1979

Darrell J. Didericksen & Sons, Inc., A Corporation v. Magna Water & Sewer Improvement District v. Utah State Department of Transportation and Templeton, Linke & Associate : Brief of Respondent

Utah Supreme Court

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 RESPONDENT

Appeal from a Judgment by the Third Judicial Court, the Honorable J. E. Banks presiding.

LAWRENCE R. PETERSON, JR.
Attorney for Respondent
2121 South State Street
Salt Lake City, Utah 84115

JOHN A. ROKICH
Attorney for Appellant
Magna Water & Sewer Improvement Dist.
3617 South 8400 West
Magna, Utah 84044

LELAND D. FORD
Assistant Attorney General
Attorney for Appellant
Utah State Department of Transportation
115 State Capitol
Salt Lake City, Utah 84114

W. ROBERT WRIGHT
Attorney for Third-Party Defendant
Templeton, Linke & Associates
Walker Bank Building
Salt Lake City, Utah 84111

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 RESPONDENT

Appeal from a Judgment by the Third Judicial Court, the Honorable J. E. Banks presiding.

LAWRENCE R. PETERSON, JR.
Attorney for Respondent
2121 South State Street
Salt Lake City, Utah 84115

JOHN A. ROKICH
Attorney for Appellant
Magna Water & Sewer Improvement Dist.
3617 South 8400 West
Magna, Utah 84044

LELAND D. FORD
Assistant Attorney General
Attorney for Appellant
Utah State Department of Transportation
115 State Capitol
Salt Lake City, Utah 84114

W. ROBERT WRIGHT
Attorney for Third-Party Defendant
Templeton, Linke & Associates
Walker Bank Building
Salt Lake City, Utah 84111

TABLE OF CONTENTS

CASES CITED

TEXTS CITED

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 RESPONDENT

NATURE OF THE CASE

This is an action brought by plaintiff-respondent, Darrell J. Didericksen and Sons, Inc., (hereinafter plaintiff) to recover damages for breach of contract by defendant-appellant, Magna Water & Sewer Improvement District, (hereinafter Magna) and to recover $29,281.00 due under the contract between plaintiff and Magna.

Magna counterclaimed against plaintiff and filed Third-Party actions against Utah State Department of Transportation, (hereinafter DOT) and Templeton, Linke & Associates, (hereinafter Templeton) on theories of contractual indemnity and negligence respectively.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable J. E. Banks of the Third Judicial District Court who awarded plaintiff a money judgment in the sum of $24,969.00 plus interest, said sum being the contract price for the labor and material provided by plaintiff as of the date of termination less applicable discounts. The court ruled that Magna breached the contract and dismissed Magna's counterclaim, but also held plaintiff and failed to establish with certainty its anticipated profits. DOT was held to be liable to Magna for the ultimate judgment of the court and Magna stipulated that its claim against Templeton could be dismissed since the court had not allowed any damages for breach except the contract price of services and materials actually rendered. The trial court denied Magna's motion for a new trial.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks to have the judgment of the lower court affirmed and costs awarded to the plaintiff.

STATEMENT OF FACTS

This case rises from a construction contract between Magna and plaintiff for the relocation of a sewer line along 2400 Sou

in Magna, Utah. In preparation for bidding on the contract, plaintiff's personnel inspected the construction site and found it to be mostly open field with substantial ground water throughout the western portion which further investigation showed to be mainly irrigation run-off (Record: 535, 536). The bid plans showed a freeway which was to be built, but all freeway drawings were marked "future construction". The term "future construction" means, for construction after the contract in which the bid was to be rendered (R. 678). The contract made time of the essence, called for progress payments to be made by Magna by the 15th of the month for work done in the prior month, and required a written change order before payment could be made for any changed construction (Exh. 1-P: general conditions, Paragraphs 18,19,22, and 25 (a)). The contract further required that construction be completed within 180 days of the beginning of construction (Exh. 1-P: information for bidders, Item 9).

Plaintiff was the low bidder and signed the contract on the 9th day of September 1975. On the 12th day of September, 1975, Darrell J. Didericksen, president of plaintiff, noticed that construction vehicles had pulled on to the area of the sewer relocation project (R. 537). Approximtely three days later at the preconstruction conference, plaintiff's personnel were told that W. W. Clyde would be constructing the freeway at the same time as plaintiff's relocation contract would be going forward. Prior to the signing of the contract, Magna had

been notified that W. W. Clyde would be undertaking construction, but had failed to make any indication of that fact in its bid drawings or to otherwise notify plaintiff (Exh. 17-P, R. 677, 679).

