

2001

General Insurance Company of America v.  
Carnicero Dynasty Corporation, Wendell L.  
Butcher; Irene B. Butcher; Christ L. Stanfield; Janis  
B. Stanfield; Ben D. Issac; and Lila O Issac : Brief of  
Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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Reuben Clark Law School

IN THE SUPREME COURT  
OF THE STATE OF UTAH

GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
*Plaintiff-Respondent,*

vs.

CARNICERO DYNASTY  
CORPORATION, a corporation;  
WENDELL L. BUTCHER; IRENE  
B. BUTCHER; CHRIS L.  
STANFIELD; JANIS B.  
STANFIELD, BEN D. ISAAC;  
and LILA O. ISAAC,

*Defendants-Appellants.*

Case No.  
13836

APPELLANT'S BRIEF

Appeal from judgment against alleged indemnitor of  
bonding company on construction bond  
District Court of Salt Lake County, State of Utah  
Honorable Bryant H. Croft, *District Judge*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
*Plaintiff-Respondent,*

vs.

CARNICERO DYNASTY  
CORPORATION, a corporation;  
WENDELL L. BUTCHER; IRENE  
B. BUTCHER; CHRIS L.  
STANFIELD; JANIS B.  
STANFIELD, BEN D. ISAAC;  
and LILA O. ISAAC,  
*Defendants-Appellants.*

Case No.  
13836

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## APPELLANT'S BRIEF

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### STATEMENT OF THE KIND OF CASE

Suit by bonding company against alleged indemnitor who signed indemnity agreement after bond had been issued.

### DISPOSITION IN LOWER COURT

District Court refused amendment to assert defense of lack of consideration and awarded judgment against indemnitor for \$44,600.00.

### RELIEF SOUGHT ON APPEAL

Order reversing judgment and dismissing case as to defendants Butcher, or in the alternative remanding the case for a new trial.

## STATEMENT OF FACTS

Plaintiff (a bonding company) obtained general indemnity agreements from defendants Stanfields and Isaacs (Nov. 1968) the officers of defendant Carnicero (a contractor), (Ex. 2-P). No indemnity agreement was asked for or received from defendants Butcher at that time. (R. 120, par. 4; 376, lines 20-24). Thereafter plaintiff issued a bid bond (R. 382) and payment and performance bonds (Jan. 6, 1969 - Ex. 4-P, R. 353) for Carnicero in connection with the construction of a post office. *Over four months later* plaintiff requested and received an indemnity agreement (Ex. 1-P) from defendants Butcher (R. 299-302; 359; 376-387) (who was property manager of Carnicero, but was not an officer, director or stockholder of that organization) (R. 270-271). At the time when Butchers executed the indemnity agreement (Ex. 1-P) the plaintiff had already issued the bond (Ex. 4-P) and was legally bound to third parties thereon (R. 371, 380, 382). Plaintiff gave no consideration for the Butcher indemnity agreement and did not change it's position in reliance upon that agreement, (R. 120).

At the conclusions of the evidence the Court summarized the evidence concerning the Butcher indemnity agreement in part as follows (R. 417):

"... More than four months after the bond is issued, . . . after presumably an application for a bid bond is made and a bid bond issued, the Indemnity Agreement obtained from the others and from the cor-

poration and the bid awarded and the bonds are issued. After all of that takes place, *the insurance company as an obvious afterthought, goes out through their agent Mills, and he gets the signature of Mr. & Mrs. Butcher on that type of an Indemnity Agreement.*

Now, the defense that Mr. Barker raises here is lack of consideration. . . ." (emphasis added)

Butcher did not recall that his indemnity agreement was signed after the bond had been issued (R. 212), was not aware that the indemnity agreement was unenforceable for lack of consideration, did not disclose those facts to his attorney, (R. 421) who accordingly did not assert lack of consideration as a defense in their answer. Butchers' attorney first became aware that the Butcher indemnity agreement lacked consideration when the indemnity agreement (Ex. 1-P) and the bond (Ex. 4-P) were placed into evidence by plaintiff during the trial (R. 421). Butchers then moved the Court for dismissal of plaintiff's complaint since the indemnity agreement upon which the suit is based was not supported by consideration (R. 410, 417-421), and to amend their answer to conform to the evidence adduced by plaintiff at the trial, to assert the defense of lack of consideration (R. 122, 418-421). At the request of the Court briefs were submitted by plaintiff (R. 131-146) and by Butchers (R. 122-130), and thereafter the Court entered a memorandum decision denying Butchers' motions and awarding judgment against Butchers (R. 147-149).

