2001

Leger Construction, Inc. v. Roberts, Inc. : Brief of Appellant

Utah Supreme Court

John L. McCoy; Ryberg, McCoy and Halgren; Attorneys for Plaintiff-Appellant.
R. Mont McDowell; Attorneys for Defendant-Respondent.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

LEGER CONSTRUCTION, INC.,

Plaintiff and Appellant,

-vs-

ROBERTS, INC.,

Defendant and Respondent,

-vs-

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Defendant - Added.

Case No. 13737

APPELLANT'S BRIEF

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

John L. McCoy
RYBERG, McCOY & HALGREN
325 South Third East
Salt Lake City, Utah 84111
Attorneys for
Plaintiff-Appellant

R. Mont McDowell
340 East Fourth South
Salt Lake City, Utah 84111
Attorney for Defendant-Respondent.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

LEGER CONSTRUCTION, INC.,	)	
Plaintiff and Appellant,	)	
-vs-	)	
ROBERTS, INC.,	)	
Defendant and Respondent,	)	Case No. 13737
-vs-	)	
UNITED STATES FIDELITY AND GUARANTY COMPANY,	)	
Defendant - Added.	)	

APPELLANT'S BRIEF

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

John L. McCoy
RYBERG, McCOY & HALGREN
325 South Third East
Salt Lake City, Utah 84111
Attorneys for
Plaintiff-Appellant

R. Mont McDowell
340 East Fourth South
Salt Lake City, Utah 84111
Attorney for Defendant-Respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS--Continued

Cases Cited

Statutes Cited

Authorities Cited

TABLE OF CONTENTS--Continued

IN THE SUPREME COURT

OF THE STATE OF UTAH

LEGER CONSTRUCTION COMPANY, Plaintiff-Appellant, -vs- ROBERTS, INC., Defendant-Respondent, -vs- UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant-Added.	)	Case No. 13737

APPELLANT'S BRIEF

NATURE OF THE CASE

This action, in the sum of $2,782.00 was commenced on October 2, 1972, by plaintiff, a corporate general contractor, to establish its right to liquidated damages against the defendant subcontractor because of the defendant's failure to proceed promptly, in a good, workmanlike manner, and to complete a contract for the plumbing and mechanical construction work on two (2) State of Utah Road Maintenance Stations referred to as road sheds, one located at Salt Lake City, Utah, and one at Manila, Utah. The defendant denied these allegations and filed a cross claim and counterclaim, alleging as a first claim that the plaintiff and its surety upon said projects owned defen-

14-1-5 U.C.A. (1953), as amended; and as a second claim, that plaintiff only owed defendant the sum of $3,249.77 for several other unrelated transactions.

DISPOSITION IN LOWER COURT

After a plenary trial, the court filed a memorandum decision, findings of fact, conclusions of law, and a joint and several judgment against the plaintiff and its surety, on defendant's cross claim and counterclaim in the sum of $8,494.95 on its first claim, and against plaintiff in the sum of $782.25 upon the second claim. Motions to amend the findings of fact, conclusions of law, and judgment were made by all parties. The Court denied the motion of plaintiff and its surety, granted the defendant's motion to amend, and awarded to the defendant attorney's fees of $2,607.50 against the plaintiff and its surety on the defendant's first claim.

RELIEF SOUGHT ON APPEAL

Plaintiff and plaintiff for and on behalf of its surety asks for a reversal of certain findings of fact and conclusions of law, for reversal of the joint and several judgments against plaintiff and its surety, for reversal of the award against plaintiff and its surety of attorney's fees, or in the alternative, for a new trial.

STATEMENT OF FACTS

The defendant, hereinafter referred to as Roberts, submitted a bid to the plaintiff (Ex. 2-P) which was accepted by the plaintiff, hereinafter referred to as Leger, to do the

mechanical and plumbing work as described in the plans (Ex. 3-P) and specifications (Ex. 22-P) on maintenance stations at 1950 South Fourth West, Salt Lake City, and at Manila, Utah. The bid contained the following material provisions:

> (a) In performance of this work, time is of the essence and I agree to actually move on to the job, with all necessary tools, supplies and equipment, within two (2) working days after receiving written or oral notice and to start and carry on the work uninterruptedly to completion of the stage directed by the general contractor.
>
> (h) I agree to replace any defective workmanship or materials which occur within one (1) year from date of completion at no cost to the general contractor or the owner.
>
> (j) Quality of all materials and/or work furnished must be as specified. All materials will be subject to inspection and approval after delivery. If materials are rejected, they will be disposed of at no cost to the general contractor or owner.
>
> (p) The work shall be commenced upon written or oral order to proceed and completed within the time stated in this bid. If the work is not completed in accordance with the foregoing, it is understood that the general contractor will suffer damage and it being impractical and unfeasible to determine the amount of actual damage, it is agreed that I will pay, on demand, to the general contractor, as fixed and liquidated damages and not as penalty, the sum of $50.00 for each calendar day of delay until the work is completed and accepted. Extension of time shall be granted, when asked for in writing, when it is, in the judgment of the general contractor, not practical or impossible or because of unforeseeable causes beyond control and without fault or negligence on my behalf to complete said work in the specified time. (Above causes including but not restricted to strikes, war, acts of God, acts of the Government, acts of the owner, acts of another contractor in the performance of a contract with the owner, and adverse weather conditions.)
>
> I recognize the general contractor has a completion date guarantee in his contract with the owner that calls for completion on or before November 30, 1971.

