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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DARRELL J. DIDERICKSEN &
SONS, INC., a Corporation,

Plaintiff-Respondent,

vs.

MAGNA WATER & SEWER
IMPROVEMENT DISTRICT,

Defendant, Third-Party
Plaintiff and Appellant,

vs.

UTAH STATE DEPARTMENT OF
TRANSPORTATION,

Third-Party Defendant
and Appellant

and

TEMPLETON, LINKE & ASSOCIATES,

Third-Party Defendant.

BRIEF [illegible]

FILED

APR 06 1979

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DARRELL J. DIDERICKSEN & SONS, INC., a Corporation, Plaintiff-Respondent,	:	
vs.	:	
MAGNA WATER & SEWER IMPROVEMENT DISTRICT, Defendant, Third-Party Plaintiff and Appellant,	:	Case No.
vs.	:	16129
UTAH STATE DEPARTMENT OF TRANSPORTATION, Third-Party Defendant and Appellant,	:	
and	:	
TtempleTON, LINKE & ASSOCIATES, Third-Party Defendant.	:	

BRIEF OF APPELLANTS

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DARRELL J. DIDERICKSEN & SONS, INC., a Corporation, Plaintiff-Respondent, vs. MAGNA WATER & SEWER IMPROVEMENT DISTRICT, Defendant, Third-Party Plaintiff and Appellant, vs. UTAH STATE DEPARTMENT OF TRANSPORTATION, Third-Party Defendant and Appellant, and TEMPLETON, LINKE & ASSOCIATES, Third-Party Defendant.	:	Case No. 16129

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This case involves a construction contract for the relocation of the Magna Water and Sewer Improvement District's sewer line adjacent to 2400 South, from 7200 West to approximately 8900 West, Magna, Utah.

Respondent (hereinafter Contractor) claimed defendant Magna Water and Sewer Improvement District (hereinafter Magna) breached the contract by failure to recognize changed conditions and failure to pay progress payments timely. Magna counterclaimed for breach of contract for failure of Contractor to complete the work and sought recovery of its additional costs.

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Appellant Magna named the Utah State Department of Transportation (hereinafter DOT) and its engineers as third party defendants.

The trial court granted judgment for Contractor. Magna and DOT, the party that has the ultimate financial responsibility, joined in appealing from the judgment.

DISPOSITION IN LOWER COURT

The Third Judicial District Court of Salt Lake County, the Honorable Jay E. Banks presiding, awarded Contractor a judgment against Magna for the sum of $24,969.00, representing the amount earned but unpaid at the time Contractor ceased operations. The Court further ruled that Contractor failed to prove its right to anticipated profits. The trial court held that Magna's failure to approve change orders and to pay the Contractor's estimates as set forth in the contract constituted a breach thereof. Magna and DOT moved the court for a new trial, and after the matter was argued before the court on two occasions and memorandums submitted, the court denied their motion.

Due to Contractor's failure to prove its anticipated profits, the claims of Magna against the Third-Party Defendant Templeton, Linke and Associates were dismissed.

RELIEF SOUGHT ON APPEAL

Magna seeks a reversal of the judgment in favor of Contractor for $24,969.00, and in lieu thereof a judgment in the sum of $71,066.60 on Magna's counterclaim.

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Said amount represents the additional costs incurred by Magna to complete the sewer relocation project.

In the alternative Magna seeks a new trial with instructions to the trial court on the proper method of ascertaining damages.

STATEMENT OF FACTS

Contractor entered into a contract with Magna on September 23, 1975, to relocate Magna's sewer line along 2400 South, west of 7200 West, to accommodate construction of a new four-lane State highway, which was being constructed by DOT.

DOT had entered into an agreement with Magna for the reimbursement of all costs incurred by Magna for the sewer line relocation project.

