

1998

Interwest Construction v. Palmer : Brief of Appellant

Utah Court of Appeals

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George W. Preston; Preston & Chambers; Robert W. Wallace; Plant, Wallace, Christensen & Kanell; Attorneys for Appellees.

Steven D. Crawley; Walstad & Babcock; Attorney for Appellant.

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COPY
IN THE UTAH COURT OF APPEALS

COURT OF APPEALS
BRIEF

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DOCKET NO. 980276-CA

INTERWEST CONSTRUCTION, a Utah
corporation,

Plaintiff and
Appellant,

vs.

R. ROY PALMER and VAL W. PALMER,
dba A. H. PALMER & SONS,

Defendants and
Appellees.

Case No.: 980276-CA

Priority: 15

R. ROY PALMER and VAL W. PALMER,
dba, A. H. PALMER & SONS,

Third Party Plaintiffs,

vs.

JOHN RYSGAARD, dba, FIBERGLASS
STRUCTURES COMPANY

Third Party Defendants.

FIBERGLASS STRUCTURES AND
TANK COMPANY,

Third Party Plaintiffs,

vs.

THIOKOL CORPORATION,

Third Party Defendant.

BRIEF OF THE APPELLANT

FILED

of Appeals

JAN 4 - 1999

Julia D'Alessandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

INTERWEST CONSTRUCTION, a Utah
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Third Party Defendant.

BRIEF OF THE APPELLANT

**APPEAL FROM A JUDGMENT IN THE
FIRST DISTRICT COURT OF CACHE COUNTY
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE**

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BRIEF OF THE APPELLANT

Appellant Interwest Construction respectfully submits the following brief on appeal:

I. JURISDICTION OF APPELLATE COURT

This Court has jurisdiction over this appeal pursuant to §78-2-2(3)j and §78-2a-3(k) Utah Code Ann. 1953, as amended.

II. STATEMENT OF ISSUES RAISED ON APPEAL

A. Did the trial court properly award attorneys' fees to A. H. Palmers & Sons and their insurance carrier and against Interwest Construction?

B. Did the trial court properly deny an award of attorneys' fees to Interwest Construction and against A. H. Palmers & Sons?

Interwest Construction contends that the trial court misinterpreted the contract between the parties. Interpretation of a contract presents a question of law. *Village Inn Apartments v. State Farm Fire and Casualty Co.*, 790 P.2d 581 (Utah App. 1990).

The contract in question is not ambiguous and no extraneous evidence was considered, therefore, this Court must review for correctness. *Terry v. Price Mun. Corp.*, 784 P.2d 146 (Utah 1989).

III. DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

There are no determinative constitutional provisions or statutes in this case.

IV. STATEMENT OF THE CASE

A. Nature of the case:

In the fall of 1988, Plaintiff/Appellant Interwest Construction ("Interwest") entered into an agreement with Thiokol Corporation ("Thiokol") under which Interwest agreed to construct a waste water treatment facility known as Building M705 (the "Treatment Plant") for Thiokol. On or about December 1, 1988, Defendants/Appellees, R. Roy Palmer and Val W. Palmer, dba, A.H. Palmer & Sons ("Palmers") entered into a Subcontract

Agreement (the "Subcontract")¹ with Interwest by which Palmer agreed to perform labor and provide materials to be incorporated into the construction of the Treatment Plant. Pursuant to the Subcontract, Palmers supplied and installed in the Treatment Plant, among other things, three fiberglass waste water storage tanks. The tanks were designated on the plans and specifications of the Treatment Plant and in the court record as T-32, T-33 and T-34. These tanks were purchased by Palmers from Fiberglass Structures Company ("Fiberglass Structures").

On or about May 2, 1989, Thiokol inspected the Treatment Plant and notified Interwest that it considered the Treatment Plant to be substantially complete as of that date and accepted the work of Interwest and its subcontractors and suppliers. At some time after May 2, 1989, Thiokol modified the fiberglass waste water storage tanks without the knowledge or consent of Interwest. On or about August 24, 1989 one of the tanks manufactured by

¹ Trial Exhibit No. 37. A copy of the Subcontract is included in the Addendum.

Fiberglass Structures and supplied by Palmers failed and released approximately 35,000 gallons of water causing damage to the Treatment Plant.

At the time the tank failed and, at the time of the filing of the complaint, Thiokol was indebted to Interwest in an amount exceeding \$200,000.00 pursuant to the construction agreement mentioned above. Of this amount, \$93,000.00² was owed to Palmers by Interwest. Even though Thiokol never alleged that Interwest in any way contributed to the tank failure,³ Thiokol refused to pay the balance due to Interwest and retained the balance of the contract proceeds as a set off for the damages

² This amount is approximately 6% of the total Subcontract price.

³ In fact, in regard to the subject tanks, Interwest was a passive link in the chain of commerce. All claims made by Thiokol directly against Interwest arise solely on account of Interwest's obligation to provide a warranty on the labor and materials provided by Interwest's subcontractor and suppliers and not upon any act or omission of Interwest.

Thiokol alleged that it suffered as a result of the tank's failure.⁴

Interwest, in turn, withheld final payment from Palmers as a set off pending a resolution of the dispute.

B. Course of proceedings:

Interwest filed a complaint against Palmers for breach of contract, indemnity, negligence, and breach of warranty.

Interwest sought indemnification from Palmers for attorneys' fees, costs and expenses incurred and to be incurred as a result of the tank failure. Interwest later filed an Amended Complaint adding Thiokol as a defendant and, in addition to restating its claims against Palmers, sought recovery from Thiokol under theories of breach of contract and unjust enrichment. Palmers filed a third party complaint against Fiberglass Structures who, in turn, filed a third party complaint against Thiokol. Thiokol brought counterclaims and third party complaints against Fiberglass Structures and Palmers and a counterclaim against Interwest.

⁴ At trial, Thiokol attempted to show that it had suffered approximately \$600,000.00 in damages.

The case was tried to the court on January 29, 1992 through February 10, 1992 and March 4, 1992. The parties, by stipulation, reserved for later determination the issue of attorneys' fees and to whom they should be awarded.

C. Disposition at the trial court:

The trial court entered its Second Amended Judgment and Third Amended Findings of Fact and Conclusions of Law on September 29, 1992. Interwest was granted judgment against Thiokol in the principal amount of \$200,000.00, Palmers were granted judgment against Interwest in the principal amount of \$93,000.00. Thiokol's counterclaim, cross claim and third party complaints were dismissed with prejudice.

After briefing and argument the court issued a Memorandum Decision which was also entered on September 29, 1992 awarding attorneys' fees to Palmers and denying Interwest's claim for fees against Palmers, the trial court having determined that the cause

of the failure was overfilling of the tank by Thiokol.⁵ The trial court did not, at that time, determine the amount of fees to be awarded.

Thiokol filed an appeal challenging the trial court's determination that neither Interwest, Palmers nor Fiberglass Structures were responsible for the failure of Tank T-33 and that, in fact, the tank failed because it was overfilled by Thiokol. The Utah Court of Appeals upheld the trial court in *Interwest Construction v. Palmer*, 886 P.2d 92 (Utah App. 1994). The Utah Supreme Court granted certiorari and also upheld the trial court in *Interwest Construction v. Palmer*, 923 P.2d 1350 (Utah 1996).

Following the completion of Thiokol's appeals, Palmers re-filed its motion for an award of attorneys' fees and by Memorandum Decisions dated August 19, 1997 and February 11, 1998, the trial court awarded \$25,017.00 to Palmers and \$45,309.25 to Palmers' insurance carrier.

⁵ Third Amended Findings of Fact and Conclusions of Law; Finding of Fact No.: 27 and Conclusion of Law No.: 6.