The Court's refusal to permit Butchers to assert the



defense of lack of consideration appears to be grounded on the fact that a careful reading of plaintiff's answers to Butchers' interrogatories and the exhibits attached thereto would have disclosed that the defense of lack of consideration was available to Butchers (R. 148) four months before trial, but that since Butchers failed to observe that fact and to make a motion to amend during the four months between the time when plaintiff answered Butchers' interrogatories and the trial date, that plaintiff was somehow prejudiced in preparing to meet that issue at the trial (R. 131-146 & 148).

Plaintiff's counsel claimed that he was prejudiced in meeting the absence of consideration defense because of the long period of time that passed between commencement of the lawsuit and trial, and argued that evidence which might have been available to meet that issue, had it been raised earlier, was not available at time of trial (R. 141, 144-145), claiming that an employee of plaintiffs Denver office had left their employ, and that the local agent of plaintiff had destroyed his files. However, plaintiff's witnesses (Mills, the agent who wrote the bond) established that three or four different people in the Denver office worked on the bond involved in this case, that whoever happened to be in when he called would pull the file and help him, that there was no continuity or follow through by a particular employee in issuing the bond (R. 382-384), and that the local agent (Mills) knew in 1970 that there were problems with the bond (R. 383), but that he did not keep his files since "The company has copies of everything." The long de-

lay in bringing this matter to trial was the fault of plaintiff who for almost two years failed to request a trial date (R. 47) and failed to respond to discovery (R. 61, 67, 69, 70), which resulted in cancellation of four scheduled trial dates, (R. 48, 67, 70, 72-74, 77, 110).

## ARGUMENT

### POINT I

#### BUTCHERS HAVE NEVER BEEN LEGALLY BOUND TO INDEMNIFY PLAINTIFF

Since plaintiff was bound on it's bond before it obtained Butchers' signatures on the indemnity agreement and since plaintiff gave no consideration for that indemnity agreement, Butchers never became contractually obligated to indemnify plaintiff for it's losses on the Carnicero bond. A promise of indemnity is void for want of consideration where made after the execution of the sureties' undertaking. *Thompson v. Moe*, 265 P. 457 (Wash); *O'Neill v. Mutual Life Ins. Co. of New York*, 172 P. 306, 51 U. 592; *Manwell v. Oyler*, 361 P.2d 177, 11 U2d 433, *Latimer v. Holladay*, 134 P.2d 183, 103 U. 152. 47 Am Jur 2d Suretyship, Sec. 229, Page 153; *Jones v. Shorter*, 1 Ga. 294; *Vansant v. Gardner*, 240 Ky 318, 42 SW2d 300; 17 Am Jur 2d Contracts, Sec. 86, 397.

There can be no contract where consideration is lacking. This differs from failure of consideration where there was in fact a contract but the promised performance fails. Williston, Contracts, 3d ed Sec. 119A. A determination of this matter on the merits would be a

holding that Butchers are not now and never have been liable to plaintiff. To hold Butchers liable would be to confer a windfall upon plaintiff who wrote the bond, accepted a premium for the bond, and became contractually obligated on the bond without any guarantee or agreement from Butchers. (R. 371, 380, 382). If plaintiff is denied recovery against Butchers it will be in no worse position that it was in at the time that it accepted the premium and wrote the bond. Plaintiff has not changed its position or parted with anything of value in exchange for the Butcher indemnity agreement and it would be unconscionable to shift plaintiff's loss (which it assumed in exchange for a premium) to Butchers who received no benefit or consideration for the execution of the indemnity agreement.

It would have been better business judgment for the plaintiff to have required additional security before electing to issue the bond, but having made a business judgment to issue the bond without additional security the plaintiff is now bound by that decision and should be limited to recovery on the security which it bargained for in exchange for the bond.

Even if Butchers had paid plaintiff the amounts claimed to be due under the Butcher indemnity agreement, Butchers would have been entitled to recover those payments back from plaintiff upon discovery of the fact that the indemnity agreement was not supported by consideration. See Restatement Security, Sec. 152(b) (ii).

