1979

Industrial Construction Inc. et al v. State of Utah : Petition for Rehearing

Utah Supreme Court

John G. Marshall; Tuft & Marshall; Attorney for Respondent;
Robert B. Hansen; Leland D. Ford; Attorneys for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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INDUSTRIAL CONSTRUCTION, INC., a Nevada Corporation, and PRITCHETT CONSTRUCTION COMPANY, a Joint Venture,

Plaintiffs and Respondents,

vs.

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

Defendant and Appellant.

PETITION [illegible]
DEFENDANT [illegible]
BRIEF [illegible]
PETITIONER [illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

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INDUSTRIAL CONSTRUCTION, INC., a Nevada Corporation, and PRITCHETT CONSTRUCTION COMPANY, a Joint Venture,	:	
Plaintiffs and Respondents,	:	
vs.	:	Case No. 15167
STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,	:	
Defendant and Appellant.	:	

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PETITION FOR REHEARING BY DEFENDANT-APPELLANT AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiffs and Respondents,

vs.

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

Defendant and Appellant.

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PETITION FOR REHEARING BY APPELLANT

----oo0oo----

and

BRIEF IN SUPPORT OF PETITION FOR REHEARING BY APPELLANT

----oo0oo----

PETITION FOR REHEARING BY APPELLANT

COMES NOW, Appellant, the State of Utah, by and through the Department of Transportation, ("the State" and pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, respectfully petitions the Court to grant a rehearing in this matter for the purpose of reconsidering the Court's ruling heretofore filed on the 11th day of October, 1978. The Petitioner respectfully submits that this petition should be granted for the following reasons:

1. The main opinion is based on an error in law as to the correct measure of damages.

2. There is no substantial evidence to support the trial court's award of anticipated profits.

3. The method of ascertaining the anticipated profit adopted by the trial court is either incorrect as a matter of law, or the method adopted by the trial court was improperly applied.

4. This Court committed error in affirming the award of various other items of damage in that the Court's affirmance totally disregarded certain actions by Respondent Industrial Construction ("the Contractor").

5. Petitioner further adopts by reference its Brief in Support of Petition for Rehearing which accompanies

this Petition as though set forth herein.

Respectfully submitted this 21st day of November, 1978.

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STATEMENT OF THE KIND OF CASE

This case arises out of the alleged breach of a road construction contract by the State. The Contractor claim for damages includes an item for anticipated profits

DISPOSITION IN LOWER COURT

The trial court, the Honorable J. Harlan Burns presiding, determined that the State breached the contract and that the breach constituted an anticipatory breach. Th court awarded damages totaling $1,346,754.59.

DISPOSITION IN THIS COURT

This Court ruled on October 11, 1978 by a bare majority that the judgment should be sustained except for a award of general damages in the amount of $100,000.00. The Court thus sustained an award of $1,246,755.00. The concur ring and dissenting opinion concurred in the finding of breach but would have awarded a new trial for a correct de- termination of damages.

RELIEF SOUGHT ON REHEARING

For purposes of this Petition for Rehearing the State concedes that the contract was breached.

The State now attacks the Court's affirmance of damages and only seeks the following relief:

1. An order remanding this case to the trial court for a correct determination of damages; or

2. An order reducing the existing judgment by at least the following amounts (in addition to the deletion of general damages ordered by the entire Court):

(a) A reduction in the amount of anticipated profit awarded the Contractor from the sum of $340,025.18 to a sum not in excess of $57,657.83;

(b) A reduction in the amount awarded the Contractor for equipment rented from others from $191,370.00 to $63,790.00, or a reduction of $127,580.00;

(c) A reduction in the amount awarded for salaries to key personnel from $39,773.48 to $13,257.82; and

(d) The deletion of the sum awarded by the trial court for work done after the date of the breach in the total amount of $49,558.18.

FACTS

The parties entered into a contract in September of 1974 for the construction of a section of Interstate 15 from

North of Holden to Scipio, Utah. A dispute developed in the Spring of 1975 concerning the aggregate to be used in the paving mix. This dispute culminated in the writing of a letter by the State which the trial court determined to be a breach of contract. (For a more complete description of the facts leading up to this event, see Appellant's Brief on Appeal.) The case was tried to the Court in 1975. The issue of liability was tried in March, resulting in a determination that the State was liable, and the issue of damages was tried in July. The court in its ruling on damages awarded judgment for work in progress at the time of the breach with certain offsets for partially completed items and adjustments for measured quantities. The court further awarded damages for costs incidental to termination of operations by the contractor, including payment for equipment rented from others, salaries of key personnel, work performed after the breach as under a force account (cost plus) arrangement, and other items. Finally, the Court, after further conferences with counsel and the submission of additional briefs, awarded damages for anticipated profit in the amount of $340,025.18 by assuming a factor of 20% of the sum left in the contract at the suspension of operations was profit. Neither the resultant sum of over $340,000.00 nor the use of the 20% factor was urged by either party, and neither finds one iota of support in the record.

The Supreme Court on October 11, 1978, sustained the trial court but for the deletion of the sum of $100,000.00 general damages. As seen from the official Court opinion (actually two opinions), attached hereto as Exhibit "A", all five Justices agreed that the State had breached the contract. Concerning damages, only two of the Justices -- Maughan and Wilkins -- could agree on an opinion. That opinion affirmed the trial court's award of damages in all particulars except the award of $100,000.00 for general or temperate damages. Justice Crockett merely concurred in the result of Justice Maughan's opinion. The effect of Justice Crockett's concurrence was to affirm the trial court's judgment of $1,346,754.59 minus a deduction of $100,000.00. Justices Ellett and Hall, on the other hand, could only agree that the State had breached the contract. They disagreed with the reasoning of Justices Maughan and Wilkins as to damages in all respects except as to the impropriety of the trial court's award of $100,000.00 general damages.* In particular, they attacked the award of lost anticipated profits as resting on a method of calculation unsupported by law; in doing this they singled out the use of a 20% factor as constituting reversible error.

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* As to this, Justices Ellett and Hall make no specific mention. The formula they would employ, however, excludes the possibility of any general damages.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTION

This case is complicated in that it involves many issues going to liability and damages. Understandably, it has generated a considerable record. It is also understandable that in attempting to deal with all the many issues, the parties and the Court did not fully analyze the law and the facts surrounding each issue. The State does not wish the Court to reexamine all of the issues of this case or even a substantial number of them. For purposes of this Petition, the State concedes that it breached the contract and concedes that substantial damages should ultimately be awarded. The State submits, however, that legal error permeates the method of calculating damages adopted by the main opinion. It further submits that the measure of damages suggested by Justices Ellett and Hall -- the total contract price less amounts already paid and less cost of completion -- is required by the great weight of legal authority including two earlier cases decided by this Court. Alternatively, the State urges that even the method of calculation adopted in the main opinion was incorrectly applied so that the amount of damages reached is unsupported by any evidence.