Said agreement provided that DOT would reimburse Magna within 60 days after receipt of itemized bills covering the costs incurred by Magna for performing the work required under the terms of the agreement. The contract between Magna and Contractor stated that Magna would make progress payments on the 15th day of each month to Contractor provided Contractor submitted its estimate not later than the 1st day of the month. The Contractor's first periodic estimate for partial payment was submitted after November 7, 1975, in the sum of $22,744.32 (Exh. 3-P, TT., P. 21-22) Contractor submitted a second periodic estimate for partial payment after December 5, 1975,

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in the sum of $54,386.46. (Exh. 4-P, TT, P. 23) The Contractor submitted its third periodic estimate for partial payment sometime in January of 1976, for payment in the sum of $18,640.15. (Exh. 5-P, TT, P. 24-25)

On January 27, 1976, Magna paid Contractor the sum of $22,744.32 on Contractor's first estimate and on February 6, 1976, paid the sum of $54,386.46 on Contractor second estimate. No further payments have been paid to Contractor by Magna.

A pre-construction conference was held on the 30 day of September, 1975, at the offices of Templeton, Linke & Associates. At said conference Contractor was advised that W. W. Clyde Construction Company would commence work on a new highway along 2400 South in conjunction with the construction of the sewer line.

Contractor, Magna's engineers, and representativ of DOT met at 8400 West 2400 South, Magna, Utah, on September 30, 1975, to discuss the problems that might occur in constructing the sewer line in that area. (TT, P. 270) On that date, representatives of DOT and Magna's engineer suggested that Contractor commence construction at 8400 West and proceed west in order to avoid additional expense to Contractor by reason of having to restore work complete by the highway contractor. (TT. P. 271)

Contractor advised representatives of DOT and Magna on that date that it would not commence work west of 8400 West without a change order. (TT, P. 37) Contractor further advised that it had planned to do work west of

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8400 West in the winter time when the ground was frozen. (TT, P. 107)

Contractor failed to determine prior to bidding, that the pasture areas west of 8400 West do not freeze because of the alkalinity or salinity content of the ground. (TT, P. 305)

Contractor was advised that a change order was not necessary and that Contractor could proceed in the 8400 West area without a change order. Any of the changes in alignment of the sewer line, or additions and deletions to the construction plans, would be covered in the unit price contract that existed between Magna and Contractor. Consequently, Contractor would have been reimbursed for any expenses incurred as a result of any such changes.

In order to allow Contractor to commence work at 8400 West, DOT ordered the highway contractor not to work in that area so that Contractor could complete his work prior to the road construction project. (Exh. 36-D, TT., P. 231)

Despite the steps taken by Magna and DOT to avoid conflicts between the sewer project and the highway project, Contractor commenced construction first on the east end of the sewer line and, thereafter, the highway contractor proceeded with road construction near the west end of the sewer relocation project.

The plans and specifications for the sewer line required that the line be constructed through the Ritter

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Canal. The plans and specifications for construction of the highway required the temporary relocation of the Ritter Canal and construction of a box culvert to accommodate the canal.

W. W. Clyde and Contractor were to coordinate their work at the Ritter Canal so as to avoid additional costs to Contractor. Max Fuller of DOT had arranged a time when Contractor could construct the sewer line before W. W. Clyde Construction Company constructed the box culvert for the Ritter Canal, but Contractor failed to install the sewer line on schedule. (TT, P. 123)

Contractor constructed the sewer line from 7200 West to a manhole immediately east of the Ritter Canal at approximately 8200 West. At that point Contractor refused to proceed further without a change order.

As a result of Contractor's refusal to complete the contract, Magna, after public bidding, awarded a contract to Jay Tuft Construction Company (hereinafter Tuft) for the completion of the sewer line. Tuft completed the work for the total sum of $167,443.32.