## POINT II

PLAINTIFF FAILED TO MEET IT'S BURDEN OF  
PROOF AGAINST BUTCHERS

Plaintiff incorrectly alleged in it's complaint (without pleading dates) that the bond was issued in consideration of the Butcher indemnity agreement (R.3). Butchers did not recall and their attorney did not become aware that the indemnity agreement was executed after the bond was issued until plaintiff placed them in evidence at the trial, (R. 212, 421), and accordingly in their answer Butcher did not deny plaintiff's incorrect allegations of consideration. (R. 8-9).

Plaintiff's pleadings and defendants' failure to deny established a prima-facia case against Butchers until the evidence which plaintiff itself introduced (bond, ex. 4-p and indemnity agreement, ex. 1-p) superseded the general allegations of consideration contained in plaintiff's pleadings, and established conclusively that plaintiff was not entitled to recover against Butchers because the contract relied upon by plaintiff in it's lawsuit (Ex. 1-P) was void and unenforceable since not supported by consideration.

Plaintiff simply introduced evidence which established conclusively that it was not entitled to recover against Butcher. The fact that Butchers or their attorney might have learned that the contract lacked consideration earlier so as to have alleged that defense in their answer, by an amendment to their answer, by motion,

etc. does not change the basic fact that *Butchers are not now and never were bound on the contract of indemnity*, nor change the fact that plaintiff itself produced the evidence which conclusively established that plaintiff had not met it's burden of proving that it was entitled to a judgment against Butchers.

The burden of proof of all elements necessary to establish it's case was upon plaintiff. Had plaintiff relied upon the failure of Butchers to deny consideration and had it not introduced evidence which disproved the false consideration allegation in plaintiff's complaint, the plaintiff would have been entitled to win. Having elected to produce documents into evidence which disproved their general allegations of consideration, plaintiff is bound by those documents. The risk of non-persuasion never shifts from plaintiff as to proof of the essential elements of it's claim, including the element of consideration. Plaintiff prima facia satisfied it's burden of proof by Butchers failure to deny that the contract was supported by consideration, however that prima facia satisfaction of the burden of proof was overcome by direct evidence, and that direct evidence also conclusively established that plaintiff had not met it's risk of non-persuasion (whcih never shifts from plaintiff). See *Kartchner v. Horne*, 262 P.2d 749, 1 U.2d 112; *In re Swan's Estate*, 293 P.2d 682, 4 U.2d 277; *Peoples Finance & Thrift Co. v. Landes*, 503 P.2d 444, 28 U.2d 392; 29 Am Jur 2d Evidence, Sec. 123, 124, 125, 126, 128, 130, 142.

It is important to clearly distinguish the difference between an absence of consideration and a failure of consideration. Where this is no consideration there can be no contract, but where there is a failure of consideration there is a contract when the agreement is made, but because of some supervening cause the promised performance fails. Williston, Contracts 3d ed Sec. 119A. The burden of proving consideration is part of plaintiff's case, whereas if we were dealing with a failure of consideration situation the burden would be upon Butchers to plead and prove failure of consideration. See Rule 8(c), URCP; 29 Am Jur 2d Evidence, Sec. 142. Had plaintiff pleaded the date of the bond and the date of the indemnity agreement the complaint would have contained a "built-in" defense and would have been insufficient to entitle plaintiff to recover against Butchers. See 5 Wright & Miller, Federal Practice & Procedure, Sec. 1226, 1355 and cases there cited.

### POINT III

BUTCHERS ARE ENTITLED TO DISMISSAL UNDER RULE 41(b), URCP (PLAINTIFF HAS SHOWN NO RIGHT TO RELIEF)

Rule 41(b), URCP, reads in part as follows:

" . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, . . . may move for a *dismissal on ground that upon the facts and law the plaintiff has no right to relief. . . .*" (Emphasis added)

Introduction of the bond (Ex. 4-P) and the Butcher

indemnity agreement (Ex. 1-P) disclosed that the bond was issued before the indemnity agreement was signed, and that therefore it was without consideration and was unenforceable. Accordingly, Butchers are entitled to dismissal of plaintiff's complaint against them under Rule 41(b), URCP, and the entry of judgment against them was in error and should be reversed. *Gregory v. Denver & Rio Grande Western R. Co.*, 8 U.(2d) 114, 329 P.2d 407; *Winegar v. Slim Olson, Inc.*, 122 U. 487, 252 P.2d 205, 208; 76 Am Jur 2d Trial Sec. 1245. See also discussion under point II above distinguishing between absence of consideration (failure of plaintiff to sustain burden of proof of a valid enforceable contract) and failure of consideration (where a contract in fact existed but became unenforceable later by reason of failure of consideration, in which event burden of proof of failure of consideration is imposed upon defendant.) See Rule 8(c) and 12(h), URCP.