ARGUMENT

POINT I

THIS COURT'S CALCULATION OF DAMAGES RUNS COUNTER TO A FIRMLY ENTRENCHED RULE OF DAMAGES ADOPTED BY THIS COURT.

The most obvious deficiency in the main opinion's discussion of damages is the absence of a statement of any controlling rule of damages. Beginning on page 5 of the opinion, the two Justices discuss one by one the items of damage claimed to be excessive. But nowhere do they place their discussion in perspective. Nowhere do they allude to any principle of law governing damages. The issues involved here, however, are not matters of first impression. There is an abundance of law precisely on point and it all supports the measure urged by the dissenters. Moreover, both Justice Maughan who wrote the erroreous main opinion here and Justice Crockett who concurred here in the result have subscribed to and even written opinions in two earlier cases embracing the rule of damages they reject in this case.

In Holman v. Sorenson, 556 P.2d 499 (Utah, 1976), the Court found the site owner in breach of a construction

contract. In a unanimous opinion written by then Justice Ellett, the Court stated:

> It is the undisputed law of this state[1] and the general consensus of legal writers[2] that breach of construction contract damages are based upon the total amount promised for the project, less the reasonable cost of completing it.

1/ Keller v. Deseret Mortuary Company, 23 U.2 1, 455 P.2d 197 (1969).

2/ The Restatement of the Law, Contracts, Sec 346 (1).

Concurring in the above language were Justices Crockett a Maughan.

In Keller, footnoted in the foregoing opinion, unanimous court also found a site owner in breach of a co struction contract. The opinion expressly affirmed the fo lowing damage formula used by the trial judge there:

Total contract	$3,850.00
(less) paid by the site owner	1,500.00
Balance if job had been completed	$2,350.00
Less Reasonable cost of completion	500.00
Contractor's damage	$1,850.00

Except for the numbers, this formula is identical to that urged here by Justices Ellett and Hall. The author, incidentally, of the opinion in Keller was then Chief Justice Crockett.

In Holman, supra, the unanimous Court also referred to the Restatement of Law, Contracts, for support for what it called "the undisputed law of this state." The Restatement was also invoked by the unanimous Court in Keller, at footnote 3. That footnote expressly refers to comment g to Sec. 346 of the Restatement, Contracts, which comment states:

> In order to put the builder in as good a position as he would have been in had the contract been fully performed, it is necessary to give him the full contract price less the amount that he saves by reason of the other party's repudiation. The amount so saved is the cost of completion of the work.

Illustration 11 of Sec. 346 is on all fours with this case:

> A contracts to erect a building for B for $10,000, of which $2,000 is the agreed price of excavation and laying foundation and is payable on completion of the foundation. After A has completed the foundation B repudiates. The cost of completion of the building, from the time of the repudiation, would have been $6,000 in addition to using up materials on hand of the value of $500. A can get judgment for $3,500, this being the full contract price after subtracting $6,500, the cost of completion.

This Court in Keller also relied on Corbin on Contracts, Sec. 1094. In that classic work, the author states:

> ... the building contractor can get judgment for money damages caused by the repudiation or other total breach of the contract by

> the owner. These damages include all other unpaid instalments of the contract price, less the cost of completion of the work that is saved to the builder by reason of the repudiation of the [owner]....[35]

5, Corbin on Contracts (1964), ¶ 1094, p. 509. Footnote 35 refers to cases following this rule from many state and federal jurisdictions, including the United States Supreme Court.

The same rule is stated in the other authoritative treatise on contracts -- Williston. There it is said:

> Where no payments on account have been made, a contractor who is not in default should recover the total price promised less the cost of performing in case no work has been done, or of completing performance of the work,[7] where there has been partial performance.

5, Williston on Contracts, Third Edition, Section 1363, p. 342. Footnote 7 cites numerous cases in support of this principle.

It is thus with ample support in the case reports and treatises that this Court said in Holman, supra:

> It is the undisputed law of this state and the general consensus of legal writers that breach of construction contract damages are based upon the total amount promised for the project, less the reasonable cost of completing it.

Justices Crockett and Maughan, who fully concurred in the above language, should reconsider their contradictory positio in this case.

POINT II

THE FORMULA URGED BY THE DISSENTERS HERE AND ALMOST UNIVERSALLY ACCEPTED ELSEWHERE INCLUDES ANTICIPATED PROFITS.

One case cited by both Corbin and Williston in support of their respective statements of the same rule is Guerini Stone v. Carlin, 240 U.S. 264, (280), 60 L.Ed. 636, 36 S.Ct. 300 (1915). There the Court stated:

> No more definite or certain method of estimating profits could well be adopted, than to deduct from the K price the probable cost of furnishing the matts and doing the work.

In United States v. Behan, 110 U.S. 338, 345, 4 S.Ct. 81, 28 L.Ed. 168 (1884), cited in Appellant's Brief, the Court noted the logical deduction that profits are measured by the "difference between the cost of doing work and what [one] was to receive for it." As stated in Allen, Heaton & McDonald v. Castle Farm Amusement, 86 N.E.2d 782, 784 (Ohio, 1949):

> When a plaintiff sues on a contract to recover the amount he would have received for the full performance prevented by a defendant's breach, he seeks in effect to recover as damages the profit from performance of the contract which profit defendant's breach prevented him from earning. In such a case, plaintiff has the burden of alleging and proving not only (a) what he would have received from the performance so prevented, but also (b) what such performance would have cost him (or the value to him of relief therefrom). Unless he proves both of those facts, he cannot recover as damages the profits he would have earned from the full performance of the contract.

The method used in the main opinion to calculate anticipated profit is clearly erroneous as a matter of logic and contrary to well settled law. But, as discussed below,

even if the method employed is supportable, it was improperly if not arbitarily applied.

POINT III

THE ASSUMPTION THAT ANTICIPATED PROFIT CAN BE CALCULATED BY USE OF A MULTIPLIER IS ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE.