V. SUMMARY OF ARGUMENT

Palmers and their insurance carrier can only recover their attorneys' fees if Interwest breached the Subcontract. Interwest was not in breach of its agreement with Palmers because it was entitled to withhold final payment from Palmers pending a resolution of Thiokol's warranty claims against Interwest and Palmers. Further, Palmers and their insurance carrier are not entitled to recover attorneys' fees for proving their right to payment under the Subcontract when that right was never disputed by Interwest in the event that Thiokol's claims for negligence and breach of warranty were not sustained by the evidence.

Interwest was entitled to be indemnified by Palmers and to be held harmless by them against the claims made by Thiokol against Interwest including the right to be indemnified for the attorneys' fees that Interwest incurred in defending itself against the claims of Thiokol. Interwest is also entitled to recover the attorneys' fees it incurred in enforcing the Subcontract against

Palmers.

In addition, the trial court based its decision on the erroneous conclusion of law that Interwest would have been entitled to attorneys' fees against Thiokol had Interwest chosen to bring this action against Thiokol initially.

VI. ARGUMENT

POINT I:

INTERWEST DID NOT BREACH THE SUBCONTRACT AND WAS JUSTIFIED IN NOT MAKING FURTHER PAYMENT TO PALMERS.

It is well settled that Utah litigants can only recover attorneys' fees if the recovery of fees is authorized by statute or provided for by contract. *Regional Sales Agency, Inc. v. Reichert*, 784 P.2d 1210, 1215 (Utah App. 1989) (citing *Dixie State Bank v. Bracken*, 764 P.2d 985, (Utah, 1988)). It is undisputed that the Subcontract provides for an award of attorneys' fees that are incurred on account of a breach of the agreement.⁶

⁶ Third Amended Findings of Fact and Conclusions of Law; Finding of Fact No.: 32.

Palmer's claim that Interwest's withholding of final payment under the Subcontract was a breach of that agreement and that they are entitled to recover the attorneys' fees incurred by them to enforce their right to full payment. When interpreting a contract, this Court must look at the contract as a whole to determine the parties' intentions. *Ron Case Roofing & Asphalt v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989). There are many references in the Subcontract regarding the requirements for and the conditions precedent to payment of the full contract sum by Interwest to Palmer's. Read together, these terms afford ample authority to Interwest to withhold full payment to Palmer's when the requirements and/or conditions precedent to payment have not been met.

Under the section entitled "Payments", the Subcontract states:

The Contractor agrees to pay the Subcontractor for the satisfactory completion of the herein described work the sum of \$1,555,900.00 in monthly payments of 90% of the work performed, in accordance with estimates prepared by the Subcontractor and as approved by the

Contractor and Owner, or Owners (sic) Representative, such payments to be made as payments are received by the Contractor from the Owner covering the monthly estimates of the Contractor, including the approved portion of the Subcontractor's monthly estimate.

Palmers are only entitled to payment when the work they contracted to do has been satisfactorily completed and when Thiokol has paid Interwest for the work performed. Thiokol made payment to Interwest following the completion of the appeals mentioned above. Interwest, in turn, made payment to Palmers. No payment is presently due to Palmers by Interwest except for the fees at issue in this appeal.

In Attachment A to the Subcontract, under the section entitled "Payments (Cont)" the Subcontract states:

The Subcontractor agrees to make good without cost to the Owner or Contractor any and all defects due to faulty workmanship and/or materials which may appear within the period so established in the contract documents; and if no such period be stipulated in the contract documents, then such guarantee shall be for a period of one year from date of completion of the project.

Palmers promised to correct, without any cost to Interwest,

problems that may arise with respect to the labor and materials they contracted to provide. A problem did arise with respect to the failed tank, but Palmers refused to take satisfactory steps to correct the problem. Palmers' breach of this covenant entitles Interwest to withhold further payment from Palmers until any claims which were attributable to the labor and materials supplied by Palmers had been resolved.

In Attachment A to the Subcontract, under the section entitled "Payments (Cont)" the Subcontract further states:

Failure to comply with any of the conditions of this agreement constitutes cause for withholding payments until such time as this condition is corrected to the satisfaction of the Contractor.

For the reasons set forth above, Palmers have breached the Subcontract. The Subcontract expressly grants to Interwest the authority to withhold payments until the terms of the Subcontract have been met to the satisfaction of Interwest. It is obvious from the claim made by Thiokol, the withholding of payment by Thiokol, and the initiation of this suit that Palmers' performance

of the contract was not satisfactory and Interwest had justifiable reasons to withhold further payment. In Attachment A to the Subcontract, under the section entitled "Payments (Cont)" the Subcontract also states:

The Contractor may deduct from any amounts due or to become due to the Subcontractor any sum or sums owing by the Subcontractor to the Contractor; and in the event of any breach by the Subcontractor of any provision or obligation of this Subcontract, or in the event of the assertion of other parties of any claim or lien against the Contractor or Contractor's Surety or the premises arising out of the Subcontractor's performance of this Contract, the Contractor shall have the right, but is not required, to retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss, damage or expense therefrom, until the situation has been remedied or adjusted by the Subcontractor to the satisfaction of the Contractor.

Interwest was authorized to withhold the final payment of \$93,000 to Palmers when Thiokol was refusing to pay the final \$200,000.00 due to Interwest because a claim had been submitted against Interwest that arises out of the work done by Palmers. Although the trial court has determined that Palmers

was not at fault for the failure of tank T-33, a claim was nonetheless made against Interwest for that failure and Interwest has suffered damages by Thiokol's failure to pay the balance due under the general contract for the construction of the Treatment Plant because of that claim. Because Interwest has suffered damages as a result of a claim by Thiokol, Interwest could refuse to make final payment to Palmers until the problem was resolved to Interwest's satisfaction.

During argument on Palmers' and Interwest's cross motions for the award of attorneys' fees, the trial court recognized that "I think Interwest's withholding of the money was certainly fair. It was not unreasonable. If it's provided in the contract, and we're assuming for our discussion that it was, then I would find that [i.e., the withholding of final payment] not to be a breach (Record page 2341 at lines 14 through 18).⁷ Further, the trial court observed that "Based on our discussion here as we've wandered through this thing, it strikes me that the claim by

⁷ A copy of this page of the transcript is provided in the Addendum.

Palmers for attorney fees against Interwest could only be based upon the fact that Interwest filed an action. I'm not sure that triggers any kind of attorneys' fee award." (Record page 2433 at lines 6 through 11).⁸

Contrary to the trial court's ultimate decision, the clear intention of the parties, when the Subcontract is read as a whole, is that Interwest had every right to withhold final payment to Palmers until the dispute involving the failure of the tanks was resolved and Thiokol made payment to Interwest of the balance of the contract price. Interwest could not have breached the agreement giving rise to an award of attorneys' fees to Palmers simply by withhold payment as it was clearly authorized to do.

POINT II:

**EVEN IF INTERWEST HAD BREACHED THE SUBCONTRACT,
PALMERS ARE NOT ENTITLED TO Attorneys' FEES
TO ENFORCE THE AGREEMENT.**

Even if Interwest is determined to have breached its obligations under the Subcontract, Palmers are "entitled only to

⁸ A copy of this page of the transcript is provided in the Addendum.

those fees attributable to the successful vindication of contractual rights within the terms of their agreement." *Trayner v. Cushing*, 688 P.2d 856, 858 (Utah 1984).

Palmers are not entitled to recover fees against Interwest when those fees were incurred in defense of claims made by Thiokol and incurred in Palmers' prosecution of claims against Thiokol and Fiberglass Structures. If Palmers are entitled to fees at all, Palmers can only recover the attorneys' fees incurred in proving their claim for final payment under the Subcontract.