A major problem as perceived by the Contractor, augering under the Ritter Canal, was proven to be unnecessar Tuft merely excavated on both sides of the culvert with a backhoe and laid the pipe in one day. (TT, P. 255)

Contractor, in bidding the project, had planned to divert the flow of the canal and construct a line through the canal bed, and then redivert the flow over

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the constructed line and proceed from that point. (TT., P. 327) Contractor's plan to divert and redivert the Ritter Canal would have taken three to four days, but as a result of the box culvert being installed, the contractor would have constructed the sewer line in one day and thus benefited financially by its error in judgment. (TT., P. 328)

ARGUMENT

POINT I

THE TRIAL COURT'S FINDING THAT CONSTRUCTION COULD NOT BE COMPLETED IN ACCORDANCE WITH THE CONTRACT BECAUSE OF HIGHWAY CONSTRUCTION IS ERRONEOUS.

The trial court in its Finding of Fact No. V stated the following:

> "Because of the highway construction, construction of the sewer relocation project could not be completed in accordance with the terms and specifications of the contract entered into between plaintiff and defendant."

Appellants assert that this finding is not supported by the record and is clearly in error. In fact, the sewer line project was completed by Tuft, substantially in accordance with the requirements of the original contract.

Further, the agreement between Magna and Contractor was a unit price contract. Therefore, Contractor would have been compensated for additional work performed in re-routing any portion of the sewer line which might have conflicted with the highway construction work.

Contractor seeks to excuse its failure to perform by claiming that the highway construction project prevented completion of the sewer line under the terms of the contract. However, contractor acted in bad faith by refusing

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to avail itself of an opportunity to avoid a conflict by commencing work first in the area west of 8400 West. At the time of the pre-construction conference, Contractor was notified of a possible conflict with a highway project and that a suspension order had been issued to the highway contractor to permit Contractor to complete the sewer line in that area first. Both Magna and DOT recommended to contractor that it commence operations first at the 8400 West end of the project.

The evidence indicates that Contractor had notice of other construction work in progress in that area even prior to the pre-construction conference. James D. Didericksen testified that his father informed him three days after the sewer contract was executed that he observed another contractor excavating in the sewer project area. (TT., P. 35)

The Supreme Court of Utah has held in a recent case that Contractors are generally charged with notice of any conditions which may be less than ideal for construction work, but which reasonably could have been anticipated. In L. A. Young Sons Construction Company v. County of Tooele, 575 P. 2d 1034 (1978), the court stated:

> " . . . (O)ne who has contracted to perform a particular job for a stated price, if performance is possible, will not be excused from performance or entitled to extra compensation on account of encountering difficulties which have not been provided against in the contract." 575 P.2 at 1037

Magna should not be held to have guaranteed in the sewer line contract that Contractor would not encounter

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any difficulties in the construction of the line. The accepted rule of law applicable herein is that performance is not excused by mere inconvenience, unpleasantness, or unforeseen hardship or difficulties.

The Supreme Court of Utah in Lowe v. Rosenlof, 12 U.2d 190, 364 P.2d 418 (1961), held that a contractor, in order to recover under its contract, must establish its own performance or a valid excuse for its failure to perform.

The only excuse alleged by Contractor for its failure to complete the line resulted from Contractor's own errors of judgment in evaluating the project.

Contractor claimed it could not commence construction at the 8400 West end prior to the highway crew because it had planned to work there in the winter when the marshy ground in the area would be frozen and would support the weight of its excavating equipment.

Magna presented evidence at trial to the effect that the alkalinity and salinity of the soil in the marshy area in question prevented its freezing solidly even during severe winters.

Further, Tuft completed the work in that area with little difficulty despite the softness of the ground.

It must be noted the contract in question was between Contractor and Magna, and that Magna did nothing to hinder performance by Contractor. The acts complained of and which Contractor alleges created a change of

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conditions were the acts of an independent highway contractor and not those of Magna nor DOT.

POINT II

APPELLANT MAGNA'S FAILURE TO MAKE PROGRESS PAYMENTS STRICTLY WITHIN THE TERMS OF THE CONTRACT DID NOT CONSTITUTE A BREACH AND RESPONDENT CONTRACTOR SHOULD BE ESTOPPED FROM CLAIMING A BREACH DUE TO ITS OWN ACTIONS.