At the preconstruction conference, plaintiff was requested to begin construction in the middle of the project to avoid conflict with the freeway contractor. Plaintiff's personnel indicated they would begin in the middle if a change order were issued to cover the cost of building a pad through the ground water and to cover the additional costs of starting at the middle rather than the low end of the sewer line (R. 538, 539, 540, 541), Jim Didericksen, plaintiff's vice-president, pointed out that the plaintiff had contemplated constructing the west end of the project in mid-winter when there was no irrigation and the remaining ground water would be frozen and therefore had not included the cost of a construction pad in this bid. Beginning in the middle of the project would also impose upon plaintiff the burden of pumping substantial water, whereas beginning construction at the low end of the sewer line would not (R. 617). In the course of several discussions of the topic, Robert Emerson, project engineer for Templeton (Magna's engineers), indicated to plaintiff that he would attempt to obtain a change order and as a result of said conversations, plaintiff made preparations to begin in the middle of the project (R. 541, 542, 831).

On the 8th day of October 1975, Jim Didericksen was told by Robert Emerson that Mr. Emerson had redesigned the project

to avoid conflicts with the highway contractor and that plaintiff could, "proceed with the project as he had originally bid it. In other words, he could start at the location he had planned" (R. 831). Plaintiff began work on the 15th of October at the east end where the sewer trench was lowest (R. 523).

On the 7th day of November 1975, plaintiff submitted its estimate of $22,744.32 for work done in October, pursuant to oral instructions received by plaintiff at the preconstruction conference to the effect that estimates submitted by the 12th would be paid by the 15th (R. 523). The estimate was approved for payment by Templeton (Exh. 3-P). No payment was made by Magna on November 15th. Plaintiff submitted another estimate of $54,386.46 on the 8th day of December for work done in November which was also approved. Magna made no payment on the 15th of December (R. 525, 526).

Construction on the freeway had progressed during October and November so that many obstacles were now placed in the line of the sewer relocation project including excavations, drainage trenches, and fences (Exh. 13-P, 16-P: R. 546-550). The attempt by Templeton to redraw the sewer line had not solved the problem (R. 525). Templeton conceded there was a change in condition and applied for authorization to issue a change order (Exh. 16-P). On December 22nd plaintiff notified Magna that it was about to reach a point where no further construction could be undertaken under the original drawings and that if a change order was not issued, and the delinquent

progress payments made, plaintiff would pull off the job (Exh. 6-P). No change order was issued and no payment made. Plaintiff ceased work on the 27th of December, 1975.

Magna finally made payment on the plaintiff's first two estimates in January and February of 1976 but has not paid plaintiff for the construction work completed in December of 1975 nor for the 10% of the October and November work which was retained, amounting to a total of approximtely $24,000 after discounts, as reflected in the judgment rendered by the trial court. Also after the plaintiff had ceased work, Magna negotiated for and finally obtained easements which allowed Magna to redesign the sewer line to avoid many of the conflicts with the highway construction. In August of 1976 Magna let a contract to J. Tuft to construct the newly aligned sewer (Exh. 9-D, Appendix A. R. 751).

ARGUMENT

POINT I: THE TRIAL COURT'S FINDING THAT CONSTRUCTION OF THE SEWER RELOCATION PROJECT COULD NOT BE COMPLETED IN ACCORDANCE WITH THE TERMS AND SPECIFICATIONS OF THE CONTRACT IS SUPPORTED BY THE EVIDENCE.

It is established law in contract cases, as in other cases, that the findings of the trial court will not be disturbed on appeal if there is "a reasonable basis in evidence to support it". Holman v. Sorensen, 556 P.2d 499 (Utah 1976); Charleton v. Hackett, 11 U.2d 389, 360 P.2d 176 (1961). Two exhibits in the evidence established clearly that the court's finding of a substantial change in the construction project was correct and was supported by the evidence. The first is Exhibit 16-P which is

a letter from Templeton to DOT conceding that there was a change in circumstances in the sewer relocation project and requesting permission of DOT to issue a change order to the plaintiff.

