

2001

# Leger Construction, Inc. v. Roberts, Inc. : Reply Brief

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LEGER CONSTRUCTION, INC.,  
*Plaintiff and Appellant,*

vs.

ROBERTS, INC.,  
*Defendant and Respondent,*

vs.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY,  
*Defendant - Added.*

---

Case No. 13737

## REPLY BRIEF OF APPELLANT

---

Appeal from a Judgment and Amended Judgment of the Third Judicial  
District Court for Salt Lake County, State of Utah  
THE HONORABLE BRYANT H. CROFT, Presiding

---

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

IN THE  
SUPREME COURT  
OF THE  
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LEGER CONSTRUCTION, INC., )

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-vs- )

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Defendant and Respondent, )

-vs- )

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IN THE SUPREME COURT

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UNITED STATES FIDELITY AND  
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Defendant-Added.

REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

Appellant is constrained to comment as to the facts recited by respondent on page 8 of its brief that the excavation shown by the exhibits 30-36D were dug by Roberts, Inc., and had still not been backfilled on October 10, 1971, when the pictures were taken (see Tr. 3rd day, pp. 28-29). Any other deviation from grade was corrected by Leger's men on the same day as the problem was discovered (see Tr. 3rd day, pp. 30-31).

## ARGUMENT

### POINT I.

NO ISSUE WAS ALLEGED, TRIED OR DECIDED IN THE TRIAL COURT THAT ANY PART OF THE CONTRACT BETWEEN THE PARTIES WAS A PENALTY.

The answer of Roberts, a general denial fails to allege any issue that the contract sued upon, or any part thereof, was invalid as a penalty. The plaintiff, at the trial of this matter, attempted to introduce evidence as to the actual damages which could be reasonably anticipated at the time the contract was made if the completion of the job was delayed, and the trial court refused on its own motion to hear such evidence (Tr. 1st day, pp. 5-6); furthermore, the respondent failed to introduce or attempt to introduce any evidence as to the actual damages which could reasonably be anticipated in the event of delay in accomplishing the contract.

The trial court made no findings below that any part of the contract between the parties was valid or invalid as a penalty. The respondent now asks this court to make such a finding without any issue, evidence or findings whatsoever decided, taken or made by the lower court. This court is an appeal court, not taking evidence,

but deciding upon an established record whether or not

a lower court erred in making findings and judgment based

upon a record of evidence. Where no issue was raised in

the pleadings, no evidence taken by the trial court nor

findings made below, there is no issue before this court

to be decided.

Respondent correctly cites the rule that a

liquidated damage clause must bear some relationship to

the actual damages which could reasonably be anticipated

at the time the contract was made, then, without there being

any evidence in the record on what such anticipated actual

damages would be, blithely makes the assertion that the

liquidated damage clause does not contemplate any unfore-

seen damages which would not be fully compensated by the

payment to the general contractor's costs and expenses.

Such a statement ignores the realities within which a

contractor must operate, such as overhead and bonding limi-

tations which prevent the bidding of additional jobs prior

to certificates of completion being issued on existing

jobs, and other factors not in the record.



POINT II.

THE UNDISPUTED EVIDENCE SHOWS THAT THE INCLEMENT WEATHER OF WHICH THE DEFENDANT COMPLAINED NEVER IN FACT HAMPERED THE WELDING OR CAUSED THE IMPROPER WELDS WHICH CAUSED LEAKS.

Appellant makes no great claim as to the fact that snow fell at the jobsite in question during the month

of November, 1971. Such weather is usually expected in

the Salt Lake area during November. The appellant does

claim that both Patterson and Roberts testified that this

inclement weather hampered welding on the pads and this

was the reason for the bad welds, yet the welding on the

jobs was completed by October 30, 1971. The next phase

of the job was to put the pads under 150 pounds of air

pressure, soap the welds and valves and re-weld any leaking

welds. Neither Roberts nor Patterson made any claim that

inclement weather held up this procedure (Tr. 2nd day,

pp. 35-47). As to the welds and whether they tested out

under pressure, Patterson, at Tr. 2nd day, p. 42, L. 2-11,

deferred to a resident inspector and the daily records. A

resident inspector who was on the job eight (8) hours a

day testified during the third day of trial at pp. 22-24

that the system was so full of leaks that an air compressor

couldn't pump air into it fast enough to attain 150 pounds of pressure, and Roberts' welder had to come back to remedy the problem. The records which were introduced from the

State Building Board (Exhibit 48-P) never once mention valves as being a source of leaks, but only mention welds.