When faced with the situation where there exists more than one claim involved in a lawsuit, courts have been instructed to use their discretionary powers and apportion attorneys' fees to the appropriate claims. In *Utah Farm Production Credit Association v. Cox*, 627 P.2d 62 (Utah 1981), the court stated that "[a] party is therefore entitled only to those fees resulting from its principal cause of action for which there is a contractual obligation for attorneys' fees." The court then denied the award of any attorneys' fees due to the fact that the plaintiff did not establish

what amount of fees were attributable to prosecuting the complaint as opposed to those attributable to defending the counterclaim.

Because Interwest has never denied its obligation to pay the unpaid balance of Palmers' Subcontract, subject to Interwest's rights for indemnification and its right to withhold payment against the possibility of setting off the amount due under the Subcontract against any damages suffered by Interwest, Palmers' costs of proving its claim against Interwest would be nominal. Palmers are not entitled to recover from Interwest the attorneys' fees incurred by them in defending against the claims made directly by Thiokol against Palmers, nor are Palmers entitled to recover from Interwest the attorneys' fees incurred in prosecution of their affirmative claims against Thiokol and Fiberglass Structures.

POINT III:

**UNDER NO CIRCUMSTANCES WAS INTERWEST
ENTITLED TO RECOVER ATTORNEYS' FEES
AGAINST THIOKOL.**

As previously stated, it is well settled that litigants can only recover attorneys fees if the recovery of fees is authorized by statute or provided for by contract. In this case, there is no statutory authority for the trial court to award attorneys' fees to Interwest against Thiokol. The contract between Interwest and Thiokol was never finalized and what little written documentation of the agreement there is does not address the issue of attorneys' fees in the event of default.

In fact, the trial court, in its original memorandum decision did award fees to Interwest and against Thiokol. However, upon Thiokol's motion for reconsideration, the trial court had to reverse itself because there was no lawful basis for it to award fees against Thiokol. Yet, in spite of the clear law of this case, the trial court determined that it should award fees to Palmers and against Interwest based, at least in part, on the erroneous reasoning that

“Interwest would have been entitled to the same fees had it chosen to pursue its claim against Thiokol and defend itself rather than have Palmer do the work.”⁹ Such a conclusion can not support a decision that Interwest is obligated to Palmers for fees.

POINT IV:

**INTERWEST IS ENTITLED TO AN AWARD OF
ATTORNEYS' FEES AGAINST PALMERS DUE
TO PALMERS' BREACH OF THE SUBCONTRACT.**

The Subcontract Agreement between Interwest and Palmers requires Palmers to remedy any disputes which in any way arise from their performance of the Subcontract and if, need be, to indemnify, hold harmless, and defend Interwest from such claims.

In Attachment A to the Subcontract, under the section entitled "Payment (Cont)", the Subcontract states:

The Subcontractor agrees to make good without cost to the Owner or Contractor any and all defects due to faulty workmanship and/or materials which may appear within the period so established in the contract documents . . .

⁹ Memorandum Decision, August 19, 1997, page 3. A copy of the Memorandum Decision is attached in the Addendum.

In addition, in Attachment A to the Subcontract, under the section entitled "Prosecution of the Work, Delays, Etc.", the Subcontract states:

The Subcontractor assumes toward the Contractor all the obligations and responsibilities that the Contractor assumes toward the Owner. The Subcontractor shall indemnify the Contractor and the Owner against, and save them harmless from, any and all loss, damage, expenses, costs, and attorneys' fees incurred or suffered on account of any breach of the provisions or covenants of this contract.

Pursuant to these provisions of the Subcontract, Palmers were obligated to not only warrant the tanks against defects in workmanship and materials but also to indemnify and hold Interwest harmless from any claims arising out of a breach of that warranty.

In this case, a claim was made against Interwest on account of the failure of Tank T-33 in Treatment Plant which Interwest had contracted to build for Thiokol. It is undisputed that the tank was within the scope of work provided for in the Subcontract with Palmers. The tank was supplied by Palmers and installed under

Palmers' supervision. It is undisputed that Palmers were given timely notice of the failure and of their obligation to resolve the claim made by Thiokol. Palmers had the option to correct the problem to the satisfaction of Interwest or, in the alternative, to defend and indemnify Interwest against the claims asserted by Thiokol. Palmers refused to remedy the problem or to defend and indemnify Interwest. In this context, it is important to note that Interwest has not asked Palmers to indemnify Interwest from its own negligence. Interwest has only asked Palmers to defend itself and, by extension, Interwest. It is Palmers failure to indemnify Interwest and to accept a tender of Interwest's defense that constitutes a breach of the Subcontract by Palmers. This suit was instituted for the purpose of enforcing Interwest's right to indemnification by Palmers and to be held harmless by them from Thiokol's claims. In their Answer to the Complaint herein, Palmers denied that it had any such obligations. Therefore, Interwest was required to expend attorneys fees in defending itself against Thiokol's claims and to enforce its rights to be indemnified

by Palmers.

Interwest bargained for and contracted for Palmers to not only obtain and install tanks in the Treatment Plant but also to defend its, i.e. Palmers', work and the work of Palmers' subcontractors and suppliers against claims that the work done under the Subcontract was defective. It is and always has been, as between Interwest and Palmers, the sole responsibility of Palmers to defend the tanks against claims that the tanks were defective in that they did not meet the requirements of the plans and specifications of the Treatment Plant and against claims that the tanks were improperly installed.

Palmers have breached the Subcontract Agreement by failing to remedy the claim which arose out of their work under the Subcontract and/or by failing to indemnify Interwest from the claims made by Thiokol. As a result of this breach, Interwest was forced to initiate this action and incur costs, expenses, and attorneys' fees in pursuing this action and enforcing its rights under the Subcontract.

Had Palmers agreed to indemnify and defend Interwest and had Palmers not breached the Subcontract, Interwest would not have incurred the costs associated with this suit. Nevertheless, Palmers did not comply and as provided for in the Subcontract, Interwest is entitled to reimbursement from Palmers for all costs, expenses, and attorneys' fees it incurred in this action.

VII. CONCLUSION

Interwest and Palmers entered into a Subcontract under which Palmers agreed to remedy any breaches of its contractual obligations and/or to indemnify Interwest against any claim which arose from Palmers' work under the Subcontract. Such a claim did arise, but Palmers refused to remedy Thiokol's claim and refused to indemnify Interwest from liability. Palmers breached their contractual duties, Palmers failed to provide to Interwest all that for which Interwest had bargained. Interwest justifiably, and with contractual authority, withheld payments from Palmers because of the claim which arose from Palmers' work under the Subcontract. Due to Palmers' breach, Interwest was forced to

initiate this action and incur costs, expenses, and attorneys' fees, all of which are attributable to Palmers' breach.

Most simply put, Interwest agreed to pay Palmers a lump sum price for the performance of all of Palmers' obligations under the Subcontract of which indemnification and warranty are but two of several. Interwest is not obligated to pay more than it bargained for to get the performance that it bargained for from Palmers. Interwest is not obligated to pay the attorneys' fees incurred by Palmers and their insurance carrier in the performance of Palmers' obligations under the Subcontract. By awarding attorneys' fees to Palmers and their carrier and against Interwest, the trial court has, without justification, increased the price Interwest agreed to pay for Palmers' performance of their obligations under the Subcontract. On the contrary, Palmers are obligated to Interwest for its attorneys' fees incurred in bringing this action to enforce its rights under the Subcontract Agreement.

Interwest respectfully seeks a reversal of the trial court's award of attorneys' fees to Palmers and their insurance carrier

and against Interwest and requests that this Court remand this case to the trial court with instructions to reinstate Interwest's Complaint against Palmers and to award reasonable attorneys' fees to Interwest.