> In addition to the liquidated damages, I agree to pay the general contractor an amount equal to his cost in maintaining a field office and supervision over the work for each day beyond the specified completion date if it is determined that I caused this delay, because: I recognize and agree that the general contractor's costs are directly proportional to the length of the construction period, and therefore shall reimburse the general contractor for all days beyond the specified completion date, whether an extension of time is granted or not. (Emphasis added)

Leger's employees commenced work on the Salt Lake Road Shed on August 1, 1971, (Tr. 1st day, p. 9, l.26). Roberts' employees were working on the same job on August 4, 1971, (Ex. 17-P under date of August 4, 1971). Further, Roberts was aware before August 1, 1971, that Leger intended to begin the job and had ordered the pipe needed for the job by August 1, 1971, (TR. 2nd day, p. 112, l. 17-23). The contractual obligations which Roberts had to Leger were as follows, (Tr. 1st day, p. 15):

> 1. Installation of underground piping for sewer and other utilities.
>
> 2. Welding and fabrication of radiant heating pipe gridwork, also referred to as pads, covering the floor of the building garage area consisting of eight (8) bays in Salt Lake City and four (4) bays at Manila, Utah, but which did not cover the office area in either place.
>
> 3. Installation of plumbing and fixtures in office area.
>
> 4. Installation of boiler and pumps.
>
> 5. Installation of septic tanks.
>
> 6. Installation of the water line and gas line.

The installation of the radiant heating pads was a major portion of Roberts' contractual obligations. The materials and installation occupied the entire interior of both

buildings except for the office portion, thereby preventing the pouring of concrete floors over the pads and all other inside work requiring scaffolding on the interior of the building, (Tr. 1st day, p. 10, L. 10).

The welding and fabrication of the heating pads was performed by Dartnell Welding, a subcontractor of Roberts, (Tr. 2nd day, p. 126). Roberts was informed that the Salt Lake project was ready for the heating pads to be installed on August 27, 1971, (Tr. 1st day, p. 10, l. 21 to p. 11, L. 12) and the Manila project, on September 4, 1971, (Tr. 1st day, p. 50). Roberts was aware of the progress of the job, and was required by the contract to move on the job within two (2) days after being requested to do so. Yet he failed to begin on the heating pads at Salt Lake City until October 8, 1971, and at Manila, until September 14, 1971. When asked about this problem by the court, Roberts replied that the header part of the pad for Manila was being fabricated in Dartnell's shop, (Tr. 2nd day, p. 126), yet Roberts offered no explanation as to why fabrication in the shop wasn't completed by Dartnell so that work at the jobsite could proceed two (2) days after August 27, 1971 at Salt Lake City, and two (2) days after September 4, 1971 at Manila. Moreover, the defendant failed to call any witnesses from its own subcontractor, Dartnell, who performed the welding to explain the reason for the delay.

The work of fabricating, welding, and testing the heating pads at the Salt Lake Shed should have taken three (3) to four (4) weeks, according to Lou Leger, president of plaintiff, (Tr. 1st day, p. 12, L. 7), or two and one-half (2½) to three (3) weeks according to Thomas Patterson, Utah

State Building Board Inspector, who appeared for the defendant, (Tr. 2nd day, p. 45. L. 17-25). No other competent testimony was introduced to show how long this portion of Roberts' work should have taken. The last welding on the Salt Lake City job was done on October 28, 1971. It was tested for the first time on November 11, 1971, (Tr. 2nd day, p. 115, L. 2-16). The heating pads on the Salt Lake City job could not be approved until December 7, 1971 because they would not hold 150 pounds of pressure, as required by the specifications, (Ex. 48-P, report sheet December 7, 1971, Ex. 22-P Section 18B, Heating and Ventilation, paragraph 3).

When Roberts was asked why no work was done after October 28, 1971, Roberts said that storm had caused some difficulty in pinning down where air was escaping from the lines, and that was why it took so long after the 28th of October, (Tr. 2nd day, pp. 127-128). On the other hand, Roberts' own records, (Ex. 17-P) show that the last welding on the Salt Lake Road Shed (designated in his records as SLRS or RS) was performed on October 27, 1971. The same exhibit also records that no further work of any sort was done on SLRS until November 10, 11 and 12, 1971, and not again until November 23, 29 and 30, and December 1, 2, and 4, 1971. For the month of November, then, Roberts' own records show that out of twenty-two (22) working days, excluding Saturdays, Sundays and holidays, his employees were on the SLRS job only six (6) days. The construction records of the Utah State Building Board (Ex. 48-P) show approximately the same date of work. Rain is noted by these records only on November 29, 1971.