The second item of evidence is defendant's own exhibit (Exh. 9-D, Appendix A) which shows a portion of the sewer relocation project as bid and as constructed (R. 534). The point where the sewer line as constructed (black line) diverges from the line as bid (red line) is the very point where plaintiff ceased work (R. 560). The project had changed so substantially that the defendants themselves elected not to construct the sewer line along the line of the original bid but along a new line which avoided many of the obstacles with which plaintiff was faced on the 27th of December 1975 when plaintiff discontinued work on the project. The line along which Magna ultimately hired Mr. Tuft to construct the sewer was not available to the plaintiff in December of 1975 since easements for said alignment were not acquired by defendants until at least January of 1976 (R. 833, 834), and probably not until June of 1976 (R. 559, 665, 666).

In December of 1975 plaintiff's only options were either to continue constructing along the line of the original bid or to shut down. The substantial nature of the obstacles placed along the line of the original bid are outlined in Exhibit 6-P and described in the testimony of James Didericksen (R. 559, R. 546-552). These obtacles included newly excavated piles of dirt, fences, and drainage canals. (See Exh. 13-P

and 14-P). All of these changes constituted a very different construction project than the one plaintiff's agents had contemplated when they prepared their bid after observing the construction site, an open field.

Nor is the change mitigated by the fact that plaintiff's bid was in unit prices. What constitutes a reasonable bid per linear foot of sewer trench for an open field is not reasonable when the contractor only has access to one side of trench for stacking the excavated material and hauling in select backfill or when the excavation passes through or along newly constructed ditches or embankments where shoring, pumping, and restoration must take place.

The court's conclusion that the responsibility for the change in conditions falls upon Magna, is also supported by the evidence. Magna had been notified that the freeway construction would be underway during the term of the sewer relocation project, but had failed to reflect that in the bid specifications or to notify plaintiff of the fact in any manner (Exh. 17-P, R. 677, 678, 679). The drawings showing freeway construction were clearly labeled "future construction". Mr. Keith Slater, an engineer and plaintiff's expert witness, testified that the term "future construction" meant, to be constructed outside of the time frame of the sewer relocation contract (Exh. 8-P, R. 678). All the evidence before the trial court shows the plaintiff first learned of the impending freeway construction after execution of contr

Contrary to the allegations in appellants' brief, plaintiff was not put to the election of beginning construction in the middle of the relocation project. Plaintiff had indicated it would begin construction in the middle of the project if a Change Order were issued by Magna, and Magna's agent, Robert Emerson, the project manager, had agreed to "...check with the state and determine what could be done in this area" (R. 831). Robert Emerson then reports the following telephone conversation:

> On the 8th of October I had a telephone conversation with Jim Didericksen wherein I told him to proceed with the project as he had originally bid it. In other words, start at the location he had planned. I also indicated to him that we had realigned the sewer at the box culvert West of 8400 West to eliminate a conflict in location there and I felt that because we had a unit price contract that he could proceed in that area without any Change Orders (R.831).

Plaintiff, in all good faith, began construction as instructed. The fact that Robert Emerson's realignment did not alleviate the problem is shown not only in the testimony of Jim Didericksen to that effect (R. 552, 553), but by Templeton's own judgment that as of the 21st of November a change condition existed (Exh. 16-P). Upon learning that the problem had not been solved, plaintiff again requested a Change Order to continue construction. On the 22nd of December plaintiff notified defendant that plaintiff would no longer be able to continue construction unless a Change Order was

issued (Exh. 6-P).

Jim Didericksen testified that as of the 27th of December 1975 plaintiff had reached the point in construction where it could no longer continue under the original bid document, having reached the area of freeway construction and having received no Change Order. Plaintiff therefore terminated work. The evidence clearly supports the trial court's Finding of Fact that:

> 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. (R. 303)

The evidence also supports the court's conclusion that Magna is the party responsible for the changed condition.

POINT II: THE TRIAL COURT'S FINDINGS THAT MAGNA BREACHED THE CONTRACT BY FAILING TO MAKE TIMELY PROGRESS PAYMENTS AND THAT PLAINTIFF DID NOT WAIVE MAGNA'S BREACH ARE SUPPORTED BY THE EVIDENCE.

The contract between plaintiff was drawn by Magna or Magna's agents and makes time of the essence (Exh. 1-P: general conditions Paragraph 19). The contract requires Magna to make progress payments by the 15th of each month as follows:

> Not later than the 15th day of each calendar month the owner shall make a progress payment to the contractor on the basis of a duly certified and approved estimate performed during the preceding calendar month under this contract... provided, that the contractor shall submit his estimate not later than the first day of the month...(Exh. 1-P: general conditions Paragraph 25 (a)).