DATED this 4TH day of January, 1998.

WALSTAD & BABCOCK

A handwritten signature in cursive script, appearing to read "SD Crawley", is written over a horizontal line.

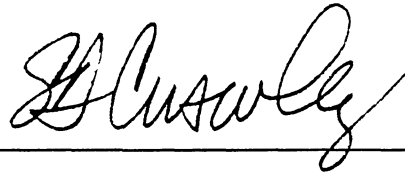
Steven D. Crawley
Attorneys for Plaintiff/Appellant
Interwest Construction

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 1998, I
mailed a copy of the foregoing, BRIEF OF THE APPELLANT,
postage prepaid, to the following:

George W. Preston
PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

Robert W. Wallace
PLANT, WALLACE, CHRISTENSEN & KANELL
4 Triad Center #500
Salt Lake City, Utah 84180



Addendum

1. Subcontract Agreement (Exhibit 37)
2. Corrected Memorandum Decision, May 1, 1992
3. Memorandum Decision, June 10, 1992
4. Memorandum Decision, September 29, 1992
5. Second Amended Judgment
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August 18, 1992, Pages 2431 through 2433
8. Memorandum Decision, August 19, 1997
9. Memorandum Decision, February 11, 1998

Subcontract Agreement (Exhibit 37)



Interwest Construction

2004 North Redwood Road
Salt Lake City, Utah 84116

(801) 363-9057

Subcontract Agreement

Consisting of this form and attachment "A"

Trade Treat Sys/Mech

Job No 842-1500-S

Job Name Thiokol M-705

THIS AGREEMENT made at Salt Lake City, Utah, this 1st day of December, 19 8

by and between Interwest Construction Inc., hereinafter referred to as the Contractor, and

A.H. Palmer & Sons

P.O. Box 905

Logan, UT 84321 (801) 752-4814

An Independent Contractor in fact, hereinafter referred to as the Subcontractor We bind ourselves our heirs, executors, administrators, successors, and assigns jointly and severally firmly by these presents

WITNESSETH. That for and in consideration of the covenants herein contained, the Contractor and the Subcontractor agree as follows

1. SCOPE OF WORK

That the work to be performed by the Subcontractor under the terms of this agreement consists of the following

Furnishing of all labor and material, tools, implements, equipment, scaffolding permits, fees, etc., to do all of the following

Construction of the Strategic Waste Water Treatment Plant - M-705

project as per plans and specifications and general conditions prepared

by Sverdrup Corporation dated 9/15/88 including addenda #1 (11/10/88)

and addenda #2 (11/11/88) for the following scope of work: Division

11000-Treatment System; Less section 11040; Division 15000-Mechanical,

less Section 15700-Fireprotection; Section 2740-Septic Systems; Section

2550-Site Utilities; Section 10200-Louvers & Vents; Alternate A

Alt: If accepted deduct \$31,328.00 for Tax Exemption

Davis Bacon Act applies

A construction schedule will become Attachment "B" of this contract.

Construction schedule requires a six day work week and a minimum of

twelve hours per day & priority delivery schedules. The attached

letter is a part of this contract.

Subcontractor shall start no later than (as directed), and complete his work no later than (as directed)

in strict accordance with the plans, specifications, and addenda as prepared by Sverdrup Corp/Morton Thiokol

Architect and/or Engineer, for the construction of

M-705 Strategic Waste Water Treatment Plant

For Morton Thiokol, Inc.

Owner, for which construction, the Contractor has the prime contract with the Owner, together with all addenda or authorized changes issued prior to the date of execution of this agreement

The Contractor and the Subcontractor agree to be bound by the terms of the prime contract agreement, construction regulations, general and special conditions, plans and specifications, and all other contract documents, if any there be, insofar as applicable to this subcontract agreement, and to that portion of the work herein described to be performed by the Subcontractor

In the event of any doubt arising between the Contractor and the Subcontractor with respect to the plans and specifications the decision of the Architect and/or Engineer shall be conclusive and binding. Should there be no supervising architect over the work, then the matter in question shall be determined as provided in Section 8 of this agreement

2. PAYMENTS

The Contractor agrees to pay to the Subcontractor for the satisfactory completion of the herein described work the sum of

One Million Five Hundred Fifty Five Thousand Nine Hundred Dollars -

(\$ 1,555,900.00)

in monthly payments of 90 % of the work performed in any preceding month, in accordance with estimates prepared by the Subcontractor and as approved by the Contractor and Owner, or Owners Representative, such payments to be made as payments are received by the Contractor from the Owner covering the monthly estimates of the Contractor, including the approved portion of the Subcontractor's monthly estimate. Approval and payment of Subcontractor's monthly estimate is specifically agreed to not constitute or imply acceptance by the Contractor or Owner of any portion of the Subcontractor's work

Final payment shall be due when the work described in this subcontract is fully completed and performed in accordance with the contract documents and is satisfactory to the architect.

Before issuance of the final payment the subcontractor, if required, shall submit evidence satisfactory to the contractor that all pay-rolls, bills for material and equipment, and all known indebtedness connected with the subcontractor's work has been satisfied

This article 2. PAYMENTS is continued on attachment

IN WITNESS WHEREOF, the Contractor and Subcontractor signify their understanding and agreement with the terms hereof by affixing their signatures hereunto.

INTERWEST CONSTRUCTION CO., INC.
(Contractor)

DEC 22 1988

A.H. PALMER & SONS

(Subcontractor)

INTERWEST CONSTRUCTION CO., INC.

By [Signature]

By [Signature]

Witness Connie Pedersen

Witness _____

Interwest Construction

ATTACHMENT "A"

2. PAYMENTS (cont'd)

In the event the Subcontractor does not submit to the Contractor such monthly estimates prior to the date of submission of the Contractor's monthly estimate, then the Contractor shall include in his monthly estimate to the Owner for work performed during the preceding month such amount as he shall deem proper for the work of the Subcontractor for the preceding month and the Subcontractor agrees to accept such approved portion thereof as his regular monthly payment, as described above.

Subcontractor agrees to complete monthly release and supplier affidavit forms supplied under separate cover prior to receiving payments under this agreement.

Failure to comply with any of the conditions of this agreement constitutes cause for withholding payments until such time as this condition is corrected to the satisfaction of the Contractor.

The Subcontractor agrees to make good without cost to the Owner or Contractor any and all defects due to faulty workmanship and or materials which may appear within the period so established in the contract documents and if no such period be stipulated in the contract documents then such guarantee shall be for a period of one year from date of completion of the project. The Subcontractor further agrees to execute any special guarantees as provided by terms of the Contract documents prior to final payment.

In the event it appears to the Contractor that the labor, material and other bills incurred in the performance of the work are not being currently paid, the Contractor may take such steps as it deems necessary to assure absolutely that the money paid with any progress payment will be utilized to the full extent necessary to pay labor, material and other bills incurred in the performance of the work of Subcontractor. The Contractor may deduct from any amounts due or to become due to the Subcontractor any sum or sums owing by the Subcontractor to the Contractor, and in the event of any breach by the Subcontractor of any provision or obligation of this Subcontract, or in the event of the assertion by other parties of any claim or lien against the Contractor or Contractor's Surety or the premises arising out of the Subcontractor's performance of this Contract, the Contractor shall have the right but is not required to retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss, damage or expense therefrom, until the situation has been remedied or adjusted by the Subcontractor to the satisfaction of the Contractor. These provisions shall be applicable even though the Subcontractor has posted a full payment and performance bond.