The trial court ruled that Magna's failure to make progress payments within the time limits of the contract was a breach which justified Contractor in terminating work on the project.

The court, by so ruling, imposed a double standard. It held Magna to a different standard than that imposed on the Contractor in that Contractor failed to submi its payment estimates in a timely manner, yet Magna was required to make payment strictly within the times established in the contract.

A. MAGNA DID NOT BREACH ITS CONTRACT WITH CONTRACTOR BY FAILING TO MAKE PROGRESS PAYMENTS ON NOVEMBER 15 AND ON DECEMBER 15, 1975

James Didericksen testified for Contractor that none of its three estimates were submitted to Templeton, Linke, engineers for Magna, for approval and certification prior to the first day of the calendar month following the month in which the work was performed as required by paragraph 25(a) of the Magna-Didericksen contract. (TT., P. 120) Mr. Didericksen testified that he was told

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by Robert Emerson of Templeton, Linke that he would receive payment by the 15th of such calendar month if the estimates were submitted after the 1st of each month but prior to the date on which Magna's Board held its regular monthly meeting. Further, Didericksen testified that Emerson was of the opinion that such meetings occurred on approximately the 12th day of the month. (TT. pp. 20-21)

However, Didericksen testifed that during the first part of November, 1975 he first learned that DOT was making all payments and that the State's processing of the estimates would not be completed by the 15th of the month. (TT. pp.24-25) Contractor continued working during the remainder of November and December, 1975, with full knowledge of the actual manner in which progress payments would be made and that such payments could not be processed by the 15th of the month. Contractor also submitted two estimates after being so informed. Contractor accepted progress payments in January and February, 1976, without any reservation of its rights concerning the timeliness of the payments.

B. CONTRACTOR WAIVED ANY RIGHT TO RECEIVE PROGRESS PAYMENTS BY THE 15TH DAY OF THE CALENDAR MONTH FOLLOWING THE MONTH FOR WHICH WORK HAD BEEN PERFORMED.

Contractor waived its right to receive progress payments strictly within the time limits established in the contract. A waiver has been defined as the "intentional relinquishment of a known right" and may be either express

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or implied. Phoenix Insurance Company v. Heath, 90 U. 107, 61 P.2d 308, 311-312 (1936). See also, Bjork v. April Industries, Inc., 547 P.2d 219 (1976).

Based on the testimony of James Didericksen, Contractor clearly waived any right to be paid by the 15th of the calendar month following the month in which it performed work by continuing to work on the project, submitting additional estimates for work performed on the project, and accepting partial payment for such work after learning during the first part of November, 1975 that progress payments would be paid in a different manner than set forth in the written contract.

C. CONTRACTOR IS ESTOPPED FROM ASSERTING THAT MAGNA BREACHED ITS CONTRACT BY FAILING TO MAKE PROGRESS PAYMENTS TO PLAINTIFF BY NOVEMBER 15 AND DECEMBER 15, 1975.

In J. P. Koch v. J. C. Penney Company, Inc., 534 P.2d 903 (1975), the Supreme Court of Utah defined estoppel as:

> " . . .(A) doctrine of equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss . . . .The test is whether there was conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation. "
> 534 P.2d at 904-905

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The doctrine of estoppel is applied independently of any contract or agreement between the parties, and thus, there is no requirement of consideration. In Larsen v. Knight, 120 U. 261, 233 P.2d 365, 372 (1951), the Supreme Court of Utah stated that a "party claiming a right ought not to appear to acquiesce in nonperformance by the other party until the time has gone by for such performance and then claim damages."

In this case, Contractor continued performance of the contract for a period of approximately 45 days after learning that progress payments would not be made by the 15th day of the month following the month for which work was performed. By reason of Contractor's conduct and acquiescence, Magna was induced to believe that progress payments could be made at a date later than that called for by the written contract without constituting a breach thereof. Contractor, having engaged in such conduct and having accepted two of the progress payments at dates later than that specified in the written contract, ought not to be permitted to claim that Magna breached the agreement by making the payments when it did.