A. NEITHER PARTY SUGGESTED THE USE OF A "MULTIPLIER."

Both the trial court and the main opinion of this Court apparently believe that anticipated profits can be arrived at by using a factor of 20% as anticipated profit on the remaining items of work. The State disagrees with this concept in this case for the reason that the evidence does not support this approach. Neither part urged this approach to the Court and there is no evidence to support this method as applied to this contract.

The trial court and the main opinion are clearl both wrong in suggesting that the "profit" allowed on a force account should govern here. The testimony and the special provisions (Exh. D-4) both reveal that the 30% allowed under force account is for "overhead and profit" and of even more importance, this add-on is added only to the total labor amount. In force account work the amount payable is the total of the labor expended, the cost of the material used and the equipment rental. Of these three co ponents "labor" is usually the smallest factor and general

does not exceed 1/3 of the total cost. It is thus apparent that the 30% allowed for "overhead and profit" really amounts to considerably less than 30% of the total payment and would usually equate to 10% or less as a true "profit." Both opinions are therefore incorrect since they erroneously assume that this 30% is a factor added on to the entire cost.

The crucial point, however, is that the evidence regarding a 30% profit only came up in connection with the cross-examination of the Contractor's witness, Erma Hitchcock. A rough calculation of the claimed profit on various items of work to which she had referred indicated a profit of 30%. The cross-examination was really a challenge to this percentage of profit since it was obviously excessive. Later, in cross-examincation of the State's witness Bob Rowley, he testified that 30% was added to the labor amount under "force account" for "overhead and profit." As can be seen, the two do not equate.

Again, the point here is that neither of the parties were attempting to urge that anticipated profit be determined by the use of a multiplier.

B. NO EVIDENCE IN THE RECORD SUPPORTS THE TRIAL COURT'S MULTIPLIER OR ITS MULTIPLICAND

If the trial court's multiplication formula is to be used, there are two figures which have to be determined; the first is the multiplier percentage. The Court's selection of 20% is simply arbitrary. No witness said anything about 20%, and no document supports it. The second figure is the multiplicand or the sum to be multiplied. Here again there is no evidence to sustain the amount used by the trial court and which the main opinion has adopted.

In the Contractor's memorandum submitted in October 1976 (R.)* on page 4 the Contractor asserts that $1,700,125.93 is the remaining work to be done by the Contractor and its subcontractors. This sum was selected by the trial court as the multiplicand. The Contractor in that memorandum urges the use of a 30% multiplier, well knowing that included in that figure is some 432,967 cubic yards of roadway excavation having a dollar value of $398,329.64 upon which there is no profit according to the Contractor's own witnesses. Also included are three items totaling $43,658.75 (Bid items # 2, 3, and 4) which according to the Contractor's testimony are non-profit items. In addition, there are two adjustments for over-payments totaling $129,519.90 involving topsoil and roadway excavation items which would

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* See explanation on page 16

reduce the multiplicand and which are non-profit items. There are also items of partially completed work which the Court allowed recovery from the State of $167,344.76 which further reduces the multiplicand. (To leave these items in the multiplicand would result in double recovery.) Finally, on page 6 of the memorandum of the Contractor (R.)* there is a table showing remaining subcontracted items of $536,520.36 which is part of the multiplicand and it is also shown in the table that the profit on this amount is $27,338.31. (In spite of this the Contractor has the temerity to urge that it should recover 30% profit when its own evidence shows it to be approximately 5%.)

When the foregoing sums are deducted, the multiplicand becomes considerably smaller as the following summary shows:

Multiplicand selected by Court:		$1,700,125.93
Less:		
Roadway Excavation	$398,329.64	
Bid items 2,3, & 4	43,658.75	
Overpayments	129,519.90	
Partially completed items paid previously	167,344.76	
Subcontracted items	536,520.36	$1,275,373.41
Net Multiplicand		$ 424,752.52

At this point it is obvious that the remaining multiplicand includes the cost of completing the work and

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* In preparation for this Petition the State discovered for the first time that the Contractor's Memorandum referred to is not included in the file. The trial court obviously had the Memorandum, however, since the figures are identical. A copy was served on the State in October 1976.

profit and the amount of either is uncertain. The use of the multiplier at this point would not be too offensive if the Court had properly analyzed the evidence. However, the State does not believe that the evidence in any way will support use of a multiplier due to the arbitrary nature of it and the fact that its use was never urged during trial but is simply an after-thought of the Contractor's counsel three months after the trial.

Again, the State cites the previous ruling of this Court in the case of Monter v. Kratzers Specialty Brea Company, 29 U.2d 18, 504 P.2d 40 (1972), where it said, "... a judgment cannot be based upon mere speculation...." It is submitted that the trial court has engaged in speculation by using a multiplier to calculate damages.

POINT IV

THE AWARD OF ANTICIPATED PROFIT IS NOT SUPPORTED BY THE EVIDENCE.

The main opinion states:

> Defendant has attempted to reargue the evidence by submitting certain figures on a selective basis. The trial court had not only the evidence and exhibits but a number of memoranda from counsel concerning damages; there is no basis in the record to rule the trial court erred. (Emphasis supplied.)

The above statement is simply wrong. The State's evidence merely takes the contract amount and adds supplemental agreements which increased the original contract amount and then deducts payments already made. In doing this, the State is merely applying the rule in Holman and Keller, supra. Items of work in the contract which according to the Contractor's testimony do not include profit or which by contract provision are not to include profit are deducted. Other work items which are to be performed by subcontractors or the joint venture Respondent Pritchett are likewise deducted to arrive at an amount which represents the remaining work items which the Contractor claims include profit. If you take the Contractor's own figures which it claims represent profit and deduct those amounts from the bid price, the remainder obviously represents the cost to the Contractor of performing those items or work. This is merely a mathematical exercise based on documents not disputed by either party and the Contractor's own evidence. The result is a figure far less than the sum claimed by the Contractor or allowed by the trial court. The State merely askes this Court to examine the evidence that was before the trial court to see if it sustains the judgment. The State submits that the evidence does not. The following summary is fully supported in the evidence:

Original Contract Amount			$6,680.000.0
Supplemental Agreements Added (Exh. D-67)			103,603.5
TOTAL			$6,783,603.5
Earned to date of breach (Exh. D-67)		$3,715,324.00	
Unpaid mobilization earned (Exh. D-67)		274,000.00	
Unamortized cost of water (Exh. P-52)		19,513.00	
Subcontract amounts (net) (Exh. P-41)		493,120.00	
Asphalt (pass through item at cost) (Exh.P-4, Sheet 52)		1,073,708.32	
Roadway excavation (orig. quantity less quantity paid =432,967 cu.yards @ bid price of $.92=		398,329.64	(No profit per Hitchcock R.109)
Items in contract which the contractor concedes do not contain profit:			
Flagging		36,258.75	
Pilot car		5,000.00	
Obliteration of roads		2,400.00	
Items effectively eliminated:			
Granular borrow		18,000.00	
Items in dispute awarded by Court:			
Price reduction	$ 1,822.37		
Clearing and grubbing	2,000.00		
Drilling and shooting	28,427.45		
Pipe, rip-rap, topsoil [See Finding of Fact 26(d)]	124,350.94		
Stockpiled gravel	10,734.00		
Overpayments to Respondent found by Court: (Par. 28)			
Roadway excavation overpaid (Note 1)	61,501.08		
Roadway excavation paid for as topsoil (Note 1)	68,018.82		$6,332,508.37
MONEY REMAINING IN CONTRACT WHICH INCLUDES PROFIT			$ 451,095.19

Note 1 - These two deductions represent amounts already paid as roadway excavation; the topsoil amount is paid for at a higher price. The roadway excavation is a reduction for an over payment. Since Respondent does not claim profit on remaining roadway excavation the deduction is proper.

As can be readily seen, the remaining amount of money left in the contract which includes profit also must cover the cost of the work involved in those items. We have previously analyzed the remaining 9 items using Respondent's claimed profit and the bidding schedule to calculate the cost of the work which is $420,775.67. (The Court is referred to page 31 of Appellant's Brief attached as Appendix "B" herein which shows this total cost.)

If this cost is deducted from the remaining money set forth above ($451,095.19), the indicated profit would appear to be the mathematical difference, which is $30,319.52.

To the figure of $30,319.52 the profit on subcontracts which is conceded to be $27,338.31 should be added making a total of $57,657.83 which the State submits is the absolute maximum anticipated profit which the Contractor could earn using the Contractor's figures and analyzing the remaining amount of work in light of the evidence. (Appendix "C")

At this point the State desires to point out that the sum set forth above of $451,095.19 would be a proper item for a multiplier, if one could in fact be arrived at, since that figure contains "profit." Contrast this with the figure of $1,700,125.93 which the trial court used which contained among other things remaining work to be performed by subcontractors of approximately $500,000.00 on which the profit was fixed at $27,338.31.

The State challenges the statement of the main opinion to the effect that it is submitting figures on a "selective basis." The figures submitted all apply and are all in evidence, mostly by agreement.

POINT V

THE COURT'S RULING WITH RESPECT TO DAMAGES AWARDED SUBSEQUENT TO OCTOBER 22, 1975 IS ERRONEOUS.

The State's letter of September 25, 1975 delive to the Contractor on September 26, 1975 has been held to c tute a breach of contract and for purposes of this Brief t breach is conceded. As a result the State became immediat liable to pay damages consisting of three main areas: (1) in progress at the time of the breach or earned but unpaid (2) the cost of terminating and suspending its operations; (3) anticipated profits.

In this case there is no controversy remaining over the first area of damage, and we have addressed the t area on anticipated profits. The remaining area of contro versy is on the cost of suspending operations.

The contractor claimed to be entitled to reimbu ment for equipment rental on equipment leased from others also claimed reimbursement for salaries of key personnel, other incidental items. The Contractor claimed that these

going changes were in the area of 6 to 9 months in duration.

The State contended at trial that most, if not all these "ongoing damages" could have been terminated without cost to the Contractor, or that in the case of equipment rental contracts they were in fact purchase contracts where it was to the Contractor's advantage to continue the lease payments. The trial court awarded these damages for a period of three months in the amount of $231,143.48.

It is respectfully submitted that the trial court and the main opinion are both in error in that they overlook the legal significance of the Contractor's letter of October 22, 1975. That letter says in effect that "no contract exists" and that the Contractor will complete a small amount of paving to enable traffic to be placed on the northbound lane and off the existing Highway 91 "solely to protect the public."

In its Brief the State has previously cited the case of Rockingham County v. Luten Bridge Co., 35 F.2d 301 (1929) for the proposition that the party who stops performance of a contract becomes liable for the consequences of that action but that the other party cannot thereafter "increase the damages" by performance. The case of Blair

et al. v. U.S. for Use of Gregory-Hogan, et al., 147 F.2d 840, also cited in the State's Brief stands for the proposition that the party not in breach is not entitled to better his condition nor profit by non-performance.

The State believes that in this case the breach occurred on September 26, 1975 and was followed by a period of negotiation which ended with the Contractor's letter of October 22, 1975. The State represents that the evidence shows that as of that date all rented equipment could have been returned to the owners without any penalty to the Contractor. During the period of negotiation between September 26, 1975 and October 22, 1975, the State concedes its liability. The work done during the period between October 22, 1975 and the actual termination of operations has been paid for by the State under the contract unit prices for the work done. In addition, the trial court allowed recovery under "force account" of an additional $49,559.18 for this same work.

The Contractor in announcing its decision to "stand on the breach" as of October 22, 1975 (Exh. P-9) incurred a duty to mitigate its damages as of that date. It thereafter recovered for all work done beyond that date allegedly to "protect the public." The Contractor in fact could have returned the rented equipment and terminated the employment of its "key personnel" and stopped the running

of damages without any cost on that date. The failure of the trial court to recognize the significance of the Contractor's written statement of October 22, 1975 and its subsequent actions is error. By using the proper cut-off date of October 22, 1975, the damages for equipment rented from others would be reduced from $191,370.00 awarded by the Court to $63,790.00, and the salaries to key personnel would likewise be reduced from $39,773.48 to $13,257.82.

The main opinion justifies the trial court's failure to limit damages to the October 22, 1975 cut-off date by saying "defendant persisted in its position that it had not breached the contract, plaintiff's retention of the equipment and key personnel was a reasonable action under the circumstances." The State agrees with that statement so long as the parties are continuing to negotiate. The State does not agree with the main opinion after the letter of October 22, 1975. The clear statement of the Contractor that "no contract exists" should be as equally binding on the Contractor as the Court says the State's letter of September 25, 1975 is on the State.

The State believes that the trial Court and the main opinion are opting for a double standard by their rulings, and the State respectfully submits that the damages

allowed by the trial court should be reduced from the combined total of $231,143.48 to one-third of that amount which is $77,047.82, or the State should have a new trial. This is particularly true when you consider the amount the trial court awarded the Contractor for the paving done in October 1975 of $49,558.18 under a "force account" theory. The trial court held that there was a breach of contract on September 25, 1975 and then turns around and applies a contract theory to calculate the cost of the work in Octobe and ignores the State's written response to the Contractor' letter of October 22, 1975, which letter was dated October 2 1975 (P-10) and which clearly stated that any work done wou be at "contract rates."