3. PROSECUTION OF WORK, DELAYS, ETC.

The Subcontractor shall prosecute the work undertaken in a prompt and diligent manner whenever such work or any part of it becomes available, or at such other time or times as the Contractor may direct, and so as to promote the general progress of the entire construction, and shall not, by delay or otherwise, interfere with or hinder the work of the Contractor or any other Subcontractor and in the event that the Subcontractor neglects and/or fails to supply the necessary supervision, labor and/or materials, tools, implements, equipment, etc., in the opinion of the Contractor and/or in the event the Subcontractor is unable to perform because of strikes, picketing or boycotting of any kind which result in Subcontractor's employees, suppliers or Subcontractor's being unable or unwilling to enter on the job and complete the work, or in the event that the Subcontractor or his men refuse to work after having been requested by the Contractor to proceed with the work, then the Contractor shall notify the Subcontractor in writing setting forth the deficiency and or delinquency and forty eight hours after date of such written notice, the Contractor shall have the right if he so desires to take over the work of the Subcontractor in full and exclude the Subcontractor from any further participation in the work covered by this agreement or at his option the Contractor may take over such portion of the Subcontractor's work as the Contractor shall deem to be in the best interest of the Contractor, and permit the Subcontractor to continue with the remaining portions of the work. Whichever method the Contractor might elect to pursue, the Subcontractor agrees to release to the Contractor for his use only without recourse, any materials, tools, implements, equipment, etc., on the site, belonging to or in the possession of the Subcontractor for the benefit of the Contractor in completing the work covered in this agreement, and the Contractor agrees to complete the work to the best of his ability and in the most economical manner available to him at the time. Any costs incurred by the Contractor in doing any such portion of the work covered by this agreement shall be charged against any monies due or to become due under the terms of this agreement and in the event the total amount due or to become due, under the terms of this agreement shall be insufficient to cover the costs incurred by the Contractor in completing the work then the Subcontractor and his sureties, if any, shall be bound and liable to the Contractor for the difference.

Should the proper workmanlike and accurate performance of any work under this contract depend wholly or partially upon the proper workmanlike or accurate performance of any work or materials furnished by the Contractor or other subcontractors on the project, the Subcontractor agrees to use all means necessary to discover any such defects and report same in writing to the Contractor before proceeding with his work which is so dependent and shall allow to the Contractor a reasonable time in which to remedy such defects and in the event he does not so report to the Contractor in writing, then it shall be assumed that the Subcontractor has fully accepted the work of others as being satisfactory and he shall be fully responsible thereafter for the satisfactory performance of the work covered by this agreement, regardless of the defective work of others.

The Subcontractor shall clean up and remove from the site as directed by the Contractor, all rubbish and debris resulting from his work. Failure to clean up rubbish and debris shall serve as cause for withholding further payment to Subcontractor until such time as this condition is corrected to the satisfaction of the Contractor. Also he shall clean up to the satisfaction of the inspectors, all dirt, grease, marks, etc., from walls, ceilings, floors, fixtures, etc., deposited or placed thereon as a result of the execution of this subcontract. If the Subcontractor refuses or fails to perform this cleaning as directed by the Contractor, the Contractor shall have the right and power to proceed with the said cleaning and the Subcontractor will on demand repay to the Contractor the actual cost of said labor plus a reasonable percentage of such cost to cover supervision, insurance, overhead, etc.

The Subcontractor agrees to reimburse the Contractor for any and all liquidated damages that may be assessed against and collected from the Contractor by the Owner, which are attributable to or caused by the Subcontractor's failure to furnish the materials and perform the work required by this Subcontract within the time fixed in the manner provided for herein, regardless of the cause from which the delay occurred, and in addition thereto, agrees to pay to the Contractor such other or additional damages as the Contractor may sustain by reason of such delay by the Subcontractor. The payment of such damages shall not release the Subcontractor from his obligation to otherwise fully perform this Subcontract.

Whenever it may be useful or necessary to the Contractor to do so, the Contractor shall be permitted to occupy and/or use any portion of the work which has been either partially or fully completed by the Subcontractor before final inspection and acceptance thereof by the Owner, but such use and/or occupation shall not relieve the Subcontractor of his guarantee of said work and materials nor of his obligation to make good at his own expense any defect in materials and workmanship which may occur or develop prior to Contractor's release from responsibility to the Owner. Provided, however, the Subcontractor shall not be responsible for the maintenance of such portion of the work as may be used and/or occupied by the Contractor, nor for any damage thereto that is due to or caused by the sole negligence of the Contractor during such period of use.

Subcontractor shall be responsible for his own work, property and/or materials until completion and final acceptance of the Contract by the Owner, and shall bear the risk of any loss or damage until such acceptance. In the event of loss or damage, he shall proceed promptly to make repairs, or replacement of the damaged work, property and/or materials at his own expense, as directed by the Contractor. Subcontractor waives all rights Subcontractor might have against Owner and Contractor for loss or damage to Subcontractor's work, property or materials.

It is agreed that the Subcontractor, at the option of the Contractor, may be considered as disabled from so complying whenever a petition in Bankruptcy or the appointment of a Receiver is filed against him.

The Subcontractor assumes toward the Contractor all the obligations and responsibilities that the Contractor assumes toward the Owner. The Subcontractor shall indemnify the Contractor and the Owner against, and save them harmless from, any and all loss, damage, expenses, costs, and attorney's fees incurred or suffered on account of any breach of the provisions or covenants of this contract.

Subcontractor shall pay reasonable and proportionate cost for hoisting services provided by Contractor.

4. SURETY BOND

The Subcontractor agrees to furnish to the Contractor, at the Contractor's request and expense, a surety bond guaranteeing the faithful performance of this agreement and the payment of all labor and material bills in connection with the execution of the work covered by this agreement. The bond is to be written by a surety company designated or approved by the Contractor, and in a form entirely satisfactory to the Contractor.

5. PERMITS, LICENSE FEES, TAXES, ETC.

The Subcontractor shall, at his own cost and expense, apply for and obtain all necessary fees, permits and licenses and shall at no extra cost to the Contractor, conform strictly to the laws, building codes and ordinances in force in the locality where the work under the project is being done, insofar as applicable to work covered by this agreement.

Subcontractor is an independent contractor in fact and also within the scope of the United States Internal Revenue Code, the Federal Social Security Act, together with present and future amendments thereto, and any and all unemployment insurance laws, both Federal and of any state or territory, and is therefore solely responsible to the Federal, State or territorial Governments for all payroll taxes, deductions, withholdings and contributions under such laws. The compensation payable to Subcontractor as above provided includes all sales and use taxes, and franchise, excise and other taxes and governmental impositions of all kinds, and is not subject to any addition for any such taxes or impositions now or hereafter levied.

6. INSURANCE

The Subcontractor agrees to provide and maintain workmen's compensation insurance and to comply in all respects with the employment of labor required by any constituted authority having legal jurisdiction over the area in which the work is performed.

The Subcontractor shall maintain such third party public liability and property damage insurance including general products and automobile liability as will protect it from claims for damages because of bodily injury including death or damages because of injury to loss, destruction or loss of use of property which may arise from operations under this agreement whether such operations be by it or its subcontractors or anyone directly or indirectly employed by either of them. Limits for third party public liability shall be not less than \$1,000,000 each occurrence and \$2,000,000 each policy. Limits for property damage shall be not less than \$500,000 each occurrence and \$1,000,000 each policy. If the prime contract requires higher limits than those listed above, then such requirements shall govern and the higher limits shall be provided (SEE INS. ATTACHMENT).

The Subcontractor agrees to furnish a completed certificate of insurance issued to Interwest Construction Co., Inc.