The first pressure test in Exhibit 48-P is shown as occurring on November 24, 1971. As of that date, the system was leaking about one (1) pound of air pressure per hour. Location of leaks in welds was noted on November 29, 1971. The pad was still leaking on December 1, 1971. No work by Roberts' men is recorded again in Exhibit 48-P until December 6, 1971, when pressure was put on the pad. On December 7, 1971, the pressure was noted as being about 160 pounds.

Roberts testified there was "a lot of rain," while the weather records (Ex. 46-P) for the period of October 27th show rain on October 27, 29, 30 (Saturday), 31 (Sunday), November 12 (from 5:00 p.m. to 12:00 midnight), November 13 (Saturday), and November 14 (Sunday), November 15 (from 12:00 midnight to 7:00 a.m.), November 16 (10:00 p.m. to 12:00 midnight), November 26 (4:00 p.m. to 11:00 p.m.), November 27 (from 3:00 a.m. to 7:00 a.m., and from 4:00 p.m. to 11:00 p.m.)(Saturday). These same records show that if Roberts had commenced work on the heating pads within two (2) days after August 27th, he would have encountered virtually no precipitation nor inclement weather during regular working time,(month of September, Ex. 46-P). Contrary to Roberts' complaints about inclement weather, no extension of time for any reason was requested by Roberts nor give by Leger (R. p. 36-37, Finding No. 32).

Further, the plans and specifications called for the following items to be furnished by Roberts (Ex. 22-P), Sections 18A-05:

> 3. Lubricated plug valves equal to Nordstrom or Walworth....
>
> Workmanship....

> 1. Run lines as indicated on plans and connect up to gas main or to supply tank furnished by owner.

and at Section 18B-11 of Exhibit 22-P:

> Boiler Flue and Breaching....
>
> 2. Shall be constructed with a stainless steel line and a galvanized steel casing separated from liner by spacers.

There is no dispute that the defendant failed and refused to properly accomplish the foregoing requirements of the specifications. Larry Roberts, president of Roberts Corporation, Inc., the defendant, acknowledged that the lubricated plug valve he installed at Manila did not have a lubrication fitting on it, admitted that he refused to replace it, (Tr. 2nd day, pp. 105 and 106), and refused to do anything further about the aluminum stack on the boiler at Manila other than to write his subcontractor a letter of demand, (Tr. 2nd day, p. 80, L. 26). Roberts, through its president, Larry Roberts, refused to install the gas line at the Salt Lake City job to a gas main, although Leger and the Utah State Building Board requested that Roberts do the work, (Tr. 1st day, pp. 18-19).

Both the furnace at Manila and the furnace at Salt Lake City, which were also Roberts' responsibility, never operated properly (Tr. 1st day, pp. 41 and 42). As a result, Leger was required to hire a boiler repairman to resolve the problem, despite repeated requests to Roberts to provide the remedy himself (Tr. 1st day, pp. 41 and 42).

Roberts repeatedly ignored these items even though they were shown on the punch lists from the Utah State Building Board (Ex. 4-P, 5-P, 6-P and 7-P). He also repeatedly refused to correct these items (Tr. 1st day, pp. 22-25). This

resulted in the sum of $11,330.42 being held up from the State of Utah until February 26, 1973, some five (5) months after the filing of the instant action by the plaintiff, (Tr. 1st day, p. 44, L. 22,; Tr. 2nd day, p. 12, L. 6-10; Ex. 21-P).

Despite the foregoing undisputed facts, the Court failed to make any finding that Roberts' sole remedy in accordance with his contract was to apply in writing to Leger, and made the following findings of fact which are erroneous: (R. 37-40) 34, 35, 36, 37, 41, 42, 43, 44, 45, 46, 47, 49. Furthermore, after finding that Roberts was not entitled to attorney's fees, the trial court granted a motion to amend the findings and judgment to award attorney's fees, which Leger and its surety also claim is error.

ARGUMENT

POINT I.

IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO FIND THAT DEFENDANT'S EXCLUSIVE REMEDY FOR EXTENSION OF TIME IN THE EVENT OF DELAY WAS TO MAKE WRITTEN APPLICATION TO THE PLAINTIFF.

The accepted bid of the defendant (Ex. 2-P) contained the following language: (Emphasis added)

> I will pay, on demand, to the general contractor, as fixed and liquated damages and not as penalty, the sum of $50.00 for each calendar day of delay until the work is completed and accepted. Extension of time shall be granted, when asked for in writing, when it is, in the judgment of the general contractor, not practical or impossible or because of unforeseeable causes beyond control and without fault or negligence on my behalf to complete said work in the specified time.