#### POINT IV

##### FAILURE TO DENY PLAINTIFF'S FALSE ALLEGATION OF CONSIDERATION WAS NOT A WAIVER BY BUTCHERS OF THE DEFENSE OF ABSENCE OF CONSIDERATION

A waiver is "The intentional or *voluntary relinquishment of a known right.*" Black's Law Dictionary, revised fourth edition, and cases there cited. It is undisputed that at the time Butchers attorney filed their answer neither he nor they were aware that the indemnity agreement sued upon was void for absence of consideration (R. 212, 421), and that when Butchers counsel be-

came aware of that fact he moved the court for dismissal of plaintiff's complaint and to amend the answer to conform to the evidence (R. 122, 410, 417-421). Since Butchers were not aware of the facts necessary to know that consideration was absent, there could be no waiver of the lack of consideration defense by not raising that defense in the original answer.

Plaintiff's counsel argued (R. 133) (apparently successfully R. 147-149) to the Court that absence of consideration is an affirmative defense which is waived if not asserted in the answer. Rule 8(c), URCP, lists various affirmative defenses which must be pleaded or they are deemed to be waived under Rule 12(h), URCP. One of the listed defenses is "failure of consideration." Failure to plead such an affirmative defense does not preclude proof of such a defense at a trial in all cases. See *Cheney v. Rucker*, 14 U.(2d) 205, 381 P.2d 86.

Counsel for plaintiff and the Court apparently failed to observe the distinction between absence of consideration (never was an enforceable contract) and failure of consideration (valid contract terminated because of subsequent failure of consideration). (See discussion under Point I above). Rule 8(c), URCP, requires an affirmative allegation only where the consideration fails, not where the consideration was wholly absent. *Zebod v. Hurst*, 65 Okla 248, 166 P. 99, 61 Am Jur 2d Pleading Sec. 160.

A denial by Butchers of the consideration allega-



tion in plaintiff's complaint would have violated the letter and spirit of Rule 11, URCP, (good ground to support pleadings). Butchers should not be penalized for honesty in their pleadings, and plaintiff should not be rewarded with an undeserving judgment because Butchers did not discover the falseness of the consideration allegations in plaintiff's complaint until contrary evidence was produced by plaintiff during the trial. Public policy should favor the pleader who honestly admitted that which he believed to be true. To hold otherwise would encourage denial of facts not really in dispute to avoid such pitfalls should evidence at the trial establish new facts as in our case.

The allegation of consideration in plaintiff's complaint was false. Plaintiff now seeks to take advantage of it's false pleading and it's own wrong by claiming prejudice because Butchers did not learn that it was false until trial.

#### POINT V

THE DEFENSE OF FAILURE TO STATE A CLAIM FOR RELIEF UPON WHICH RELIEF CAN BE GRANTED MAY BE RAISED FOR THE FIRST TIME AT THE TRIAL

Rule 12(h), URCP, reads in part as follows:

"A party waives all defenses and objections which he does not present either by motion . . . or in his answer . . . , except (1) that *the defense of failure to state a claim upon which relief can be granted*

*... may also be made by a later pleading, ... by a motion for judgment on the pleadings or at the trial on the merits, ... The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."* (Emphasis added).

Plaintiff's original complaint falsely stated that the indemnity agreement sued upon was executed in consideration of issuance of the bond (which in fact had already been issued), and accordingly appeared to state a claim for relief upon which relief could have been granted until contrary evidence was presented by plaintiff (Ex. 1-P & 4-P). In plaintiff's answer to Butchers' interrogatories (R. 79, Par. 1(b)(3) & 92) plaintiff disclosed facts which, if carefully studied, would have informed Butchers' counsel of the defense of absence of consideration (filed over a year late — about four months before the trial — R. 61 & 78). Plaintiff's pleadings were thereby amended or superseded by evidence of the actual facts, and it then first appeared affirmatively in the record that there was in fact no consideration for the indemnity agreement, and that plaintiff's complaint (as modified by answers to interrogatories and by actual evidence) did not state a claim for relief upon which relief could be granted. Under Rule 12(h), URCP, (quoted above), after the answers to interrogatories were in the record, (R. 78-106), Butchers were entitled, at their option, to either move to amend their answer to raise the defense of absence of consideration or to raise that defense at the trial. Butchers' counsel failed to

observe the facts showing lack of consideration in reviewing the answers to interrogatories and accordingly first raised the defense when plaintiff presented exhibits 1-P and 4-P into evidence at the trial, which procedure is expressly authorized by Rule 12(h), URCP, (quoted above). Rule 12(h), URCP, directs the Court to "dispose of" such a defense raised for the first time at trial under Rule 15(b), URCP. Rule 15(b), URCP, reads in part as follows:

