

1979

# L. Keith Lignell et al v. Clifford M. Berg et al : Supplemental Brief of Defendants-Respondents

Utah Supreme Court

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Callister, Skeene & Nebeker; Attorneys for Defendant-Respondent;  
Wilford A. Beesley; Attorney for Defendant-Respondent;  
Earl S. Tanner & Associates; Attorneys for Plaintiffs-Appellants;

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## Recommended Citation

Supplemental Submission, *Lignell v. Berg*, No. 15001 (Utah Supreme Court, 1979).  
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IN THE SUPREME COURT OF THE STATE OF UTAH

\*\*\*\*\*

E. KEITH LIGNELL, MARIAN H. :  
LIGNELL, his wife; BURTON M. :  
TODD and PHYLLIS W. TODD, :  
his wife, :

Plaintiffs and :  
Appellants, :

Case No. 15001

vs. :

CLIFFORD M. BERG and WILLIAM R. :  
BERG, a partnership, dba BERG :  
BROTHERS CONSTRUCTION COM- :  
PANY, and FRANK C. BERG, an :  
individual, a joint venture, dba :  
BERG CONSTRUCTION COMPANY; :  
and FIDELITY AND DEPOSIT :  
COMPANY OF MARYLAND, a :  
corporation, :

Defendants and :  
Respondents. :

\*\*\*\*\*

SUPPLEMENTAL BRIEF OF DEFENDANTS-RESPONDENTS

\*\*\*\*\*

FILED

Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
The Honorable Gordon R. Hall, Judge

FEB 16 1979

\_\_\_\_\_  
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SUPPLEMENTAL BRIEF OF DEFENDANTS-RESPONDENTS

\* \* \* \* \*

This Brief is submitted by Respondents Berg and his Surety, Fidelity and Deposit Company of Maryland in response to the Notice dated February 8, 1979, from the Clerk of the Supreme Court, which reads as follows:

In its consideration of this case it appears to the Court there is one question which has not been adequately covered in the briefs and arguments heretofore presented: that is, assuming without presently indicating or deciding, that the general contractor, defendant Berg, should be entitled to recover, would there be a basis upon which a

further award of attorney's fees, as distinguished from those assessed as damages, should be awarded to general contractor Berg.

Respondents have assumed from the foregoing Notice that the Court is questioning the right of Berg, as general contractor, and his Surety to recover attorney's fees in the sum of \$21,000.00 each (total \$42,000.00) against Liggett and Todd (the owners of the Incline Terrace Apartments). The pertinent question is raised: " . . . as distinguished from those [attorneys' fees] assessed as damages . . . ", and thus we assume that the Court has perceived the theory of the attorneys' fees assessed against Berg and the Surety in favor of the two contractors being passed on to the owners; that these attorneys' fees constitute damages, which are the natural and proximate consequence of the wrongful act of the owners in not paying the subcontractors, and involving the general contractor and his Surety in litigation with the drywall and electrical contractors. See page 52 of Respondent's Brief and the cases cited of Pacific Coast Title Insurance Co. vs. Hartford Accident and Indemnity Co., 7 Utah 2d 377, 139 P.2d 906; Armstrong Company vs. Thomson, 64 Wash. 2d 191, 390 P.2d 57; and City of Cedarburg vs. Glens Falls Insurance Co., 166 N.W. 2d 165 (Iowa, 1969).

The right of Berg and the Surety to recover attorney's fees is bottomed upon the legislative intent in §14-2-1 and §14-2-3, U.C.A., 1963.

The statutes provide:

14-2-1. The owner of any interest in land entering into a contract, involving \$500.00 or more . . . obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties conditioned for the

faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear. (Emphasis added)

\* \* \*

14-2-3. In any action brought upon the bond provided for under this chapter the successful party shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action. (Emphasis added)

The 1977 amendment, raising the jurisdictional amount from \$500.00 to \$2,000.00, occurred after the cause of action arose in this case. The language underlined in §14-2-1 that the bond be conditioned for the faithful performance of the contract is the same descriptive language (inter alia) as contained in §14-1-5(1) requiring public bodies to obtain a Performance Bond. In a suit upon a public Performance Bond attorney's fees are to be awarded to the prevailing party (14-1-8) while 14-2-3 states: " . . . the successful party shall be entitled to recover a reasonable attorney's fee . . . " The provision as to attorney's fees being taxed as costs in a suit upon the private contractor's bond became effective in 1963, at the same time the legislature amended §14-1-1 et seq. pertaining to bonds of public contractors. The legislature obviously intended to bring attorney's fees in private contract bonds in line with public contract bonds.