There is no question that Roberts never asked for any extension of time in writing; nor did Leger give Roberts any extension of time in which to complete and obtain accept-

A clause similar to the above is seen in Russell vs. Bothwell & Swaner Co., 57 Utah 362, 194 P. 1109 (1920), wherein the plaintiff entered into a contract with a contractor, one of the co-defendants, to furnish carpentry work for the erection of a dwelling for another co-defendant. A mechanic's lien was filed by the plaintiff and suit was filed for a sum claimed due plaintiff.

The contract between the plaintiff and the general contractor, who was referred to as "owner", provided in part as follows:

> Should the contractor be delayed in the completion or presecution of the work by the act, neglect, or default of the owner or by any damage caused by fire or other casualty for which the contractor is not responsible, or by general strike or lockout caused by act of employes and beyond the control of the contractor, then the time herein specified for the completion of the work may be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, provided a claim for such allowance is determined by agreement in writing of the parties hereto.

The plaintiff subcontractor never applied for an extension of time in writing. However, the trial court made findings of fact that the contractor defendant delayed the plaintiff's carpentry work by failing and refusing to furnish materials, and awarded the plaintiff damages for this loss of time. The Utah Supreme Court, after noting that there was no evidence that the delay was the result of fraudulent, malicious, capricious, or unreasonable acts on the part of the contractor, cited the case of Goss vs. Northern Pacific Hospital Assn., 50 Wash. 238, 96 P. 1079, which case said:

> ....but where the probability of the happening of the condition has been foreseen, and a remedy is provided for its happening, the presumption is that the parties intended the prescribed remedy as the sole remedy

> where there is nothing in the contract itself or in the conditions surrounding its execution that necessitates a different conclusion.

Accordingly, the award for damages for delay made to the plaintiff by the trial court was reversed. See also Western Engineers Inc. vs. State, 20 Utah 2d 294, 437 P.2d 216 (1968).

The reasons given by Roberts for its delay in the instant case were adverse weather conditions and defective valves, which are discussed infra. No extension of time was requested by Roberts orally or in writing for delay from any cause, nor was excuse an issue until the case was tried. This being the defendant's sole remedy in the event of delay, the court should not have accepted Roberts' reasons for delay as excusing its requirements under the contract. A finding of fact should have been made by the court that this remedy was the sole and exclusive remedy of Roberts if it claimed that its delay was excused.

POINT II.

THE COURT COMMITTED ERROR IN MAKING FINDINGS THAT THE PLAINTIFF WAS MAKING A CLAIM FOR LIQUIDATED DAMAGES ONLY FOR THE DELAY ROBERTS WAS RESPONSIBLE FOR IN LAYING THE RADIANT HEATING PADS IN THE MANILA AND SALT LAKE ROAD SHEDS.

Finding of fact No. 34 provides:

> Lou Leger, president of the plaintiff corporation, testified that it was claiming liquidated damages only for the delay Roberts was responsible for in laying the radiant heating pads in the Manila and Salt Lake Road Sheds, it being plaintiff, Leger Construstion Company's contention that defendant was slow in starting, laying and finding leaks in said radiant heating pads, thus delaying pouring of cement floors.

Finding of fact No. 42 provides as follows:

alleged delay in starting and completing installation of radiant heating pads.

Leger's testimony regarding these findings is found in the first day of the Transcript starting at page 67, line 25:

Q Now, he (Roberts) had some work to do in the office area, didn't he, so far as toilet facilities go?

A Yes.

Q And that can't be done until after the framing is up, can it?

A No.

Q And the framing is your responsibility?

A Yes.

Q He couldn't finish that office portion until the sheetrock was up, could he?

A No.

Q Do you know when the sheetrock went on?

A I don't have that record here.

Q It had to go on after the framing, doesn't it?

A Yes.

THE COURT: Is it your claim the delay is based solely upon the heating pad?

THE WITNESS: Yes, sir.

(Emphasis added)

The question interposed by the court did not ask Leger if the claim of the corporation for liquidated damages is based solely upon the delay with respect to the heating pads. Leger was being asked questions at that time which related to possible delay by either Leger or Roberts in the office area of the building. The office area of the building did not have the heating pads in the floor. At that time the trial court interposed only one question at line 10, page 68, of the Transcript, in which

the court referred to the delay on the heating pads only. It is obvious, in the context that the question was asked, that Leger's answer intended to convey to the court that the delay in construction about which he was being questioned at that time was not due to any failure of Roberts to install toilet fixtures in the office area, as he was being queried about in the immediately preceding questions, but was solely due to installation of the heating pad.