The Subcontractor shall indemnify the Contractor and the Owner against and save them harmless from any and all loss, damage, costs, expenses and attorney's fees suffered or incurred on account of any breach of the aforesaid obligations and covenants and any other provision or covenant of this subcontract.

Subcontractor shall indemnify, save harmless and defend Owner and the Contractor from and against any and all loss, damage, injury liability and claims thereof for injuries to or death of persons and all loss of or damage to property resulting directly or indirectly from Subcontractor's performance of this contract regardless of the negligence of Owner or Contractor or their agents or employee except where such loss, damage, injury liability or claims are the result of active negligence on the part of Owner or Contractor or its agents or employees and is not caused or contributed to by an omission to perform some duty also imposed on Subcontractor, its agents or employees.

All insurance required hereunder shall be maintained in full force and effect in a company or companies satisfactory to Contractor shall be maintained at Subcontractor's expense until performance in full hereof (certificates of such insurance being supplied by Subcontractor to Contractor) and such insurance shall be subject to requirement that Contractor must be notified by ten (10) days written notice before cancellation of any such policy. In event of threatened cancellation for nonpayment of premium, Contractor may pay same to Subcontractor and deduct the said payment from amounts then or subsequently owing to Subcontractor hereunder.

7. CHANGES, ADDITIONS AND DEDUCTIONS

The Contractor may add to or deduct from the amount of work covered by this agreement and any changes so made in the amount of work involved or any other parts of this agreement shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof which shall be mutually agreed upon between the Contractor and the Subcontractor. The Subcontractor agrees to proceed with the work as changed when so ordered in writing by the Contractor so as not to delay the progress of the work and pending any determination of the value thereof.

Subcontractor shall be entitled to receive no extra compensation for extra work or materials or changes of any kind regardless of whether the same was ordered by Contractor or any of its representatives unless a change order therefor has been issued in writing by Contractor. If extra work was ordered by Contractor and Subcontractor performed same but did not receive a written order therefor, Subcontractor shall be deemed to have waived any claim for extra compensation therefor regardless of any written or verbal protests or claims by Subcontractor. Subcontractor shall be responsible for any costs incurred by Contractor for changes of any kind made by Subcontractor that increase the cost of the work for either the Contractor or other Subcontractors when the Subcontractor proceeds with such changes without a written order therefor.

Notwithstanding any other provision, if the work for which Subcontractor claims extra compensation is determined by the Owner or Architect not to entitle Contractor to a change order or extra compensation, then Contractor shall not be liable to Subcontractor for an extra compensation for such work. (As used in this Subcontract the term "Owner" includes any representative of Owner and Architect includes the Engineer, if any.)

8. DISPUTES

In the event of any dispute between the Contractor and Subcontractor covering the scope of the work, the dispute shall be settled in the manner provided by the contract documents. If none be provided or if there arises any dispute concerning matters in connection with this agreement and without the scope of the work, then such disputes shall be settled by a ruling of a board of arbitration consisting of three members, one selected by the Contractor, one by the Subcontractor and the third member shall be selected by the first two members. The Contractor and Subcontractor shall bear the expense of their selected members respectively, but the expenses of the third member shall be borne by the party hereto requesting the arbitration in writing. The Contractor and Subcontractor agree to be bound by the finding of any such boards of arbitration, finally and without recourse to any court of law.

9. TERMINATION OF CONTRACT

In the event the prime contract between the Owner and the Contractor should be terminated prior to its completion, then the Contractor and Subcontractor agree that an equitable settlement for work performed under this agreement prior to such termination will be made as provided by the contract documents, if such provision be made, or if none such exist by mutual agreement or failing either of these methods, by arbitration as provided in Section 8.

10. EQUAL EMPLOYMENT OPPORTUNITY

During the performance of this subcontract, the Subcontractor agrees to not discriminate against any employee because of race, color, creed or national origin. As outlined in the Equal Opportunity Clause of the Regulations of Executive Order 10925 of March 6, 1961 as amended by Executive Order 11114 of June 22, 1963. The executive orders and the respective regulations are made a part of this subcontract by reference.

Subcontractor shall also fully comply with wage hour and Equal Opportunity regulations and shall take vigorous affirmative action including the submittal of a written affirmative action program to employ minority employees whenever so required—and is encouraged to do so in the absence of such requirements.

11. TERMS OF LABOR AGREEMENTS

It is hereby understood and agreed that for the work covered by this subcontract, the Subcontractor is bound and will comply with the terms and conditions of the labor agreements to which the general contractor is a party insofar as said labor agreements lawfully require subcontractors to be so bound.

12. ADDITIONAL PROVISIONS

The Subcontractor agrees not to sublet, transfer or assign this agreement or any part thereof without written consent of the Contractor.

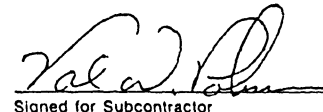
As built drawings, when required, shall be accurately maintained by Subcontractor for his portion of the work and turned over to Contractor in an acceptable manner before final payment is made to Subcontractor.

The Subcontractor agrees to provide his employees with safe appliances and equipment, to provide them with a safe place to work to perform the work under this contract in a safe manner with high regard for the safety of his employees and others, and to comply with health and safety provisions and requirements of local, state and federal agencies including the Williams Steiger Occupational Safety and Health Act, and to hold the Contractor harmless for any costs, deficiencies, fines or damages incurred because of his negligence to comply with these regulations, acts and procedures.

Subcontract Agreement

Attachment "A"

 12.23.88
Signed for Interwest Construction Date

 12/14/88
Signed for Subcontractor Date

Corrected Memorandum Decision, May 1, 1992

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

INTERWEST CONSTRUCTION,
a Utah Corporation,

Plaintiff

vs.

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Defendants

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Third-Party
Plaintiffs,

vs.

JOHN RYSGARRD, dba FIBERGLASS
STRUCTURES COMPANY and
FIBERGLASS STRUCTURES COMPANY
INC.,

Third-Party
Defendants

FIBERGLASS STRUCTURES and
TANK COMPANY, fka, FIBERGLASS
STRUCTURES COMPANY of St.
PAUL, INC.,

Third-Party
Plaintiff

vs.

THIOKOL CORPORATION,

Third-Party
Defendant

CORRECTED
MEMORANDUM DECISION
CASE NO. 900000321

THIS MATTER WAS SUBMITTED to the Court on post-trial briefs for Memorandum Decision. After having reviewed at length the pleadings, memoranda, depositions, the Court's own notes and the exhibits offered at trial this Court holds, primarily for reasons set forth in Palmer's and Interwest's post trial briefs, against Thiokol and in favor of Interwest and Palmer and Fiberglass Structures. Although it is inviting to write a lengthy Memorandum Decision addressing each of the numerous factual and legal issues raised, this Court declines to do so. Each of the issues addressed in the post-trial briefs may merit attention, but the parties' attention is directed to the issues argued and in the order found in post trial brief filed by Palmer. The Court's holding is consistent with the positions taken therein and in addition to a few comments which may here be appropriate.

Again, without addressing each of the legal and factual issues raised in the trial and explored in the various post trial briefs, this Court would find that Thiokol has failed to show conclusively or even to a preponderance of the evidence the reason for the failure of the tanks. This Court noted early on that the cause of the failure was the key issue upon which all other issues in this case turned. The reason for the failure has not been demonstrated to this Court's satisfaction to be a result of noncompliance, by the Defendants, with the terms and provisions of the contract.

Generally speaking and to be addressed more particularly later, this Court finds that the contract, prepared and drafted by Thiokol, was neither specific or sufficiently clear to require certain performance of which Thiokol now complains. Specifically and only by way of example, the Court does not

find that the contract and specifications required the safety factor of ten (10) nor a certain wall thickness. Moreover it was not shown that Fiberglass Structures, Interwest or Palmer failed to comply with the provisions of the contract in any way which caused or resulted in the failure.

