'S
MOTION FOR A NEW TRIAL OR TO SET ASIDE THE SUMMARY
JUDGMENT?**

The confusion with Moon Lake's Affidavits (see Facts, No. 244-26), justify setting aside the Summary Judgment. Moon Lake's regular counsel was hospitalized, and as a result, was being assisted by an associate who was not totally familiar with the procedure. Mr. Mangan's hospitalization and unavailability ought not preclude Moon Lake from receiving the benefit it is legally entitled to.

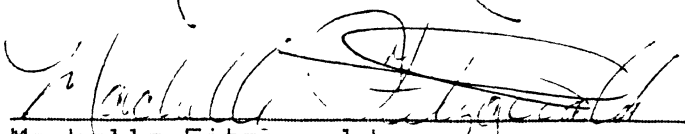
CONCLUSION

Moon Lake is entitled to have the Summary Judgment set aside, and the issues determined on their legal merits. Moon Lake is entitled to have its day in Court, and these issues resolved as a matter of law and not because of some technical omission arising out of a combination of unique circumstances.

RESPECTFULLY SUBMITTED this 17th day of September, 1987.

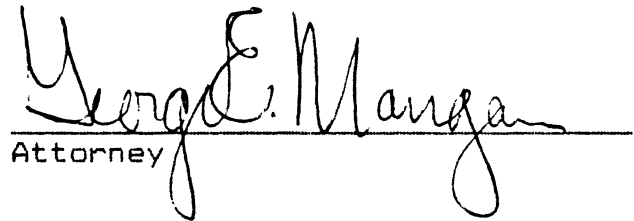
ATTORNEYS FOR PLAINTIFF/APPELLANT:


George E. Mangan


Machelle Fitzgerald

CERTIFICATE OF MAILING

I do hereby certify that on the 17th day of September, 1987, I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF, postage prepaid, to Clark B. Allred, Gayle F. McKeachnie, NIELSEN & SENIOR, Attorneys for Ultrasystems Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84078; and to A. Dennis Norton, David W. Slaughter, SNOW, CHRISTENSEN & MARTINEAU, Attorneys for Industrial Indemnity Company, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, Utah 84145; by depositing the same in the United States Post Office at Roosevelt, Utah.


Attorney