The inclement weather which Roberts complained of working under during the month of November, 1971, would have never

affected the work if Roberts had commenced fabrication of the pads on the job within two (2) days, or even a week, of August 27, 1971, the day he was requested to commence

said work, rather than October 8, 1971, the day he actually commenced said work, a period of forty-two (42) days,

nearly one-third (1/3) of the total days (120) required by the prime contract to perform.

With this undisputed evidence, the various findings by the trial court that there was no delay on the part of Roberts and that inclement weather caused delay on the

part of Roberts, have no foundation in the evidence and should be modified accordingly. The appellant asked for

the court to enter findings of fact that Roberts delayed the job in its motion to amend findings of fact, but the trial court refused.

POINT III. IT IS NOT NECESSARY TO RAISE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS WHERE THE TRIAL IS TO THE COURT WITHOUT A JURY.

The attacks made by the appellant upon all of the findings of fact of the trial court are primarily rooted in the sufficiency of evidence to support those findings. The trial court, in accordance with Rule 52(a) of the Utah Rules of Civil Procedure, made findings of fact upon which it based its judgment. Rule 52(b) of the Utah Rules of Civil Procedure provides for a motion to amend such findings and allows it to be made together with a motion for a new trial and also includes the following sentence:

"When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment or a motion for a new trial."

None of the cases cited by the respondent in his brief with respect to amendments to findings or a motion for a new trial apply to the situation in the instant case. It is obvious that in drafting the foregoing rule, the drafters realized that a trial court, once it has made its

decision upon its notes from the evidence, is not likely to change it, and on questions of sufficiency of the evidence, the appellate court, because it can look at the cold record taken by a certified court reporter, can better evaluate the questions of sufficiency of the evidence than the trial court who must rely upon handwritten notes and memory impressions of the evidence. Rule 52(b) of the Utah Rules of Civil Procedure should govern the appellate court decision with respect to the issues raised by the plaintiff as to the findings of fact.

POINT IV.

APPELLANT'S MOTION TO AMEND CHALLENGED ALL OF THE FINDINGS OF THE TRIAL COURT WHICH REFUSED TO ASSESS DAMAGES FOR DELAY ON THE PART OF ROBERTS.

The trial court was asked in the motion of the appellant to amend findings of fact, to delete the finding that Leger's claim for delay was limited only to the heating panels or pads (R. p. 21). Appellant also asked the trial court to assess damages for Roberts' refusal to complete the gas line, failure to install promptly the heating panels in a workmanlike manner and Roberts' failure to complete the Salt Lake Road Shed job (R. p. 22). There is nothing

in the record to show that a new trial would do anything other than to re-hear the same evidence. The questions raised on appeal were raised in the trial court.

POINT V.

THE AWARD OF ATTORNEY'S FEES WAS ERROR BY THE LOWER COURT

Respondent states that section 14-1-8 of the Utah Code Annotated (1953), was enacted to provide adequate compensation to a successful party who was forced to sue for the recovery of payments due under a prime contract.

It is clear from the record that Leger, as much as Roberts, was forced to sue because of defalcations of Roberts upon the contract, and to obtain an adjudication on liquidated damages. The summons and complaint were served upon Roberts on October 2, 1972, while the State Building Board still refused to issue its certificate of completion because of the failure of Roberts to complete his contract until February of 1972 (Tr. 2nd day, pp. 11-12). One can hardly believe that the legislature enacted section 14-1-8 to force a litigant to pay attorney's fees for the opposing party where there are proved breaches of contract by that

opposing party and a legal basis in the contract between the parties for withholding the funds actually withheld. Appellant asserts that there is no particular "custom" as to the awarding of attorney's fees in bond law cases in the State of Utah; and even if there were such a "custom," the statutory law and Rules of Civil Procedure must necessarily nullify any "custom" of lawyers of the courts. To construe section 14-1-8 and rule otherwise asks this court to engage in judicial legislation which this court has wisely refused to do.