In the case of Wagstaff v. Remco, Inc., 540 P.2d 931 (1975), the Supreme Court of Utah stated concerning delayed payments:

> " . . .(A) a mere delay of a month by a party in making a payment on a contract will usually result in damages only and will not justify the other pary in abandoning the contract. . ." 540 P.2d at 933

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In Wagstaff, supra, the court held that a contractor must complete construction unless the delay in payment affects its ability to continue performing under the contract. In the instant case, Contractor clearly had the ability to continue performance in view of the fact that it continued progress on the construction of the sewer line for some 45 days after learning of the delay in progress payments.

Contractor evinced no serious concern over delays in payment and made no objection when informed by Magna that payments would have to originate with DOT. In fact, this issue was not raised until after Contractor terminated operations, apparently as an afterthought, to justify terminating performance under the contract.

POINT III

RESPONDENT CONTRACTOR, AFTER ALLEGEDLY LEARNING OF VARIOUS OBSTACLES FOR THE FIRST TIME, ELECTED TO PROCEED UNDER TERMS OF THE CONTRACT, AND ITS SUBSEQUENT SUSPENSION OF OPERATIONS WAS A BREACH THEREOF.

Magna and DOT both urged the trial court to find that Contractor had breached its agreement with Magna. The trial court rejected the arguments of the parties and various legal authorities in concluding that Contractor was justified in terminating operations.

Contractor began construction at the east end of the sewer line despite the fact it had been informed of the highway project at the 8400 West end which would

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be suspended to permit Contractor to complete its work in that area first.

Further, Contractor refused to proceed further when it reached the Ritter Canal crossing, claiming that a box culvert installed at that point would necessitate augering under the culvert at great expense in order to proceed with the sewer line. Once again, Contractor's own error in judgment was claimed as an excuse for breaching the agreement with Magna. The contractor who completed the project did so without having to auger at the Ritter Canal crossing.

The evidence reveals that the alleged changed conditions claimed by Contractor as an excuse for refusing to complete performance were the product of Contractor's own errors and omissions and its refusal to cooperate with the suggestions by Magna and DOT to avoid conflicts with the highway project.

Appellants submit that the case of Hurwitz v. David K. Richards Co., 20 U.2d 232, 436 P.2d 749 (1968), outlines three alternatives for one who claims that another party to a contract has breached the same. They are: (1) to rescind the contract; (2) to treat the contract as binding and wait for performance; or (3) to sue for damages. Concerning the first alternative, the Supreme Court of Utah stated in the case of Green v. Palfreyman, 109 U. 291, 166 P.2d 215 (1946):

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" Forfeitures are not favored, and in interpreting an agreement, every reasonable presumption should be indulged against an intention to allow a forfeiture." 166 P.2 at 219.

In Jameson v. Wurtz, 396 P.2d 68 (1964), the Supreme Court of Alaska states:

". . .(E)quity abhors forfeiture and will seize upon slight circumstances to relieve a party therefrom."396 P.2d at 74

The case of Schepf v. McNamara, 354 Mich. 393, 93 N. W. 2d 320 (1958), involved a claim of breach of contract for hauling sand after the haul distance was increased. The Michigan Supreme Court stated:

" By continuing thus to perform and to accept payments under it, as above noted, he lost his right, if any, to terminate the contract and declare it forfeited.

It was appellant's duty, when it discovered the apparent breach of the contract, if it intended to insist upon a forfeiture, to do so at once. By permitting appellees to proceed with the performance of the contract it waived a breach.

Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed of depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his own part."

Contractor herein allegedly did not know the highway contractor would be working in the project area

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at the same time. However, between the time the Contractor submitted its bid on the 15th of October, 1975, Contractor became aware of the following facts:

(1) There was ground water in the pasture area west of 8400 West;

(2) There would be simultaneous highway construction in the immediate area of the project;

(3) The highway contractor had commenced work and had begun excavating the drainage ditch on the western portion of the project, and Contractor knew this would result in a restricted working area;

(4) A box culvert would be installed at the Ritter Canal crossing;

(5) A box culvert would be installed at 8400 West; and

(6) There would be a substantial need for coordination among the various contractors working on the project.