The Performance Bond which the owners sued upon is conditioned upon " . . . Contractor shall promptly and faithfully perform said contract . . . " The labor and material bond is conditioned upon " . . . principal shall promptly make payment to all claimants as hereinafter defined for all labor and material used or reasonably required for use in performance of the Contract"

(Ex.18P). On both bonds Berg Construction Company is the principal and Fidelity and Deposit Company of Maryland is the Surety. The Labor and Material Payment Bond states:

Note: This bond is issued simultaneously with Performance Bond in favor of the owner conditioned on the full and faithful performance of the contract.

The Surety Company was paid a premium for issuing the bonds, but most fundamental is the fact that it always obtains an application for the bonds (Ex.256) and/or an Indemnity Agreement (Ex. 256P) wherein the principal Clifford Berg and his two brothers agreed to indemnify and hold harmless the Surety Company against all loss costs, damages, expenses and attorney's fees.

From these bonds in evidence, it can be seen that bonding a construction project requires the two provisions as to coverage: (1) the faithful performance of the contract, and (2) the prompt payment for material furnished and labor performed. The legislature has been well aware of the two forms of surety bond protection, and required in cases of private construction contracts exceeding \$500.00 or more (now \$2,000.00) the same type of performance bond as is required in public contracts. Both 14-1-5 and 14-2-1 require a bond conditioned for the faithful performance of the contract. This is consistent with the surety industry's standard practice of issuing a Labor and Material Payment Bond simultaneously with a Performance Bond. The general contractor and the Surety are entitled to assume, as per the Performance Bond, that the owner will perform owner's obligations under the contract, to-wit: pay the agreed upon contract price.

In this case the owners sued the general contractor and the Surety on the Performance Bond, first in the sum of \$387,079.45 (R,A-5); then amended their Complaint to allege overpayment of \$600,495.45 plus attorney's fees of \$35,000.00 (R,C-636). At trial, the owners' exhibit 148d summarized their accounting and claimed that there had been an overpayment by them to Clifford Berg of \$82,640.00. The owners claimed that Berg and the Surety owed the subcontractors Murray Electric (\$61,693.01) and Claron Bailey (\$42,653.68) on the Payment Bond, and in addition, owed the owners \$82,640.00 overpayment to be recovered upon the Performance Bond. However, the jury found upon proper evidence that Berg was entitled to judgment of \$159,148.68 which allowed him sufficient funds to pay the two subcontractors and obtain a net recovery of \$54,801.99.

The construction contract between Berg and the owners did not have a provision for payment of attorney's fees. However, the owners were suing Berg (as principal) and the Surety on the Performance Bond, and at the same time claiming that these two obligors on the Payment Bond should pay the unpaid subcontractors. The Findings of Fact as set forth at pages 3 and 4 of Respondent's Brief show that Lignell commenced making payments directly to the sheetrocker and the electrician, then ceased making any final payment or settlement with them, causing them to sue Berg and the Surety on the Payment Bond. Attorney's fees were not awarded to Berg and the Surety on the legal theory that Berg proved he was entitled to an unpaid balance upon his contract, but because Berg and the Surety were the successful parties in the action brought against

them upon the Performance Bond by the owner. The Trial Court saw this distinction, and stated in its Memorandum Decision: "That Western, Bailey, Co. Murray, Berg and Fidelity are the successful parties within the provisions, Chapter 14, U.C.A., 1953" (R,C 1395).

The entire case was a tedious difficult accounting matter, due to the fact that Lignell kept no ledger of the electrical extras which he requested or required. The owners counterclaimed against, and disputed directly with subcontractors. Lignell's nonpayment required the subcontractors to sue on the Payment Bond. Lignell further claimed that he had overpaid Berg in the sum of \$600,495.45. Berg and the Surety proved to be the successful party concerning this demand.