A reduction as suggested above or a new trial is the only reasonable answer to the trial court's obvious errors in this area of damage.

CONCLUSION

By way of conclusion, Appellant reluctantly concedes the fact of its breach of the contract for purposes of this Brief and the resulting requirement to respond in damages. Appellant does not concede that the damages found by the trial court are correct. They are obviously excessive. This Court has apparently reached that conclusio as to general damages. It is respectfully submitted that th

evidence viewed in a reasonable light does not sustain the award of anticipated profit. It is further submitted that those damages which arise out of events subsequent to October 22, 1975 should be disallowed as well.

The obvious conclusion is that there are substantial errors both factually and legally in the judgment of the trial court, and in view of the division of opinion apparent in the decision of this Court it would be reasonable to remand the case for trial on the issue of damages in light of the Court's ruling on the question of breach and with the further instruction and guidance as to other points at issue in this case.

Respectfully submitted,

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This is to certify that two copies of the foregoing Petition for Rehearing and Brief in Support of Petition for Rehearing were mailed, postage prepaid, to John G. Marshall of Tuft and Marshall, Attorneys for Respondent Industrial Construction, Inc., 103 Social Hall Avenue, Salt Lake City, Utah 84111, this 21st day of November, 1978.

Leland D. Ford

IN THE SUPREME COURT OF THE STATE OF UTAH

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Industrial Construction, Inc., a Nevada corporation, and Pritchett Construction Company, a Joint Venture,
Plaintiffs and Respondents,

v.

The State of Utah, by and through the Department of Transportation,
Defendant and Appellant.

No. 15167

FILED
October 11, 1978

Geoffrey J. Butler, Clerk

MAUGHAN, Justice:

Defendant appeals from a judgment awarding plaintiff, contractor, da for defendant's breach of a highway construction contract. After a lengthy t which was bifurcated in order to determine first, whether defendant had breac the contract and whether it was a total breach, and second, the appropriate me of damages; the trial court ruled primarily in favor of plaintiff. The damage awarded to plaintiff compensated for work completed and unpaid under the cont for anticipatory profits for the work not completed under the contract, for wor formed for the public safety, the compensation for which was not measured b terms of the contract, and for damages which the trial court characterized as g or temperate damages. The judgment of the trial court is affirmed except fo award of $100,000 for general or temperate damages. Costs are awarded to pl

Plaintiff, a Nevada corporation entered into a joint venture with Pritch Construction Company, a Utah corporation to bid on an interstate highway proje identified as the North Holden to Scipio project. By stipulation all claims betw Pritchett and defendant have been severed and reserved for trial at a later date. Plaintiff was the successful bidder and entered into a written contract with defe ant, wherein plaintiff agreed to perform certain excavation and construction wo in conformity with the plans and specifications prepared by defendant.

Incorporated in the contract were certain standard specifications, under which plaintiff had previously performed work. These standard specifications been superceded and supplemented by certain special provisions. The inceptio the dispute between the parties involved sheet #56 of the special provisions, wh concerned the storage of mineral aggregate (gravel) to be used in the bitumino surface course of the highway. Sheet #56 required the split stockpile method, which entails dividing the gravel into two separate piles according to gradatio

r to feeding the material into a hot plant to produce the asphalt material for the minous surface course. This specification was new to the State of Utah, and her plaintiff nor the resident engineer had prior experience in the operation of h a provision.

Prior to the opening of the bidding the President of plaintiff, who was unsure ther sheet #56 applied only to a dryer-drum mixer asphalt plant (the specifications which immediately preceded sheet #56), conferred with the Utah State Highway ineer. The president was informed sheet #56 did not apply to the type of hot plant ations utilized by plaintiff, and if it were the successful bidder, the split stockpile thod was not applicable. Upon that understanding, the joint venture submitted the and was awarded the contract. Pritchett was to do the concrete items and a few r items incidental thereto, plaintiff was responsible for the excavation, embank-t, construction, and paving work.

Plaintiff preceded with the work under the contract which was approximately completed on September 26, 1975. On this date, plaintiff had substantially com-ed all portions of the roadway embankment and concrete structures which could be e prior to diversion of the traffic from Highway 91, since the remainder of this type ork would interfere with public travel. At this juncture in the construction, plain-intended to apply two lifts of bituminous surface course to the north-bound lane of new highway; so traffic could be diverted thereto and the remaining portion of road-embankment work could commence.

Prior to September 18, 1975, plaintiff was notified by the resident engineer, an loyee of defendant, that plaintiff would be required to comply with the split stock-requirement of sheet #56. Plaintiff communicated the understanding related by gent of the state prior to bidding that this requirement was not applicable to the of hot plant operation utilized by plaintiff; plaintiff requested, according to con-tual procedures, an adjustment in the construction method. Plaintiff was informed llow the split stockpile method. The resident engineer requested plaintiff outline in ting its proposal for compliance with the prescribed stockpile method. Plaintiff onded by letter on May 28, 1975, outlining a proposal to construct three stockpiles, different contents in each; this proposal was approved by the resident engineer on e 4, 1975. Neither sheet #56 nor plaintiff's letter specified the location of the stock-

Thereafter, plaintiff constructed three stockpiles; one was located at the site of hot plant on the north end of the project; the other two were situated at the site of ntiff's crusher on the south end of the project, approximately eight miles in distance, available for use as required. The resident engineer knew the location of the stock-s, since he directed tests thereon to ascertain the contents.

Sheet #56 required the contractor to have sufficient material in the stockpile for ration for two days prior to commencing hot plant operations. There is no provision heet #56 for a reduction in price for failure to follow the method set forth. Sheets through 50 inclusive of the special provisions contain the standards applicable to the formance of the bituminous surface course and provide a formula for adjusting the e in the event the contractor does not fully comply with the standards. The pay

factors for the performance of the bituminous surface course in these provisi include the gradation and bitumen content of the material produced and the de smoothness and roughness of the material as it is laid and compacted.

Plaintiff commenced operation of its hot plant on September 18, 1975 a any notice or objection from defendant concerning its stockpiling method. Th after and including September 26, 1975, plaintiff produced and placed approxi 9,868 tons of bituminous surface course material, with a contract value of ap mately $29,000 on the north-bound lane of the roadway. All of the bitumi material produced by plaintiff was within substantial compliance with the acc standards of the special provisions of the contract, although some price reduc under the formula was assessed for failure of the material to meet the gradati standard.