Additionally, this Court finds that many of the principles of law suggested to be applicable by Thiokol do not apply in this case, as after the first failure the parties in large measure modified their relationship with one another in the contract and Thiokol undertook a new relationship with the other parties in engineering and supervising the modification and completion of the tanks in question. Further, that if any failure to comply with the terms and provisions of the contract occurred, such failure was encouraged, accepted and waived by Thiokol. What deficiencies there may have been in the tanks was as well or better known to Thiokol than to any of the other parties including Fiberglass Structures. But those deficiencies, whatever they were, have not been shown to be the cause of failure.

The Court further finds that the claim by Thiokol for replacement of the tanks was excessive. Thiokol did not replace three contracted tanks with similar products, but rather with far more costly products. The cost for clean up, response, down time, overhead, etc. were not only excessive and not properly mitigated, but also unsubstantiated. Nor were most of them necessarily, naturally and consequentially flowing from the fault, if any, by the other parties, but in fact flowed from action by Thiokol itself. In addition, most of those damages could not have been reasonably foreseen and were not, at the time the contract was entered into or during the

completion stage of the contract, within the reasonable contemplation or expectation of the parties thereto.

As to the warranty provisions themselves, if in fact they were binding upon the parties, would be limited to the cost of the replacement of the tanks themselves at the contract price.

CAUSES OF FAILURE

Much evidence and testimony was received relative to the cause of the failure of the tank. Testimony was that Fiberglass Structures failed to properly design and engineer the tanks, failed to sufficiently overlap the woven roving, failed to use the specified resin, failed to make the wall thickness and tensile strength sufficient, failed to conduct proper testing and that all of the above contributed to the failure. Testimony more specifically was that the hoop stresses were so great on a tank completely filled, that the wall strength was insufficient to withstand. There was contrary testimony however, that there was sufficient tensile strength to withstand the hoop stresses anticipated (though perhaps not to a safety factor of ten). The coupon test of the segments near or similar to where the break occurred were in this Court's mind inconclusive. Overlapping of the woven roving, as indicated on the coupon test was inappropriately controlled and in fact though the coupon test may reveal mass, weight, composition, etc., there is some question about the accuracy of the overlapping of the woven roving as it was disclosed in the coupons. Insufficient testimony was given to this Court with respect to the controls placed thereon and in fact a close review of the the coupons indicate that there had

been a shift in the woven roving during or after testing at the overlap area when the length of the coupon is measured against the length of the segment from which it was taken.

Much also has been said relative to the change in the method of filling the tanks from gravity feed to overhead feed. Though that is a substantial change which in and of itself may void any warranties given, the Court was not persuaded that that change without more resulted in the failure. The evidence of vibration or trauma to the tanks from the overhead filling was, to this Court, insufficiently persuasive to indicate that it was a causative factor.

The overhead filling method did however allow for over filling of the tank, which this Court finds was the most likely cause of the failure, and such over filling would not have occurred had the gravity feed system remained in place.

In that connection, testimony persuasive to the Court, was that the most likely cause of the failure was the over filling of the tank causing uplift which the tank was not designed to withstand. The Court is unconvinced from the testimony of the technicians from Thiokol that over filling did not occur. In order to believe that over filling did not occur, this Court would have to believe that the pumps were turned off just minutes before the rupture occurred. ~~The testimony with respect to the same was unconvincing and in this Court's mind incredible. Most likely the facts were that the tank was over filled and had been over filling for some time prior to its discovery, causing an uplift, rupturing the bottom of the tank which went up the side of the tank causing the entire failure.~~ This Court is simply not persuaded given the pumping capacity that the space along the top of the tank would be sufficient to

allow escape of the fluid with sufficient speed to eliminate the uplift pressures at the bottom of the tank.

DESIGN SPECIFICATIONS

There has been much testimony and controversy as to whether the tanks were built pursuant to the design specification. This Court would find that they in fact were. There is little question, however, that the tanks were under-designed, that they did not have sufficient hoop or tensile strength and likely may have eventually failed in any regard. Having so found an explanation is needed. This Court does not find that NBS/PS 15-69 standards were incorporated with sufficient clarity for the designer to be aware of their application and specifically with respect to wall thickness and safety factors. The Thomas report addressed these very issues to some degree and testimony from the stand elaborated thereon. The Court is not convinced that the specifications included those standards for the reasons argued by Interwest and Palmer. The Court is however under the opinion that manufactures of tanks such as this (as well as Thiokol) in all likelihood should have been aware of the need for higher standards as applied to both wall thickness, woven roving overlapping and safety factors. The fact remains that Thiokol knew of the wall thickness or lack thereof and of the safety concerns and accepted the product anyway. Whatever deficiencies there may have been were fully accepted by Thiokol.

TORT - CONTRACT

This case is entirely controlled by contract. The

principles of tort law do not have application and will not be considered. The parties agreed between themselves by contract as to what duties were being undertaken, what liability and damages as a result of the breach would apply. That finding and conclusion eliminates a number of claims between each of the parties and specifically as against Mr. John Rysgarrrd personally. Thiokol's claims therein are denied.

Without going through all of the provisions of the contract, this Court finds, as argued by Palmer, that after the first failure "Thiokol undertook" and became very much involved in the new plans specifications, acceptance, design, implementation, and construction of the new tanks. In large measure under Thiokol's supervision, the parties jointly constructed the tanks. Thiokol accepted them and the engineer placed his stamp of approval on the same. In like measure Interwest and Palmer were in large degree "left out of the loop" and being left out of the loop is one of the very reasons Thiokol is finding itself directly in the liability loop. After completion and in addition to the above, the action taken by Thiokol to modify the filling mechanism and the over filling was Thiokol alone.

WARRANTY

Much has been argued and plead with respect to the warranty provisions by Palmer, Interwest and Fiberglass Construction. Arguments have been heard relative to duration, implementation, consideration (expressed and implied), and remedies. Warranties were given. Consideration existed even though payment was not made and has never been made in full for the

tanks. The limitations, however, on the warranty are significant and this Court finds that the obligations under the warranties would be to simply and only replace the tanks involved. The Court would find that all three (3) tanks of necessity would have to be replaced, the cost of the same being approximately \$80,000.00. The failure, however was not a warranty matter and no claim thereunder is therefor appropriate.

CONTRACT AND REMEDIES

Ambiguities in the contract are to be resolved against Thiokol. As to warranty, the Court finds that that is a contractual matter. Principles of comparative fault would apply in the warranty field but action by Thiokol in this case bars recovery.

There is some issue with respect as to whether Interwest, Palmer, or Fiberglass were given the adequate opportunity to remedy the alleged breach after the failure. Whether that time was sufficient between the failure and when Thiokol contracted to have another supplier replace the tanks is uncertain. This Court finds that it is not dispositive of the issue and in any event the Court would limit the damages to \$80,000.00 in any event.

UCC

There has been much argument with respect to the application of the UCC. The parties here are contractors not suppliers or merchants as contemplated within the Uniform Commercial Code language and therefore provisions of the same

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are not directly applicable.

JUDGMENT

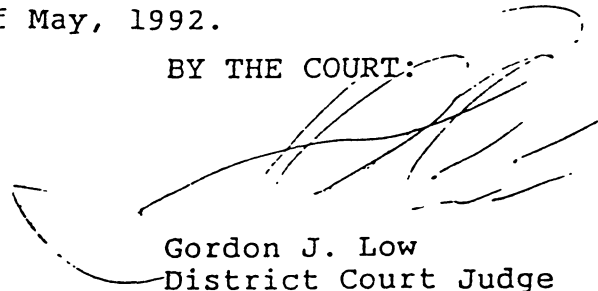
Interwest is awarded Judgment against Thiokol in the sum of \$229,000.00 plus 10% interest from May 2, 1989. Palmer is awarded Judgment against Interwest in the sum of \$93,673.70 plus 10% interest from the same date.