In the first day of the Transcript at page 82, line 24, the same basic sequence of questions is seen relative to the Manila job:

> Q They (Leger's men) poured the slabs in October?
>
> A Yes.
>
> Q What about the framing, when did that go in?
>
> A I don't know.
>
> Q The framing had to go in before Roberts could put their pipes in the walls, right?
>
> A Yes.
>
> Q And the sheetrock went on after that?
>
> A Yes.
>
> Q You have to have an inspection before the dry-wall goes on, don't you?
>
> A No.
>
> Q Tell me if I am saying this correctly, The total to be alleged attributed to Roberts at the Manila job resulted only from the laying of the pad; is that right?
>
> A Yes.
>
> (Emphasis added)

The last question is incapable of any definition. There is no subject of the sentence. Counsel simply said,

"The total to be alleged to be attributed...." Nothing more was said by counsel as to what he meant by the use of the word "total." Any answer to such a question is meaningless, as the question itself does not specify what is being asked. No other questions were asked to clarify what was meant, and none of the questions preceding that question use any word to fill in the meaning as to what was meant by "total." In any event, the question was pertinent only to the Manila job.

In both of these underlined questions and answers, no mention is made of the plaintiff corporation's claim for liquidated damages, nor is Leger asked if that was the extent of the entire claim of the corporate plaintiff. Further, there is no mention made in these questions of Roberts' refusal to install the gas line, (Tr. 1st day, pp. 18 and 19), nor a stainless steel stack at Salt Lake (Tr. 1st day, p. 20), and the items on the punch lists (Ex. 4-P, 5-P, 6-P, 7-P), nor in particular, the lubricated plug valve at Manila, which resulted in the State of Utah's refusing to pay Leger until Leger finished Roberts' work. To base a finding that the plaintiff corporation was limiting its entire claim upon both road sheds solely upon Leger's answer to the above two questions as to delay on the heating pads as opposed to delay in installing the office toilet fixture, is to allow both the court and counsel to take advantage of tricking a witness into saying something he obviously did not mean, and, as a matter of fact, did not say, in the context of the record.

A finding of the trial court must be based on competent evidence that supports the findings. Johnson vs. Hughes, 120 Utah 50, 232 P. 2d 362 (1951). No competent evidence was introduced to show that Leger's corporation intended to limit

its claim for liquidated damages to delay caused by Roberts in the fabrication, welding and testing of the heating pads; thus, this finding of the trial court must be reversed.

POINT III.

IT WAS ERROR FOR THE COURT TO MAKE ITS FINDING THAT THE DEFENDANT COMMENCED WORK ON THE RADIANT HEATING PADS AT SALT LAKE CITY WITHOUT ALSO MAKING A FINDING AS TO THE DATE ROBERTS WAS REQUESTED TO DO SUCH WORK.

Finding No. 36 states that Roberts' installation of the radiant heating pads at the Salt Lake Road Shed was commenced on October 8, 1971; yet it is silent as to when Roberts was requested to do the work. The record shows without dispute that Roberts was told by Leger to commence this work on August 27, 1971. Roberts offered no reason for the delay until October 8th, a period of 42 days, until he was asked about it by the court. At that time, his sole excuse for such a delay was that he was still fabricating the panels in the shop. However, no reason or excuse was offered by Roberts as to why the fabrication in the shop was not commenced prior to August 27th so that the materials for installation would be available for on-site installation when the site was ready for these pads, nor why the work could not have been carried out uninterruptedly in accordance with Paragraph a. of defendant's contract if he had commenced the fabrication on time. The failure of the court to award damages in accordance with this admitted delay, a period of 43 days, or one third of the work period of a contract which was commenced on August 1st and was to be completed by November 30th, a total of 122 days, was error because the facts showing this part of the delay by

POINT IV.

THE COURT WAS IN ERROR IN GIVING ANY WEIGHT TO TIME CONSUMED IN CONSTRUCTING A ROAD SHED IN LEHI BECAUSE SUCH EVIDENCE WAS INCOMPETENT TO SHOW WHAT A REASONABLE TIME IN CONSTRUCTING THE HEATING PADS IN SALT LAKE AND MANILA, UTAH WOULD BE.

Finding No. 39 states that no greater progress was made on a road shed construction by Leger at Lehi than at the Manila and Salt Lake Road Sheds. This was based upon testimony on cross examination by Leger that the Lehi installation of radiant heating pads took about the same amount of time as the Manila and Salt Lake City jobs. This particular finding is irrelevant and incompetent to show that Roberts did not delay the Salt Lake and Manila jobs because there was no showing that the mechanical contractor on the Lehi job did that project in a workmanlike manner. All that it shows is that another subcontractor may have breached its contract with Leger, and is irrelevant and immaterial to the case involving Roberts and Leger.

POINT V.

IT WAS ERROR FOR THE COURT TO FIND THAT INCLEMENT WEATHER IN ANY WAY MADE WELDING ON THE SALT LAKE ROAD SHED DIFFICULT.