On September 23, 1975, the resident engineer by letter to plaintiff acknowledged three stockpiles had been built but only one was located at the ho plant, plaintiff was directed to add an additional stockpile at that location. On September 26, 1975, the resident engineer delivered a letter personally to plai tiff's agent in which it was stated that plaintiff had failed to comply with the spe stockpile method of sheet #56 or plaintiff's letter of May 28, 1975, relating to storage of the mineral aggregate, for that reason defendant refused to pay for bituminous surface course produced and laid on the roadway to that date. Then upon, plaintiff suspended its operations and asserted to defendant that the refus to pay constituted a breach of contract. Plaintiff further denied that it had not complied with the method of aggregate storage set forth in its letter of May 28,

On October 1, 1975, defendant, by letter, informed plaintiff that any continued operations in violation of defendant's interpretation of sheet #56 would be interpreted by defendant as an acceptance by plaintiff of "a suitable price reduction yet to be determined." There was no contractual provision to support defendant's position that it could reduce the price for plaintiff's alleged failure to comply with the method set forth in sheet #56.

At the time plaintiff suspended its operations, it had placed one lift of asphalt upon approximately two-thirds of the north-bound lane, which plaintiff had intended to pave prior to turning the traffic from Highway 91 thereonto. The traffic could not be diverted onto the north-bound lane prior to completi of the paving. The location of Highway 91 in relation to the construction projec created a danger to the public when the weather turned inclement. In the interes of protecting the motoring public from the undue risks in traversing the constru tion project, plaintiff recommenced operations on October 28, 1975, to finish th paving of the first lift on the north-bound lane. With the approval of the resid engineer, plaintiff turned the traffic onto the north-bound lane, after the pavi was completed to protect the work that had been performed, Pritchett Constru tion Company constructed a concrete drainage structure, which would drain water away from the portion of the north-bound lane being utilized by the public.

The foregoing recitation constitutes the facts as found by the trial court. rvey of the record reveals substantial evidence to support the findings.

The trial court concluded, as a matter of law, that neither the original ification nor the modification as set forth in plaintiff's letter of 1975 contained requirement as to the location of the three stockpiles. Three stockpiles were tructed by plaintiff, one was immediately available to the hot plant, and the two were available for blending purposes. Plaintiff was reasonably led to ve it was in compliance with the contract concerning the location of the stock- , and on September 18, 1975, plaintiff was allowed by defendant to start up its lant and commence paving operations without any objection from defendant. bituminous surface course produced by plaintiff was in substantial compliance the provisions of the contract relating to acceptance standards. There was no onable justification for defendant to deliver the letter of September 25, 1975, r withholding payment for materials produced through September 26, 1975. obligation to pay for the bituminous surface course material was a material essential part of the performance required of defendant under the contract and necessary at that point of performance in order to require the continued per- ance of the plaintiff. Defendant breached the contract by its refusal to pay, refusal amounted to a total breach and released plaintiff from any further per- ance; defendant's letter of October 1, 1975, further justified plaintiff's refusal ntinue performance. The trial court further concluded, at all times prior to reach, plaintiff was in full and substantial compliance with the requirements contract. For that reason defendant's counterclaim was dismissed.

On appeal, defendant contends the trial court erred in its conclusion that tiff was in full and substantial compliance with the provisions of the contract. ndant urges the plaintiff committed the first breach by its failure to comply the method concerning the stockpiling of the aggregate. Defendant claims that ugh the exact language of either the special provisions or the letter of May, 1975 not specify the location of the stockpiles, anyone of common intelligence would me that a competent contractor would locate the separate sized piles at the site. Defendant urges that only one intent can be gleaned from the language specifications. Defendant quotes the following language from sheet #56: minus 4 aggregate shall be fed to the drier at a uniform rate. . .." Defend- easons there must be two piles consisting of plus four and minus four aggregate mply with the provision, and, therefore, the language implies the stockpiles e located at the plant site.

The evidence indicated there was a mechanism on plaintiff's hot plant which ated the amount of fine material being fed into the mix. The project engineer nowledge of how plaintiff's plant functioned and the location of the stockpiles; mitted without objection the commencement of the hot plant operations. There bstantial evidence to support a finding that plaintiff reasonably understood that s in compliance with the special provisions, and the project engineer so con- ed. The language as to the location of the stockpiles was ambiguous, and the s demonstrated through their conduct their mutual understanding. The ruling trial court must be sustained.

Defendant contends the work performed by Pritchett Construction Co as a member of the joint venture, constituted an election by plaintiff to contin formance after defendant's breach; therefore, plaintiff breached the revived by its refusal to perform. Defendant further contends the work performed b tiff after September 26, 1975, constituted an election to waive the breach and proceed to perform the contract. The type of work and reason for the work disputed issues of fact, which the trial court resolved. The evidence is undi the public safety was placed in jeopardy when plaintiff terminated its perform The location of Highway 91 in relation to the project was such so that all drai would flow onto the highway and create a skating rink in freezing weather. potential liability the two members of the joint venture performed essential divert the traffic to the newly constructed way, where the public could travel

The evidence indicates that prior to performing this work the agents of plaintiff and defendant discussed the dangerous conditions and potential liabili Defendant represented it would respond but failed to do so. Finally on Octobe 22, 1975, plaintiff delivered a letter to defendant stating that in the interest of safety of the public, it would perform the work required so that traffic could be diverted to the north-bound lane. Plaintiff further stated it was entitled to be on the basis of force account. Plaintiff invited defendant's cooperation since emergency work being performed under emergency conditions.

On appeal defendant claims it had considered two contingent plans which would have obviated the work performed. This evidence was excluded, after a proffer of proof, because defendant's plans were never made known to plaintiff and could therefore not be probative of plaintiff's intent to waive the breach and perform the contract. There is no evidentiary basis to hold plaintiff had waived the breach and proceeded to perform under the contract.

Defendant further contends plaintiff should have been paid for the emerge work on the basis of the contract prices or in the alternative the reasonable valu of the work. Since the contract had been breached, the cost as set forth therein would not determine the reasonable value of the work. "Force account" prices a a means used by defendant under a contract to compensate for work not covered under the contract. Plaintiff's evidence concerning the cost of the emergency w followed the "force account" method. The trial court in an oral ruling found the evidence of plaintiff, as to the cost, was unrebutted. This cost was incorporate into the judgment. Defendant has not presented any evidence the claimed amount was not the reasonable value of the work; the ruling of the trial court must be sus tained.