Because of this interplay between the subcontractor's suit on the Payment Bond caused by Lignell's control of the payment of moneys (not Berg) and the suit on the Performance Bond, the Court must view Chapter 2 of Title in light of the overall legislative intent. The statute is intended to require payment for all construction work done, and improvement of the owner's property. If the owner fails to obtain the required bond, he is personally liable to all persons who have furnished materials (14-2-2, U.C.A., 1953). If the owner decided to go ahead and pay the subcontractors, with notice to the Surety, the owner could sue on the Performance Bond to recover overpayment, and if he were the successful party he would be entitled to recover his attorney's fees. Thus, we have a situation where the subcontractors can recover their attorney's fees in a suit on the Payment Bond, the owner can recover its attorney's fees

a suit on the Performance Bond, and the general contractor and the Surety should likewise be entitled to recover their attorney's fees in a case where they are the successful parties, to show that the owner wrongfully brought suit for overpayment. The legislature clearly intended that a general contractor (who is always required to indemnify the Surety in order to provide the Payment Bond and Performance Bond) should be treated fairly and equitably, if he were the successful party in a suit brought upon the Bonds.

There are many cases which announce the rule that the statutory law of the State is an implied term of any contracts or bonds made in regard to that subject.

In Quagliana vs. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah June 27, 1975), the opinion states:

    Insofar as a municipal ordinance is applicable to a contract, it is by operation of law an implied term of that contract.

In State ex rel Building Owners, Etc. vs. Adamany, 219 N.W. 2d 274, 64 Wis.2d 280, the court reviews the prior Wisconsin doctrine and concludes:

    This court adheres to the basic philosophy of Kuhl, supra, that an unequivocal legislative declaration of public policy, made either before or after the execution of a contract, becomes a part of that contract if the legislature makes it clear that such is its intention and if it can be determined, either by recitals in the legislation or by judicial notice, that vital public interest will be impaired if the legislation is not given effect and vital interests will be enhanced by enforcement of the legislation.

In Sterling Engineering & Constuction Co. vs. Town of Burrillville Housing Authority, 279 A.2d 445 (R.I. July, 1971), the court:

It is a fundamental rule that all contracts are made subject to any law prescribing their effect or conditions to be observed in their performance. The statute is as much a part of the contract as if the statute had been actually written into the contract.

The requirement that a contractor on a public or private construction project furnish a labor or material Payment Bond and a Performance Bond serve a highly commendable purpose: to assure all suppliers and laborers that they will be paid. The Surety Bonds are liable under the statute for attorney's fees to both the successful owner, and successful subcontractor. But the legislature did not mandate payment of attorney's fees only against the Bonds. The prevailing party" (14-1-8) or the "successful party" (14-2-3) is entitled to recover attorney's fees. The statutes incorporate into every Payment Bond and Performance Bond a reciprocal or mutual obligation governing attorney's fees.

Respondents Berg and the Surety urge again that the Supreme Court include an order in its opinion that the attorney's fees incurred in the appeal to this court be awarded to respondents, upon proof of time spent, at a reasonable hourly rate. A case granting attorney's fees on appeal in a suit upon a road contractor's payment bond is Tiffany Construction Co. vs. Kelley Construction Company, 539 P.2d 978, 24 Ariz. App. 504.

Respectfully submitted,

CALLISTER, GREENE & NEBEKER  
Richard H. Nebeker

Attorney for Respondent Fidelity and  
Deposit Company of Maryland

WILFORD A. BEESLEY  
Attorney for Respondent Berg Brothers  
Construction Company

MAILING CERTIFICATE

I certify that two copies of the foregoing Supplemental Brief of Defendants-Respondents were mailed to Earl D. Tanner Associates, attorneys for Appellants, 345 South State Street, Suite 101, Salt Lake City, Utah 84111, this 16 day of February, 1979.

Richard H. Nebeker

IN THE SUPREME COURT OF THE STATE OF UTAH

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E. KEITH LIGNELL et al.,

Plaintiffs and  
Appellants,

vs.

CLIFFORD M. BERG . . . and  
FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND, a corporation,

Defendants and  
Respondents.