As appellant's brief points out plaintiff was told by Magna's agents at the preconstruction conference that estimates

submitted by the 12th would be paid by the 15th. Plaintiff submitted an estimate of $22,744.32 for the work done in October on the 7th of November which estimate was approved by Templeton and submitted another estimate of $54,386.46 on the 8th day of December for work done in November which estimate was also approved for payment by Templeton (Exh. 3-P, 4-P, R. 523, and 526).

The trial court did not find Magna's failure to make payment on the 15th of November to be a breach of the contract since the estimate had not been submitted by the 1st of November. The court however did find that Magna's failure to make a payment of $22,744.32 on the 15th day of December was a breach of the contract which justified plaintiff's termination of work on the 27th of December (Findings of Fact and Conclusion of Law: Conclusion II (3), R. 306).

Where time is of the essence of the contract, failure to perform within the time stipulated is sufficient breach to allow the non-breaching party to consider the contract at an end. University Properties Inc. v. Moss, 388 P.2d 543 (Wash. 1964), 17A C.J.S. Contracts 422 (1) Page 520.

In the case of Wagstaff v. Remco, 540 P.2d 931 (Utah 1975) there is no indication of a contract provision making time of the essence. Nonetheless, the Supreme Court sustained the trial court's finding that a one month delay in the payment of a progress payment justified the contractor in pulling off the job. Even applying the standard of Remco to

this case the trial court's finding is sustained by the evidence. In light of the representations made by Magna's agent at the pre-construction conference as to the date for submitting estimates for payment, plaintiff reasonably anticipated receiving payments by the 15th of December totally in excess of $77,100.00. The contract requires the contractor pay for all materials and transportation services by the 20th day of the month following the month in which the service or materials were provided (Exh. 1-P: general conditions Paragraph 27). The court made a specific finding that in preparing plaintiff's bid, plaintiff had negotiated agreements with plaintiff's material suppliers which allowed plaintiff a discount for prompt payment for materials and plaintiff had relied on these discounts in calculating plaintiff's bid (Findings of Fact IX, R. 304).

The trial court made a specific finding that plaintiff had not waived its right to receive payment in full by accepting the $77,000 payment made by Magna after termination of work by plaintiff. (Finding of Fact XVI, R. 305). In contract matters such as this, the findings and judgment of the trial court enjoy a presumption of validity and appellant has the burden of showing from the record that the trial court erred in its finding. R. C. Tolman Construction Company Inc. v. Myton Water Association, 563 P.2d 780 (Utah 1977).

The testimony of Jim Didericksen shows that plaintiff learned for the first time at the pre-construction conference that Magna was obtaining the funds for the construction project from the State. No mention was made at any time, however, of any

delay in payments (R. 621). In fact, at the pre-construction conference Magna's agent affirmed that if estimates where submitted by the 12th payments would be made by the 15th. There is no evidence in the record of any agreement by plaintiff or plaintiff's personnel to allow Magna any delay in the making of installment payments. In its notice of breach and demand for cure, dated December 22nd, plaintiff specifically demanded that Magna pay the progress payments due (Exh. 6-P). Magna paid the $77,000.00 of installments after termination of the contract without negotiation or stipulation from plaintiff. All of the above sustains the finding of the trial court that there was no waiver of Magna's breach.

Nor does the doctrine of estoppel apply to the facts of this case. There is neither evidence that the plaintiff acquiesced in Magna's late payment, nor is there evidence that any conduct of Magna whatsoever was motivated by Magna's reliance upon any alleged acquiescence on the part of the plaintiff. Exhibit 6-P clearly shows that plaintiff asserted its claim for progress payments during the period in which the contract was in force and gave Magna an opportunity to cure its breach which Magna refused to do. The estoppel argument was made to trial court which responded as follows:

> (Mr. Wright) We think, your Honor, that he has waived that provision with respect to payment on the 15th.
>
> THE COURT: Well, let me put it to you this way.
>
> MR. WRIGHT: And that he's estopped.