The Contractor, having knowledge of the facts above enumerated and believing the same to constitute grounds for breach of contract, nevertheless elected to proceed, thus depriving it of any excuse for later ceasing performance. Contractor remained obligated to complete the job. It would still have had an opportunity to assert that it was damaged by reason of the alleged breach at the conclusion of the contract and could conceivably have recovered appropriate damages, if any.

POINT IV

THE TRIAL COURT'S METHOD OF DETERMINING DAMAGES IS CONTRARY TO ESTABLISHED LEGAL PRECEDENT.

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The trial court ruled that Contractor failed to prove its claimed anticipated profits. Further, it determined that Contractor had earned the sum of $24,969.00 which had not been paid to Contractor by Magna. Appellants do not contest these rulings. Appellants contend, however, that the law of this State is well defined concerning the issue of damages in construction contract cases. In the recent case of Holman v. Sorensen, 556 P.2d 499 (1976), the Supreme Court of Utah found the construction site owner in breach of a construction contract. In its opinion, the C citing the earlier case of Keller v. Deseret Mortuary Co., 23 U.2d 21, 455 P.2d 197 (1969), stated:

> "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 costs of completing it." 556 P.2d at 500

Keller, supra, contains a formula for the computation of damages in construction contract cases approved by a unanimous court as follows:

"Total contract	$3,850.00
Paid by the defendant	- 1,500.00
Balance if job had been completed	2,350.00
Less reasonable costs of completion	- 500.00
Plaintiff's damage	$1,850.00"

455 P.2d at 198

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This formula was applied by the court in Wagstaff v. Remco, supra. In that case, the Court, based on disputed evidence, allowed an offset of $4,099.00 against the balance claimed by the plaintiff to be due and owing, constituting the difference between the total contract price and the amount paid by the owner. The result was a net judgment in favor of the plaintiff for the sum of $4,064.94.

The court in Wagstaff stated the following:

> " Notwithstanding the trial court's ruling that Remco had been guilty of breach for failing to make the large initial payment as set forth above, it also ruled, (and we do not disagree) that Remco was entitled to offset against Wagstaff's contract price, the amount of expenses reasonable and necessary to complete the job." 540 P.2d at 933

Using the above described formula and substituting the applicable amounts as derived from the evidence in the instant case, results in the following determination:

Total contract price for sewer relocation	$198,476.50
Less amount paid by Magna to Contractor	- 77,130.78
Amount available to complete project	$121,345.72
Magna's cost to complete project:	
Paid to Tuft	$167,443.32
Amount earned but unpaid to Contractor	24,969.00
	$192.412.32
Less funds available to complete project	- 121,345.72
Magna's total damages	71,066.60

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Less offset for amount earned but unpaid to Contractor	$ 24,969.00
Magna's net damages	$ 46,097.60

The court ruled that Contractor failed to prove its damages as far as any anticipated profits. On the other side, the cost to Magna of completing the contract as well as the additional cost for work completed by the Contractor was established by the evidence. The result is that the trial court should have ruled on the basis of the evidence before it, which evidence was not challenged by the Contractor, that Magna was entitled to judgment against Contractor since the reasonable cost of completing the project exceeded the funds available under the original contract by an amount of $71,066.60. Further, Magna was entitled to retain as an offset against said sum the amount of $24,969.00 earned by but unpaid to Contractor, leaving net damages to Magna in the sum of $46,097.60.

CONCLUSION

On the basis of the foregoing, Appellants request this court to reverse the judgment in favor of Contractor and grant judgment in favor of Magna, or in the alternative, to reverse and remand the case for a new trial with instructions as to the correct method of computing damages.

DATED this 4th day of April, 1979.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that on the 6th day of April, 1979, I mailed two copies of the foregoing Brief to each of the following attorneys, postage prepaid:

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