Case No. 15001

FILED

FEB 21 1979

Clark, Supreme Court, Utah

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ADDITIONAL PAGES 9 and 10

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At the time of supplemental oral argument before the Court on February 20, 1979, counsel for Appellants made the assertion that there were no pleadings or findings by Defendants-Respondents to sustain the judgment for attorneys' fees. An examination of the record will not sustain this allegation. First, in the action brought by plaintiff Copinga/Greenwood, Berg cross-claimed (R.249) against the owners to recover all amounts adjudged in favor of Copinga and Greenwood in the following language:

1. That plaintiffs Hendrik Copinga and Brent Greenwood d/b/a Western Drywall, a partnership and third-party plaintiff Claron Bailey have claimed herein against defendants and cross-plaintiffs Clifford M. Berg and William Berg d/b/a Berg Brothers Construction Company, a partnership in the sum of \$56,786.43 and \$42,786.43, respectively, together with attorney's fees for a contract balance allegedly due and owing plaintiffs and third-party plaintiff as a result of construction of the Incline Terrace

Apartment owned by cross-defendants E. Keith Lignell and Burton M. Todd. . .

\* \* \*

3. That all of the alleged claims against the defendants and cross-plaintiffs Clifford M. Berg and William Berg d/b/a Berg Brothers Construction Company by plaintiffs Hendrik Copinga and Brent Greenwood d/b/a Western Drywall, a partnership and third-party plaintiff Claron Bailey are the liability of cross-defendants E. Keith Lignell and Burton M. Todd as owners under said construction project; that these cross-plaintiffs are entitled to judgment against cross-defendants for any amounts adjudged to be due and owing herein by these defendants and cross-plaintiffs Clifford M. Berg and William Berg d/b/a Berg Brothers Construction Company to plaintiffs Hendrik Copinga and Brent Greenwood d/b/a Western Drywall or third-party plaintiff Claron Bailey.

In the action brought by subcontractor Comstock-Murray Electric, Berg also cross-claimed against the owners to recover all amounts adjudged in favor of the electrical subcontractor (R.29). Each of these actions included specific allegations for recovery of attorneys' fees.

Second, Berg (R.827) and Surety (R.825) both pleaded by counterclaim against the owners (to the Amended Complaint brought by the owners on the Performance Bond) to recover attorneys' fees pursuant to the bonding statute, 14-2-3, U.C.A. The language of the Berg Counterclaim is as follows:

### COUNTERCLAIM

Defendants Clifford M. Berg and William R. Berg, d/b/a Berg Brothers Construction Company complain of the plaintiffs E. Keith Lignell and Marian H. Lignell, his wife, and Burton M. Todd and Phyllis W. Todd, his wife, and allege as follows:

1. Defendants incorporate herein their answers to  
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paragraphs 12 and 13 of plaintiffs Third Cause of Action  
Digital Access and Technology Act, administered by the Utah State Library.

2. Defendants Clifford M. Berg and William R. Berg d/b/a Berg Brothers Construction Company as principals on the performance and payment bond furnished the same pursuant to Chapter 2 of Title 14, Utah Code Annotated, 1953. The statute provides as follows:

"In any action brought upon the bond provided for under this chapter the successful party shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action."  
(14-2-3)

3. Plaintiffs at the present time owe the subcontractors Coppinga and Greenwood and Comstock Electric and Murray Electric a sum of money for the work performed by said subcontractors on the Incline Terrace Apartments, and plaintiffs further owe Berg Brothers Construction Company a sum of money for the work performed by the general contractors as alleged in prior Complaints, Cross-claims and Counterclaims filed herein.

4. Pursuant to the provisions of 14-2-3, these defendants are entitled to recover a reasonable attorney's fee to be fixed by the court which defendants allege to be the sum of \$35,000.00 for attorney's fees and expenses. (R.827 at 831)

The allegations in the Surety's Counterclaims against the owners are practically identical to the foregoing allegations of Berg's Counterclaim (R.825).

Third, the Findings of Fact and Conclusions of Law are reproduced in full at pages 3 to 8 of the Brief of Defendants-Respondents. Findings, numbers 4 through 14, inclusive, clearly establish the award of attorney's fees. The evidence concerning, and the matter of attorney's fees (by stipulation of all counsel), was not submitted to the jury. The statute (14-2-3 U.C.A.) provides that attorneys' fees shall " . . . be fixed by the Court, which shall be taxed as costs in the action" (Emphasis added). The trial court very carefully followed the statute.

Citation to the pleadings was not formerly furnished in the Brief of Defendants-Respondents because Appellants' points on appeal did not raise any issue as to lack of pleadings to sustain an award of attorneys' fees.

Respectfully submitted,

Wilford A. Beesley  
Richard H. Nebeker