> THE COURT: Looking at it most favorably, as I recall, in order to make--get that payment by the 15th, they had to be submitted by the 1st. And according to my notes, his first estimate was submitted on November the 7th. So, the strict interpretation of the contract, he couldn't expect to be paid until the 15th of December. Where does that put you in your position?
>
> MR. WRIGHT: Well, the position that it puts us in is that he wasn't paid on the 15th.
>
> THE COURT: He wasn't paid. He can quit within twelve days, and he quit within twelve days of when he was entitled to be paid under the terms of the contract. Your motion's denied. (R. 699)

That finding is supported by the evidence.

POINT III: THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT APPELLANT, MAGNA, BREACHED THE CONTRACT BY FAILING TO PROVIDE PLAINTIFF WITH WRITTEN AUTHORIZATION TO UNDERTAKE CONSTRUCTION OF THE SUBSTANTIAL CHANGES IN THE SEWER RELOCATION PROJECT.

Again, in Point Three, appellant appears to be attacking a finding of fact of the trial court upon which substantial evidence was presented at trial and the court ruled in favor of the plaintiff. The trial court found that:

> Changes in construction and the necessity for coordination, which resulted because of the highway construction, were substantial and were not anticipated by plaintiff in plaintiff's bid.

and

> Plaintiff requested permission from defendant to undertake the changed construction which defendant failed to grant.

and concluded therefrom that defendant, Magna, breached the contract:

> by failing to provide plaintiff with written authorization to undertake construction of the substantial changes in the sewer relocation project which resulted from the highway construction. (Findings of Fact and Conclusions of Law: Finding VI and VIII and Conclusion II (2)).

Jim Didericksen testified that at the time Magna requested plaintiff to begin construction in the middle of the sewer relocation project, plaintiff requested a Change Order which Magna's agent attempted to procure (R. 831). Thereafter, defendant's agent, Robert Emerson, told plaintiff that drawings would be forthcoming which would alleviate the conflict and that plaintiff could begin construction of the project as it had originally bid the project (R. 831, see exact quote in Point One above). As work progressed it became clear that the attempt of Templeton to avoid the conflict had not succeeded, (R. 552) and Templeton at the request of the plaintiff again attempted to obtain permission to issue a Change Order (Exh. 16-P). Nowhere in this chain of events did plaintiff agree to undertake construction of the changed portion of the project without written authorization from Magna.

Appellant, however, seems to argue that plaintiff had a duty to immediately rescind the contract upon discovering the possible conflict and cites the case of Herwits v. David K. Richards Company, 20 U.2d 232, 436 P.2d 749 (Utah 1968) in support of that proposition. The Herwits case, however, is an

anticipatory breach case and therefore is not applicable here. In the present case, as Exhibit 16-P demonstrates, Magna did not unequivocally reject plaintiff's request for a Change Order. On November 27th, Magna's agent took action to procure a Change Order (Exh. 16-P). Plaintiff was not put to the election to shut down until plaintiff had reached a point in construction where it could no longer continue construction without a Change Order. That day came on the 27th of December, 1975, when plaintiff elected to discontinue work rather than undertake the changed construction without written authorization. In the Herwits case, the opinion reads, at Page 235: "If there had been an anticipatory breach Richard had three options available to him;" then the court lists the three options mentioned in the appellant's brief. Those options were not presented to the plaintiff in this case until it became clear from Magna's actions that it would not issue a written order for plaintiff to undertake the changed construction. This became clear from Magna's failure to respond to plaintiff's demand for such an order; (Exh. 6-P) whereupon, plaintiff made the election to discontinue work on the contract.

In Weber Meadowview Corporation v. Wild, 575 P.2d 1053, 1055 (Utah 1978), the court stated with approval the proposition that, "One who enters into a contract must cooperate in good faith to carry out the intention the parties had in mind when it was made". Fisher v. Johnson, 525 P.2d 45 (Utah 1974). In R. C. Tolman Construction Company Inc. v. Myton Water Association, supra, the court said:

> It is true that there is an implied obligation arising out of a construction contract that the person hiring the work to be done will cooperate with the contractor and will not hinder or delay his performance. (at 782).

Since Magna had known of the intention of W. W. Clyde to undertake freeway construction in the area of the sewer relocation project prior to the letting of the sewer relocation contract and had failed to make that fact known to the plaintiff, it had, at the very least, a duty to cooperate with the contract by issuing Change Orders which would allow plaintiff to receive compensation for the extra expenses entailed in coordinating or avoiding the freeway construction. The trial court correctly ruled that Magna's failure to do so was a breach of contract.