*"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence."* (emphasis added)

Rule 15(b), URCP, is modified by Rule 12(h), URCP, (quoted above), to add the proviso that if the de-

fense of failure to state a claim upon which relief can be granted is raised at the trial, then that defense

“ . . . shall be disposed of as provided in Rule 15(b) in light of any evidence that may have been received.”

Accordingly, the defense of absence of consideration was properly first raised at the trial, and as provided in Rules 12(h) and 15(b), URCP, that defense is “ . . . *treated in all respects as if they (it) had been raised by the pleadings,*” particularly in view of the additional provision in Rule 15(b), URCP, that permits the Court to allow pleadings to be amended “ . . . *when the presentation of the merits of the action will be subserved thereby . . .*” A determination of this case on the merits requires a determination that the indemnity agreement is void for absence of consideration and dismissal of plaintiff's claims as to Butchers. Justice requires that such an amendment of the pleadings be permitted.

In *Goeltz v. Continental Bank & Trust Co.*, 299 P.2d 832, 5 U.(2d) 204, the Supreme Court affirmed a denial of a motion to amend made at the trial, allegedly to conform to the evidence. In that case the Court found that the facts upon which the defense of statute of limitations was founded were well known and were pleaded, but that the pleading failed to assert that defense. In our case the facts were not known when the answer was filed, nor were those facts pleaded by plaintiff. In that case the Court also found that to defeat the plaintiff's

claim by the bar of the statute of limitations is not a determination of the case on its merits. In our case to defeat plaintiff's claim by reason of absence of consideration is in fact a determination of the case on the merits. See also *Meyer v. Deluke*, 23 U.(2d) 74, 457 P.2d 966, denying amendment where facts supporting defense of usury were known and pleaded without pleading the defense of usury.

When plaintiff introduced the bond and indemnity agreement into evidence (Ex. 1-P & 4-P) showing the absence of consideration, plaintiff by implication consented within the meaning of Rule 15(b), URCP, to a trial of that issue as though it had been raised by the pleadings and waived it's right to object to that defense being raised by Butchers. The material variance of the evidence from plaintiff's pleadings concerning consideration is sufficient to justify a nonsuit. *Vance v. Whalon*, 7 U. 44, 24 P. 672; 61 Am Jur 2d Sec. 366, 376 & 378.

#### POINT VI

PLAINTIFF WAS NOT PREJUDICED IN IT'S DEFENSE RE ABSENCE OF CONSIDERATION BY ANY ACT DONE BY BUTCHERS

The evidence which established the absence of consideration was received without objection from plaintiff, who itself presented that evidence (Ex. 1-P & Ex. 4-P). Rule 15(b), URCP, imposes a duty upon a party to object to evidence concerning issues not raised by the plead-

ings. Plaintiff is bound by the unfavorable aspects of the evidence which it produced. *Ray v. Consolidated Freightways*, 289 P.2d 196, 4 U.(2d) 137. Plaintiff cannot now escape the legal effect of that evidence.

Had plaintiff pleaded the date of issuance of the bond (Ex. 4-P) and the date of execution of the Butcher indemnity agreement (Ex. 1-P), then plaintiff's complaint would have had a "built in" defense. (See 5 Wright & Miller, Fed. Practices & Proc., Sec. 1226 and 1355 and cases there cited.) Plaintiff as an expert in the bonding business is held to a higher standard of care than defendants who are lay persons who lacked information to ascertain that the indemnity agreement was void, a fact which should have been known to plaintiff from the inception. Plaintiff was not misled by Butchers ignorance.