The hourly precipitation section of the weather reports for September 1971 (Ex. 46-P) shows that during the month of September, 1971, when the defendant should have been working on the heating pads for the Salt Lake Road Shed, but was not, precipitation fell during working hours only five days out of the total of thirty (30) days with only one (1) day showing more than one-hundredths (1/100) of an inch of precipitation. On the other hand, during October, 1971, when the defendant actually started

work on the heating pads, Exhibit 47-P shows precipitation during working hours for eight (8) days, and out of these eight (8) days, the 16th, 17th, 24th, and 31st were week-ends during which time Roberts had no men on any job. Thus, finding of fact No. 31 (R. 39) is in error. The only testimony to support this finding was the testimony of Thomas Patterson, and he admitted that he didn't know how often or how much rain fell during this period of time (Tr. 2nd day, p. 44). Therefore, Patterson's testimony was not competent to establish that the weather hampered Roberts. On the other hand, the weather reports show clearly that Roberts encountered precipitation during working hours for only four (4) days out of twenty-one (21) working days during the entire thirty-one (31) days of October, 1971.

POINT VI.

IT WAS ERROR FOR THE COURT TO FIND THAT DEFENDANT WAS NOT RESPONSIBLE FOR DELAY CAUSED BY FAULTY VALVES FURNISHED BY IT.

Finding No. 46 (R. 13) is as follows:

> The main problem in completing the radiant heating pad on the Salt Lake Road Shed was leaks which were ultimately found to be in several control valves furnished by a supplier to Roberts and which were as specified in the plans and specifications.

Section 18B of Exhibit 22-P provides the specifications for the heating and ventilating system and Subdivision 18B-06 of this exhibit governs the specifications as to valves and provides:

> Valves, strainers and items listed below are specified with Crane....numbers. Walworth, Nibco, R. P. & C. will be acceptable.

Thereafter, the valves required are listed by their various Crane numbers. Nowhere in the specifications is the brand name, "Jenkins," mentioned or specified. Roberts testified that the valves he installed which leaked were Jenkins ball valves of a 125-pound rating, (Tr. 2nd day, p. 75) an obvious deviation from the specifications, as Exhibit 22 provides at Section 18B, Paragraph 3, first sentence , that the system shall prove tight under pressure of 150 p.s.i.g.

Under Section 18 of Exhibit 22-P, it is provided as follows:

> G. Materials:
>
> 3. If a contractor receives approval to use other than first named items, he shall be held responsible to meet specified capacities, and must check space and openings available to be certain any alternate equipment will fit the job site and conditions. In the event other than first named equipment is used and it will not fit the job site conditions, this contractor assumes responsibility for replacement with items first named in the specifications. (Emphasis added)

It is apparent that the reason for leakage of the valves was that they were not as required by the specifications, therefore a breach of the contract Roberts signed with Leger.

Even if the valves provided by Roberts were in accordance with the specifications, but were defective, there is nothing in the contract of the defendant, (Ex. 1) or the specifications, (Ex. 22-P) which makes such a fact an excuse for delay of performance. The furnishing of defective material under a contract to furnish that material is not found in any treatise or cases as an excuse for delay in performance. Section 13, Am. Jur. 2d 58; Section 54, 17 Am. Jur 2d, Section 387, 388; also, 17 Am. Jur. 2d 400 et seq.

POINT VII.

IT WAS ERROR FOR THE COURT TO, IN EFFECT, REQUIRE LEGER TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, FAULT OR NEGLIGENCE ON THE PART OF THE DEFENDANT.

Finding No. 44 provides:

> Leger did not establish by a preponderance of the evidence that the failure to complete the work within the time specified at the Salt Lake Road Shed on the radiant heating pad was due to the fault or negligence of the defendant.

Such a finding has the effect of converting a breach of contract action for failure to perform, to a claim by Leger against Roberts for negligence which was neither pleaded nor intended to be proved. It is hornbook law that it is not necessary to prove negligence or fault in a contract action. II Williston on Contracts, 3rd Ed. 2, Section 1290:

> As a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise which forms the whole or any part of a contract.

It is apparent that the trial court completely misconstrued one provision of Exhibit 2-P:

> (p)....Extension of time shall be granted, when asked for in writing, <u>when it is, in the judgment of the general contractor</u>, not practical or impossible or because of unforseeable causes beyond control <u>and without fault or negligence on my behalf</u> to complete said work in the specified time. (Emphasis added)

The clause referring to fault or negligence is used only in conjunction with the judgment of the contractor in response to a written request by Roberts for an extension of time, which request was never made by Roberts. However, Leger, the contractor, was never given the opportunity to use his judgment as to whether Roberts' delay was because of the

various causes listed and without fault or negligence on the part of Roberts. Since neither party invoked the clause, it has no efficacy. Even if the clause were to have any effect, Roberts would be the party having the burden of proving the affirmative defense of excuse by a preponderance of the evidence.