POINT IV: THE TRIAL COURT PROPERY COMPUTED PLAINTIFF'S DAMAGES.

There can be no dispute that the proper formula for the computation of damages of an executory contract is the contract price less the reasonable cost of completion. Holman v. Sorensen, supra, Wagstaff v. Remco, supra. In the case before the court, the plaintiff presented evidence to establish that the reasonable cost of completion of the sewer relocation project as originally bid would have produced a profit for the plaintiff, which plaintiff should have been entitled to recover as a result of Magna's breach. The trial court, however, found that plaintiff's evidence was not sufficiently certain to establish that the reasonable cost

of completion would have been less than contract price for the balance of the project and therefore awarded plaintiff no lost profit. The court, however, did award the plaintiff the contract price for the portion of the project already completed in the sum of $24,969.00 plus interest, a finding which the appellant apparently does not contest.

In the case of Keller v. Deseret Mortuary Company, 23 U.2d 1, 455 P.2d 197 (1979), the court and parties conceded that the non-breaching party was entitled to recover the reasonable value of the work performed and the materials furnished. The court stated the general rule as follows:

> The assessment of damages by the trial court was consistent with the general principal which underlies the ascertainment of damages for breach of contract. That the non-breaching party should receive an award which will put him in as good a position as he would have been in had there been no breach. (at 3)

Under the standard of the Keller case, the non-breaching party (plaintiff) would be entitled to the contract price for the completed portion of the contract, the plaintiff having already incurred the cost of completion. Plaintiff would also be entitled to the contract price for the uncompleted portion of the contract less the reasonable cost of completion. The trial court's finding that plaintiff's evidence was not sufficiently certain to establish a difference between the contract price and the reasonable cost of completion of the executory portion of the contract should not in any way deprive the plaintiff of the

benefit of its bargain for the portion of the contract completed.

It is clear that the trial court made no finding as to the reasonable cost of completion of the contract. Appellant asks the Supreme Court to find, however, that the reasonable cost of completion is the sum paid by Magna to its contractor, Tuft, after August 1976 for the completion of the newly aligned project. As Exhibit 9-D (Appendix A) clearly shows, the sewer line constructed by Tuft was not the one bid upon the plaintiff. The mere fact that Tuft's contract was let one year after plaintiff's contract is enough to disqualify it as an indication of the reasonable costs of completion, in light of the historical inflation in the cost of materials and labor. There is no evidence in the record to establish that the sewer line constructed by Tuft is similar to the one bid upon by the plaintiff either in time, terms, or surrounding circumstance. Finally, the Supreme Court is not the proper court to make a finding of fact in a contract case (Pugh v. Stockdale and Company, 570 P.2d 1027 (Utah 1977).

Appellant is asking this court to impose upon plaintiff the same damages which would have been imposed had the trial court found plaintiff to be the breaching party. Since plaintiff is the innocent party, it should receive, at the very least, the contract price of the materials and services actually rendered which is exactly what the trial court has awarded.

CONCLUSION

There is ample evidence in the record to support the findings of the trial court that Magna failed to make timely progress payments in breach of its contractual obligation and that Magna failed to inform plaintiff of the freeway construction which would conflict with plaintiff's contract and failed to issue plaintiff a change order to allow plaintiff to coordinate with, or avoid said construction all in breach of Magna's contractual obligations, which breach justified plaintiff in terminating the contract. The trial court awarded plaintiff the contract price for the materials and services actually provided to Magna by the plaintiff and plaintiff respectfully submits that as the innocent party plaintiff is entitled to that measure of damages.

DATED this 30th day of April, 1979.

LAWRENCE R. PETERSON, JR.
KING AND PETERSON
Attorney for Respondent
Suite 205 Sentinel Building
2121 South State Street
Salt Lake City, Utah 84115

Appendix A

MAILING CERTIFICATE

Undersigned certifies that a true and correct copy of the foregoing Brief was mailed to John A. Rokich, Attorney for Appellant Magna Water & Sewer Improvement District, 3617 South 8400 West, Magna, Utah 84044; Leland D. Ford, Assistant Attorney General, Attorney for Appellant Utah State Department of Transportation, 115 State Capitol, Salt Lake City, Utah 84114; and to W. Robert Wright, Attorney for Third Party Defendant Templeton, Linke & Associates, Walker Bank Building, Salt Lake City, Utah 84111, this 30th day of April, 1979.