Defendant further contends the amount awarded as anticipatory profit was excessive and cannot be supported by the evidence. A plethora of exhibits and testimony was presented concerning the cost of the work to be completed and the anticipated profit. In this type of contract, the items of work are separately list and a contract price per unit is specified. The contractor includes his profit in item listed. For example, a price is set in a contract for roadway excavation a sum certain per ton. The contractor has computed his expenses and profit in de mining the amount of his bid on this item. The amount the contractor is ultimate

is determined by the number of tons he actually moves, since the parties can only ate the tonnage at the time the contract is executed. The parties presented con- g evidence as to the amount of work remaining to be completed, and the actual o plaintiff to perform the work. It should be observed the payments plaintiff had ously received for the work completed included its profits on those items, thus its ges for defendant's breach would be limited to the profits it would have realized on maining unfinished work.

The trial court found the total remaining under the contract, to be paid for work rofit, was $1,700,125.93. The sum of $340,025.18 was found to be the minimum nt plaintiff could reasonably have anticipated to have earned as profit on the portion contract remaining uncompleted on the day of the breach.

In its findings the trial court stated that from proof presented by both parties it n accepted computation in determining profit on force account to use 30 percent. court further found that plaintiff's witness testified that in preparing bids a gross t of 30 percent was anticipated. The court found that such anticipated profit should duced to a net amount of 20 percent, because of operating expenses, etc. This fac- e court used to determine plaintiff's anticipated profit.

Defendant contends that there were a number of items which should not have included in calculating the sum found to be the amount of work unfinished under ontract. Plaintiff contests the accuracy of defendant's argument. Defendant has pted to reargue the evidence by submitting certain figures on a selective basis. rial court had not only the evidence and exhibits but a number of memoranda from sel concerning damages; there is no basis in the record to rule the trial court erred.

The defendant further urges that the court's use of an arbitrary multiplier of 20 nt to determine the net anticipated profit was unconscionable.

Plaintiff's witness testified there was an anticipated gross profit of $502,322.68, should be reduced by 4 1/4 to 4 1/2 percent to determine net profit. The witness ied that depreciation expenses, overhead, payroll taxes, and contributions for oyees to labor organization benefit funds must be deducted to determine net profits. bstantiate the sum anticipated as gross profits, plaintiff's witness testified as to onetary figure allocated to profit per ton or per gallon for each item still to be sup- under the contract. She further testified that although the percentage of profit may from item to item, generally in preparing a bid, plaintiff submits figures which de a 30 percent gross profit.

One of defendant's witnesses testified that defendant had established a formula mpensate for work which is not done under a contract. The court inquired whether rmula involves taking the costs, as determined by defendant, and then adding 30 nt for additional factors. The witness responded affirmatively. Included in the rcent were certain fixed costs and gross profits. Defendant further presented an it calculating plaintiff's anticipated profit as $250,266.28. In its brief defendant s the maximum anticipated profit could be no more than $90,301.35. From all nflicting evidence, the court devised a formula which would determine as accu- as possible the anticipated net profits. There is an evidentiary basis to sustain

the ruling, and defendant has not sustained its burden of showing, from the re the trial court erred.

> The policy of this Court has been, after reviewing the record, not to disturb the trial court's findings if there is a reasonable basis in the evidence to support it.[1]

Defendant contends the trial court erred in awarding plaintiff certain items of expense. One of these items was the unrecovered costs for developing wate plaintiff's witness testified that three or four wells were drilled at different lo tions on the project. The labor costs for drilling the wells, laying waterlines, setting up storage tanks were determined; this cost was then allocated as an "watering" to the various items of work where water was to be utilized; viz., amount used at the asphalt plant to control dust, on the untreated base course, The amount sought by plaintiff was the cost of watering for the items not perfo under the contract since this expense had already been incurred. The witness specifically denied the cost of water was included under the mobilization provis in the contract. Defendant presented no evidence on this issue. On appeal defe an merely cites the generalized wording in the mobilization provision to sustai its claim the court erred in its award. Defendant has not sustained its burden.

Defendant urges the trial court erred in awarding plaintiff damages for t expenses incurred in retaining certain items of rented equipment and the salari of certain key personnel after the date defendant breached the contract. Plaint cross-appeals claiming the trial court should have awarded it the entire cost of the rental of the equipment.

The facts adduced indicated that after plaintiff terminated its performance in September, 1975, defendant adamantly claimed it had not breached the contra Plaintiff filed a declaratory judgment action on October 2, 1975, to have this mat ter determined, which the trial court resolved in April 1976. In the interim, the parties continued negotiations. Under the circumstances plaintiff retained and p the salaries for a limited period of time for its grade foreman, rotary drill oper tor, asphalt foreman, and superintendent. Plaintiff also had certain items of equipment which it had rented; some were of such a type they would be difficult t locate, if they were returned to the lessor, and then work was resumed. The t court awarded the entire amount claimed for salaries for key personnel. Howev the court limited the equipment rented to three months for the reason the evidenc indicated the equipment could not have been used after the first of the year due t weather conditions.

Defendant contends the amount awarded for key personnel and equipment rental was unreasonable. This argument is predicated on a letter sent by plaint to defendant on October 22, 1975, wherein plaintiff stated that it considered its co tract with defendant terminated on that date. Defendant claims the portion of the award for compensation for damages beyond that date should be disallowed.

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1. Holman v. Sorenson, Utah, 556 P.2d 499, 500 (1976).

The statement in the letter was made in conjunction with plaintiff's notice to ndant that certain emergency work was being performed for the public safety not pursuant to the contract. Since defendant persisted in its position that it not breached the contract, plaintiff's retention of the equipment and key per- nel was a reasonable action under the circumstances. The limitation of three nths for the equipment rental, imposed by the trial court, was a rational ice for the reason the equipment could not be utilized under the weather con- ons, after the first of the year. Neither party has sustained its burden to ficate the trial court was in error.

Defendant's arguments concerning offsets and restoration of a price reduction paving are without merit.

Finally, defendant contends the award of general damages was not supported the evidence.

The trial court found plaintiff was unable to bid and bond other work while this tter was unresolved. The court found the interruption of plaintiff's cash flow maged its credit reputation and earning capacity and subjected it to suits from cred- rs with resulting counsel fees. The trial court awarded $100,000 as general or mperate damages.