POINT VIII.

IT WAS ERROR FOR THE COURT TO FIND THAT THE WALLS AND ROOFS OF THE SALT LAKE ROAD SHED HAD NOT BEEN COMMENCED BY LEGER NOVEMBER 22, 1971.

Finding No. 45 (R. 39) provides as follows:

> A third draw request dated November 22, 1971, on the Salt Lake Road Shed (Ex. 12-D) prepared by Leger reported that 70% of the mechanical work required to be done by Roberts had been completed by that date. Work which was required to be done by Leger and which was not dependant upon the completion of the radiant heating pads, viz., the walls and roof, had not been completed by the thirtieth day of the month.

Exhibit 12-D was a request for money made by Leger to the state of Utah. No testimony was offered to show that the figures were meant to show precise project progress. It was merely used as estimates by Leger to obtain periodic draws of money from the state of Utah on the project. Yet Leger testified that the plaintiff went ahead and started the structural steel and roofing, and this is supported by the records of the resident inspector for the state of Utah (Ex. 48-P) which shows work on the walls and roof on the following dates with the following work performed:

> Roof trusses placed or roof work done: October 14, 15, 18, 19, 20, and 12.
> Exterior wall block masonry: October 20, 21, 22, 25, 26, 27, November 8, 9.
> Welding roof steel: November 12.
> Roof sheeting: November 15.
> Facia framing: November 16.
> [illegible] November 17

POINT IX.

IT WAS ERROR FOR THE COURT TO FIND THAT LEGER DID NOT PROVE THE NUMBER OF CALENDAR DAYS OF DELAY, IF ANY, CAUSED BY ROBERTS ON THE SALT LAKE ROAD SHED.

Leger proved without dispute that Roberts was requested to begin on-site fabrication of the radiant heating pads on August 27, 1971, and Roberts admittedly did not start until October 8, 1971. Deducting two (2) days pursuant to the contract, a total of forty (40) days are left attributable to this portion of the delay. Allowing the defendant a full month to complete the fabrication testing and completion of the work would bring the completion to November 8, 1971. As has been stated before on this very point, the defendant's own expert testified that it would take 2½ to 3 weeks to complete the job, and the defendant did not proffer any evidence to the contrary. The pads at the Salt Lake Road Shed, however, were not completed until December 6, 1971, a period of twenty-nine (29) days. This makes a total delay of sixty-nine (69) calendar days out of a contract that should have been completed in four (4) months.

The record (Ex. 48-P) shows that there was a final inspection at Salt Lake City on May 3, 1972, and other punch list items completed on May 17, 1972. A punch list was sent by the State of Utah Building Board on May 4, 1972, and a copy of the same was sent to Roberts at about the same time (Ex. 4-P, Tr. 1st day, p. 22). No work was done by Roberts in the intervening time (Ex. 48-P and 18-P), and another punch list was issued on June 2, 1972, which was mailed to Roberts. This

punch list consisted solely of items to be completed by Roberts. However, despite repeated requests, Roberts refused to correct the operation of the boiler, requiring Leger to arrange for its adjustment on December 13, 1972 and February 15, 1973. The state of Utah would not sign the Certificate of Substantial Completion until February 22, 1973 (Tr. 2nd day, p. 9 L. 10 to p. 12, L. 10) (Ex. 15-P and 16-P), and held Leger's last payment of $11,330.42 until February 26, 1973.

The Manila job was substantially complete on October 9, 1972, and because of the failure of the defendant to complete his contract, the state held the final payment of $11,330.42 on the contract until February 26, 1973, a period of 135 calendar days. Adding this figure to the number of days that Roberts undisputedly delayed on the installation of the heating pads in Salt Lake, a period of 69 days, it is clear that Roberts caused a total of 204 days delay in the completion of the contract, which at $50.00 per day amounts to $10,200.00, which should have been deducted from Roberts' contract. It is apparent on the record that Roberts caused other delay, such as the gas line by deliberately refusing to perform; however, proof of the causal relationship is difficult. But there is no dispute, and it is clear, that the foregoing days of delay were caused by Roberts, and the liquidated damage clause should be enforced. See Pearce vs. Shurtz, 2 Utah 2nd 124, 270 P. 2nd 442 (1954).

POINT X.

THE COURT ERRED IN AWARDING ATTORNEY'S FEES TO ROBERTS AGAINST PLAINTIFF AND ITS SURETY.