It is true, as observed by the Court in its memorandum decision (R. 148), that had counsel for Butchers been more astute he would have been aware of the defense of absence of consideration four months before trial when plaintiff answered Butchers interrogatories (which answers were over a year late), and accordingly could have moved to amend to assert that defense prior to trial. Rule 15(b), URCP, reads in part as follows:

" . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and *the objecting party fails to satisfy the court that the admission*

*of such evidence would prejudice him in maintaining his action or defense on the merits. The Court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence."* (emphasis added)

Plaintiff's argument is that because the trial occurred 5½ years after the lawsuit was commenced (R. 4 & 112-115), since Plaintiff's local agent (Mills) has destroyed some of his old files, since a former employee of plaintiff's home office who worked on the issuance of the bonds involved in this lawsuit could not be located, and since plaintiff's attorney might have conducted further discovery procedure had the consideration issue been raised earlier (in an alleged effort to learn if Butcher had made an oral promise to become an indemnitor, which if established might have provided the missing consideration), that plaintiff is somehow prejudiced and Butchers should therefore be held liable on a void indemnity agreement (R. 131-146, 148). It is important to note that plaintiff does not claim that Butchers had notice of the availability of the absence of consideration defense until plaintiff answered Butchers' interrogatories or that they had actual notice prior to trial. Plaintiff does not claim that it would have been better able to respond to that defense had Butchers amended their answer four months before trial when plaintiff finally answered Butchers' interrogatories. This failure to amend appears to have been heavily relied upon by the Court in its memorandum decision (R. 148), however since that failure did not prejudice plaintiff in meeting the de-

fense of absence of consideration, failure to amend at that time is insufficient to justify refusal of Butchers motion to amend to conform to the evidence as provided by Rule 15(b), URCP.

Had plaintiff diligently prosecuted this lawsuit the 5½ year delay before trial would not have occurred and the claimed prejudice would not exist. Plaintiff knew that there were problems with the bonded project shortly after the bond was issued (R. 310, 314-321 and Ex. 32DI). The lawsuit was commenced in June, 1969, (R. 2). It was almost two years later when plaintiff first requested a trial date (R. 47). No discovery procedure was prosecuted by plaintiff until July, 1972 when one deposition was taken, (R. 59). Plaintiff engaged in no other discovery. Butchers submitted interrogatories (R. 61) which plaintiff did not answer for over a year (R. 78) and then only after repeated motions to dismiss for failure to answer (R. 67, 69, 70, 72, 74, 77, 107). Four trial dates were vacated because of plaintiff's failure to answer discovery (R. 72-74, 77, 110). The delay was entirely the responsibility and fault of plaintiff, who now cries "prejudice" and points to that delay as an excuse. Certainly a party should not be permitted to take advantage of it's own wrong. Plaintiff's claim of absence of a former employee is unfounded when we consider the testimony of Mills (plaintiff's agent) who stated that no particular individual handled the issuance of the bond and that there was no continuity in follow through and that three or four people from the Denver office



worked on the matter (R. 382-384); the claim of missing files is unfounded when we consider that the home office "had copies of everything" (R. 383) and that plaintiff had notice of the problems with the bonded project at an early date and destroyed files thereafter at its peril.

Plaintiff's claim of prejudice is that had it known of this defense earlier it might have been able to find evidence to overcome the defense if in fact any such evidence in fact existed (which we deny). Plaintiff has not pointed to any specific evidence which if proven would entitle it to judgment against Butcher, but has simply speculated that such evidence might have existed and might now be unavailable due to passage of time. Such a speculation is insufficient to impose liability of over \$44,000.00 upon Butchers who never were legally bound to plaintiff on any contract. The judgment should be reversed.

## CONCLUSION

Butchers never were liable to plaintiff under any contract in evidence in this case. It is undisputed that the indemnity agreement which they signed was void and unenforceable for lack of consideration. Plaintiff's claim that Butchers waived the absence of consideration defense by not pleading it (although they did not have facts which would justify such a pleading at the time that they answered the complaint), and that Butchers should not be permitted to amend their answer to conform to the evidence of absence of consideration pro-

duced at the trial by plaintiff because of alleged prejudice resulting from delay of 5½ years in bringing case to trial (which delay was solely the result of failure of plaintiff to prosecute and to answer Butchers' interrogatories), are unfounded. Plaintiff falsely alleged in it's complaint that the indemnity agreement was supported by consideration, without pleading dates from which that defense could be determined.

Plaintiff failed to sustain it's burden of persuasion and of proof by itself introducing evidence which showed that plaintiff was not entitled to recover against Butchers. The bond was issued in reliance upon indemnity agreements from third parties and plaintiff was bound on the bond long before Butchers signed the indemnity agreement. Plaintiff is not entitled to a windfall by judgment against Butchers on an unenforceable contract. The judgment should be vacated and the case dismissed as to Butchers.

Respectfully submitted,

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