There is a paucity of facts to sustain this claim. Plaintiff's only witness ncerning this claim testified in a general manner. She stated that the income opped; the equipment was idled; the company was unable to meets its obligations d was sued by various creditors. The legal actions involved various creditors, o had supplied equipment or supplies for the project. At the time of trial, laintiff had no knowledge of the ultimate cost of counsel. The witness further stified the loss of cash flow impaired the ability of plaintiff to bid and its bonding pacity, and damaged its credit reputation.

This action is distinguishable from Laas v. Montana State Highway Commission,[2] herein an award to a contractor was sustained for loss of profits because the breach contract by the state caused the road contractor to lose his bonding capacity. The ntractor presented extensive evidence proving he had always been a successful con- ctor and had always made a profit on all of his projects for some twenty-two years. e delays by defendant had forced the contractor into debt and he had thus lost his nding capacity and thereby lost profits for a period of three years.

In the instant case, plaintiff presented no evidence relating its loss of bonding pacity to its historical profit ability. Plaintiff did not even specify the number of suits initiated against it; neither did it identify the parties nor the circumstances volved. There was no evidence as to plaintiff's credit reputation and the degree, if y, it was impaired.

Plaintiff has relied on the concept of temperate damages to overcome the identiary deficiency. This principle is not applicable in this type of action. Prior the adoption of the Uniform Commercial Code, the common law presumed substan- l damage (temperate damages), without any proof of actual damage, when a bank ongfully dishonored the check of a depositor who was a merchant or trader.

Mont., 483 P.2d 699 (1971).

The impeachment of the depositor's credit and repute in the business world deemed to resemble closely cases of libel and slander. The jury could aw temperate damages as they conceived to be reasonable compensation for t indefinite mischief, which such an act must be assumed to have been inflict according to the ordinary course of human events.[3]

This court cannot presume, without proof of actual damage, that a par has sustained substantial damage in a typical breach of contract action. T judgment of the trial court awarding general damages in the sum of $100,00 reversed, the remainder of the judgment is affirmed.

This opinion adds nothing new to the law, thus it is not to be published in the Pacific or Utah Reports.

I CONCUR:

D. Frank Wilkins, Justice

Crockett, Justice, concurs in result.

3. Browning v. Bank of Vernal, 60 Utah 197, 201-202, 207 Pac. 462 (1922).

ELLETT, Chief Justice: (Concurring and Dissenting)

I concur in holding that the state is responsible for such damages as plaintiff may have sustained if they are properly proved. The main opinion and the finding of the trial court seem to me to miss the point regarding damage to be awarded.

In this case the plaintiff had a contract figure which he would be entitle to receive had he finished the job (certain adjustments were agreed upon, but the final amount to be paid is not in dispute). The plaintiff would be entitled to that figure less amounts already received and less the reasonable cost of com- pleting the project.

The trial court split the contract into and figured profits on asphalt and on sub-contracts; and found certain other items could be completed for the con tract price without any profit thereon.[1]

1. For example he claims no profit would be made on the following items in th original proposals:

Flogging	36,258.75 cost
Pilot Car	5,000.00
Obliteration of Old Road	2,400.00
Total	43,658.75

The court found that the plaintiff had been overpaid for certain items. It also that the remaining work to be performed would total $1,700,125.93 and that 20% figure would be the anticipated profit thereon. Such calculations cannot be the for an award.

Even if the plaintiff could make a profit of $340,000 on the unfinished part of he cannot ignore any losses, which he may have sustained on work already med. His profits for which the state is responsible would be on the entire job out above.

The judgment should be reversed and the case remanded for a correct deter- ion of damages, towit:

The total contract price:	$
Less: amounts paid thereon:	_____
Balance due if completed:	$
Less: cost of completion:	_____
Damages for lost profits, if any:	$_____

I would award costs to the state.

Hall, Justice, concurs in the views expressed in the concurring and ating opinion of Mr. Chief Justice Ellett.

Deducting this sum leaves a net figure of $483,738.71 to cover the cost of completing the contract and the profit, if any, due to Respondent.

If the Court could arrive at a proper multiplier, which Appellant does not believe is possible, then this figure, not the figure selected by the Court would be the one to use as a factor since it would have items in it which might contain profit.

The witness Erma Hitchcock testified concerning Respondent's profit in completing various contract items according to their figures. (Exh. P-11) By mathematical extrapolation between the claimed profit and the bid price the costs can be derived. They are as follows:

Item No.	Item	Amount	Bid	Cost	Profit	Total Cost
45	Untreated base course	140,960.7 tons	$ 1.60	$ .65	$ .95	$91,624.5
46	Bit. surface course	167,761.05 tons	3.00	1.59	1.41	266,740.0
47	Plant mix seal	16,000 tons	5.00	1.96	3.04	31,360.0
48	Bit. additive	1280 gal.	5.80	4.05	1.75	5,184.0
49	Bit. material (spread)	120 tons	35.00	5.13	29.87	615.6
50	Bit. material MC 70	546.89 tons	10.00	5.13	4.87	2,805.5
51	Deep pen. asphalt	17.0 tons	25.00	13.00	12.00	221.0
52	Blotter material	50.0 tons	12.00	9.00	3.00	600.0
53	Surface ditches	32,500 ft.	.15	.05	.10	1,625.0
				TOTAL COST PER RESPONDENT		$420,775.6

APPENDIX "C"

On page 28 of Appellant's Brief the sum of $1,073,708.32 is set forth as the cost of asphalt which said amount by specification was a pass through cost and not to contain profit. In deducting this sum from the figure at the top of the page which is $2,281,646.56 the figure of $1,277,938.24 is arrived at in the Brief. This figure is in error and the correct amount should have been $1,207,938.24. The error was discovered in preparing the "summary" for the Petition for Rehearing.

At the time this case was argued to this Court in June, 1978, the Contractor-Respondent argued that Appellant's calculations resulted in a double deduction of certain items. On page 30 of Appellant's Brief the following items are listed as deductions:

1. Stipulated offset for finishing topsoil, clean-up, etc. $26,301.48

2. Offset for embankment finishing $11,055.00

After reexamination of its theory the State agrees with the Contractor, and these amounts are not shown as deductions in the "summary" set forth in the State's Brief.

The next effect of the $70,000.00 error and the failure to deduct the two items results in a net decrease of $32,643.52 between the anticipated profit of $90,301.35 shown on page 32 of Appellant's Brief and the total anticipated profit set forth in this Brief of $57,657.83, which sum includes profit of $27,338.31 on subcontracted items.