Section 14-1-8 U.C.A. (1953) as amended, provides as follows:

> Attorney's fees allowed.--In any action brought upon either of the bonds provided herein, or against the public body failing to obtain the delivery of the payment bond, the prevailing party, upon each separate cause of action, shall recover a reasonable attorney's fee to be taxed as costs. (Emphasis added)

The court in this case awarded the defendant attorney's fees pursuant to the above statute, not as costs, but as a part of the judgment. Rule 54(d)(2) makes provisions as to how costs are to be assessed and requires a sworn memorandum of costs to be filed. The above statute clearly provides that the attorney's fees be taxed as costs. The provisions of Rule 54 must be satisfied, or the party requesting such costs will not be awarded his costs. Walker Bank and Trust Co. vs. New York Terminal Warehouse, 10 Utah 2nd 210, 350 P. 2nd 626, 630. No mention of attorney's fees is made in the memorandum of costs filed by Roberts (R. 42-43); therefore, the award for attorney's fees should be stricken from the judgment.

Furthermore, no finding was made by the court that Roberts was a "prevailing party," as set forth in Section 14-1-8 U.C.A. (1953) as amended. There are no Utah cases which decide the meaning of the word "prevailing" except as it may relate to the award of costs pursuant to Rule 54 U.R.C.P. It is common knowledge that the award of attorney's fees always will be an amount substantially larger than costs and, as in the instant

case, is a substantial part of the recovery over which parties litigate. The Utah Supreme Court has held previously that it was not a breach of discretion for a trial court to refuse to award attorney's fees against an owner of a residence pursuant to Section 38-1-18 U. C. A. (1953) as amended, which provides for award of attorney's fees to the "successful party," even though the court awarded the contractor seeking those attorney's fees a judgment of some $43,000.00. Shupe vs. Menlove 18 Utah 2nd 130, 417 P. 2nd 246 (1966).

There have been several decided cases in the state of Alaska, which construe the words "prevailing party" for the purpose of awarding attorney's fees. A leading case in that jurisdiction is Malvo vs. J. C. Penney Co., Alaska 512, P. 2nd 575 (1973), where the plaintiff sued the defendant for libel and slander. A jury found for the defendant no cause of action, and the trial court awarded attorney's fees of $10,504.20. The Alaska Supreme Court, after reviewing its adopted rule that the trial judge has wide discretion and that the Appellate Court would only interfere with such an award where the award was so manifestly unreasonable that an abuse of the trial court's discretion was established, reversed the decision as to attorney's fees. The court recognized that a cost requirement of a statute, valid on its face, could offend due process because it operates to foreclose a particular party's right to be heard, Boddie vs. Connecticut, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L. Ed. 2nd 113, 120 (1971), then cited the following passage of Benjamin Cardozo as follows:

> I am not prepared yet to advocate costs that would compensate for the expenses of a lawsuit. I have seen enough of the judicial process to know its imperfections. I would not lay too heavy a burden upon the unsuccessful litigant. Some of the losses that are incidental to the establishment of rights and the redress of wrongs through the processes of courts should be allowed, as a matter of social engineering, to lie where they fall. Very likely, heavier burdens should be imposed where there is evidence of bad faith or mere dogged perversity. (Emphasis added) Benjamin N. Cardozo, George S. Hellman, McGraw Hill Pub. Co. (1940)

The holding of the case was that where a party in good faith brings a lawsuit to court for a determination of rights and is not guilty of any reprehensible conduct, it is an abuse of judicial discretion to penalize such a party by awarding the full amount of the prevailing party's attorney's fees.

In the instant case, Roberts claimed the sum of $14,172.04 in its counterclaim and cross claim, but recovered only the sum of $8,494.95 upon a contract where Roberts and its creditors previously had been paid an additional sum of $58,748.87 for its work. It is clear from the issues raised by the record and in this brief that there were several bona fide disputes between the parties that required the determination of a court to resolve. The decision of the trial court in assessing the full amount of defendant's attorney's fees against Leger and its surety is manifestly unjust because it requires that Leger pay Roberts' expenses in fighting a lawsuit that would not have occurred had Roberts fully performed and completed his contractual duties. To even imply that Roberts should be regarded as a "prevailing party" where the violations of contractual obligations are as numerous and intentional as shown in the record

here is a miscarriage of justice, and should not be allowed to stand as the law of this jurisdiction.

CONCLUSION

In conclusion, it is respectfully submitted that the findings of the trial court that Roberts was excused from performance of its contract because of adverse weather conditions and faulty valves; that Roberts did not cause Leger delay in the completion of the contract; that Leger did not prove fault or negligence on the part of Roberts, should be vacated and findings of fact entered that Roberts breached its contract with Leger and delayed Leger's completion of the contract a total of sixty-nine (69) days without any application for extension of time; that Leger is entitled to liquidated damages, pursuant to its contract, of $50.00 a day, or the sum of $10,200.00, and that sum deducted from the amount awarded Roberts on its cross claim would leave a net sum of $1705.05 to be awarded to Leger on its complaint. Further, the conclusions of law, judgment and amended judgment should be modified accordingly. The order granting an amendment of the judgment to the defendant Roberts should be reversed, and attorney's fees stricken from the amended judgment.

Respectfully submitted,

RYBERG, McCOY & HALGREN

John L. McCoy
Attorney for Appellant