Respondent, in arguing "just compensation" and "meaningless distinctions" asks this court to ignore the plain wording of section 14-1-8, which provides that attorney's fees shall be assessed as costs. The same arguments would have been applicable in the facts of Walker Bank and Trust Co. v. New York Terminal Warehouse Co., cited in appellant's and respondent's brief. The answer is simply that the statute and the rule require it by their plain terms. The legislature could have easily provided that attorney's fees be awarded to the prevailing

party as part of its judgment, or merely awarded attorney's fees without specifying them as costs.

POINT VI.

IF THE JUDGMENT AGAINST LEGER IS MODIFIED, ANY JUDGMENT AGAINST THE SURETY, UNITED STATES FIDELITY AND GUARANTY, MUST ALSO BE MODIFIED.

Suit was brought against the added defendant, United States Fidelity and Guaranty, upon a cross-claim based upon a surety bond written by defendant pursuant to Title 14, Chapter 1, sec. 5, Utah Code Annotated, alleging

as grounds for recovery that Roberts furnished work and materials to Leger. The liability of the added defendant as to Claim I of defendant's counterclaim and cross-claim, was and is completely dependent upon the liability of its principal, Leger, as no independent issues as to the bond existed in the lawsuit. Roberts, the creditor, is entitled to but one performance upon the bond, and if it receives that by payment or other satisfaction, the

surety, United States Fidelity and Guaranty, is discharged,

10 Williston on Contracts, 721 sec. 1219; Bushman Construction

Co. v. Air Force Academy Housing, Inc., 325 F2d 481

(CA10) (1964); see also 72 CJS 572-573, sec. 92.

If this court modifies the obligation of Leger, the obligation of the surety, United States Fidelity and Guaranty, must also be modified even though it has been reduced to judgment. The reason is that the relationship of principal and surety is not terminated by reason of a judgment obtained against the principal and surety, 10 Williston on Contracts, 813 sec. 1254; 72 CJS 698, sec. 243. The courts will allow a remedy to the surety where a whole or part of the judgment against the principal has been satisfied or modified, Walin v. Young, Oregon 182 P2d 535, 541.

In the case of Stolze v. United States Fidelity and Guaranty, Mo. 131 S2 915 (1910), the surety had posted a supersedeas bond for the payment of a judgment for a defendant on appeal. The appellate court modified the original judgment of \$15,000.00 and another judgment for \$8,000.00 was entered which sum the defendant offered to pay. The plaintiff insisted on collecting interest on the \$8,000.00 which amounted to \$1,254.00 and thereafter pursued both the defendant and its surety. The trial court



decided in favor of the plaintiff and entered judgment for \$1,254.00 against both the defendant and the surety. The defendant alone appealed the trial court's decision and the surety failed to appeal. The Missouri Supreme Court held that no interest was due, reversed the judgment against the defendant, and remanded the matter to the trial court. The plaintiff then began execution upon the judgment against the surety and the trial court held that plaintiff could not enforce the judgment against the surety for the reason that the undertaking of the surety is secondary only, and where the primary obligation had been ruled as not being owed by an appellate court, the appellate court's execution could not issue thereon. Even though the statute under which the bond was posted provided for joint and several liability on the part of the principal and surety, the Missouri Supreme Court on appeal ruled that such wording does not destroy the equity between principal and surety that once the obligation of the principal is discharged, the surety is discharged also, affirming the trial court ruling, thus any modification of the judgment made

in the instant case as to the amount owed by the principal, Leger, must also be held to modify the obligation of its surety, United States Fidelity and Guaranty, upon remand to the trial court.

#### CONCLUSION

In conclusion, there is no conflict in the evidence that Roberts caused delay in the installation of the radiant heating pads, therefore, the findings of fact by the trial court are without foundation in the evidence; the trial court was asked to correct these errors as to delay and refused; the trial court erroneously granted attorney's fees against the plaintiff and its surety; and any modification of the judgment as to Leger should also apply to its surety.

Respectfully submitted,

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