ATTORNEY'S FEES

Each party claims, from provisions of the contract, that attorney's fees are to be awarded. Consistent with the Court's earlier finding of fault in this matter and breach of contract connected therewith, attorney's fees are to be awarded to Interwest on its claim for the \$229,000.99 and to Palmers on its claim to \$93,673.70. Affidavit and memoranda are invited on the issue.

Dated the 1st day of May, 1992.

BY THE COURT:



Gordon J. Low
District Court Judge

Memorandum Decision, June 10, 1992

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

INTERWEST CONSTRUCTION,
a Utah Corporation,

Plaintiff

vs.

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Defendants

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Third-Party
Plaintiffs,

vs.

JOHN RYSGARRD, dba FIBERGLASS
STRUCTURES COMPANY and
FIBERGLASS STRUCTURES COMPANY
INC.,

Third-Party
Defendants

FIBERGLASS STRUCTURES and
TANK COMPANY, fka, FIBERGLASS
STRUCTURES COMPANY of St.
PAUL, INC.,

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THIOKOL CORPORATION,

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MEMORANDUM DECISION
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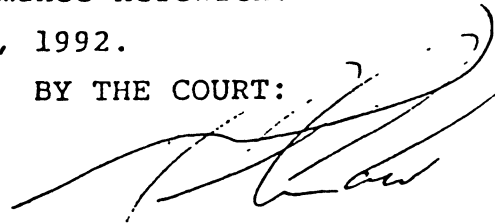
THIS MATTER IS BEFORE THE COURT upon Thiokol Corporation's Motion for New Trial and Amended Judgment.

The Motion with respect to the Amendment of Judgment is granted. Judgment is reduced to \$200,000.00 plus interest rather than \$229,000.00 as originally ordered. Award of attorney's fees is vacated for the reasons set forth in Thiokol's memorandum. The Motion for New Trial is denied.

Counsel for Thiokol is directed to prepare a formal Order and Amended Judgment in conformance herewith.

Dated the 10th day of June, 1992.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Gordon J. Low', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'G' and a long, horizontal stroke extending to the right.

Gordon J. Low
District Court Judge

Case No: 900000321 CV

Certificate of Mailing

I certify that on the 11 day of June, 1992.

I sent by first class mail a true and correct copy of the
attached document to the following:

ROBERT F. BABCOCK
Atty for Plaintiff
254 WEST 400 SOUTH
SECOND FLOOR
SALT LAKE UT 84101

GEORGE W. PRESTON
Atty for Defendant
31 FEDERAL AVENUE
LOGAN UT 84321

JOHN DAUBNEY
Atty for Defendant
JOHN RYSGAARD
2913 NORTH ALDINE STREET
ST. PAUL MN 55113

ANTHONY B. QUINN
Atty for Defendant
60 EAST SOUTH TEMPLE
EAGLE GATE PLAZA #500
SALT LAKE UT 84111

ROBERT R. WALLACE
Atty for Defendant
4 TRIAD CENTER SUITE 500
P.O. BOX 2970
SALT LAKE CITY UT 84110-2970

STEVEN D. CRAWLEY
Atty for Plaintiff
254 WEST 400 SOUTH
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KIETH KELLY
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79 SOUTH MAIN #400
P.O. BOX 45385
SALT LAKE UT 84145-0385

ROBERT C KELLER
Atty for Defendant
10 EXCHANGE PLACE 11TH FLOOR
P.O. BOX 45000
SALT LAKE UT 84145

District Court Clerk

By: Perrin Blackham

Deputy Clerk

Memorandum Decision, September 29, 1992

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

INTERWEST CONSTRUCTION,
a Utah Corporation,

Plaintiff

vs.

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Defendants

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Third-Party
Plaintiffs,

vs.

JOHN RYSGARRD, dba FIBERGLASS
STRUCTURES COMPANY and
FIBERGLASS STRUCTURES COMPANY
INC.,

Third-Party
Defendants

FIBERGLASS STRUCTURES and
TANK COMPANY, fka, FIBERGLASS
STRUCTURES COMPANY of St.
PAUL, INC.,

Third-Party
Plaintiff

vs.

THIOKOL CORPORATION,

Third-Party
Defendant

MEMORANDUM DECISION
CASE NO. 900000321

Case No. 90-321
SEP 29 1992 #75

Interwest vs. Palmer
#900000321
Page 2

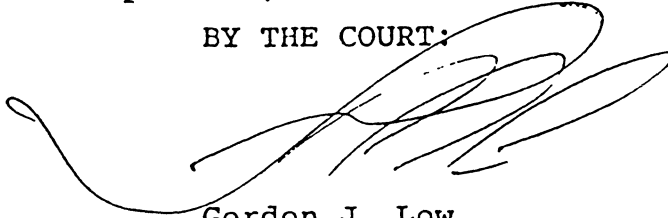
THIS MATTER IS BEFORE THE COURT with respect to attorney's fees. The issue was reserved without the amount to be determined, but only, at this point, as to whether or not they would be awarded.

For reasons set forth in the Memorandum and Reply Memorandum, filed by Palmer, the same are granted and the sum to be determined thereafter.

This Memorandum Decision will also serve as notice of the Second Amended Judgment and Third Amended Findings have been entered subject to the amount of attorney's fees to be awarded.

Dated the 29th day of September, 1992.

BY THE COURT:

A handwritten signature in black ink, appearing to be 'Gordon J. Low', written over the printed name.

Gordon J. Low
District Court Judge

Case No: 900000321 CV

Certificate of Mailing

I certify that on the 2nd day of Oct, 1992,

I sent by first class mail a true and correct copy of the
attached document to the following:

ROBERT F. BABCOCK
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LOGAN UT 84321

JOHN DAUBNEY
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ST. PAUL MN 55101-1012

ANTHONY B. QUINN
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60 EAST SOUTH TEMPLE
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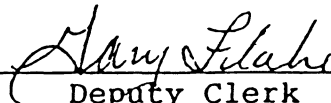
ROBERT R. WALLACE
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SALT LAKE CITY UT 84110-2970

STEVEN D. CRAWLEY
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KIETH KELLY
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P.O. BOX 45385
SALT LAKE UT 84145-0385

ROBERT C KELLER
Atty for Defendant
10 EXCHANGE PLACE 11TH FLOOR
P.O. BOX 45000
SALT LAKE UT 84145

District Court Clerk

By: 
Deputy Clerk

Second Amended Judgment

Robert R. Wallace
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970

COPY

George W. Preston
PRESTON & CHAMBERS
Attorneys for Defendants
and Third Party Plaintiffs
31 Federal Avenue
Logan, Utah 84321
(801) 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

INTERWEST CONSTRUCTION,
a Utah corporation

Plaintiff,

vs.

R. ROY PALMER and VAL W.
PALMER, dba, A. H. PALMER
& SONS

Defendants.

SECOND

A M E N D E D

J U D G M E N T

R. ROY PALMER and VAL W.
PALMER, dba, A. H. PALMER
& SONS

Third Party Plaintiffs

vs.

JOHN RYSGAARD, dba,
FIBERGLASS STRUCTURES COMPANY
and FIBERGLASS STRUCTURES
COMPANY, INC.

Third Party Defendants

FIBERGLASS STRUCTURES AND
TANK COMPANY, fka, FIBERGLASS
STRUCTURES COMPANY of St.
Paul Inc.

Third Party Plaintiff

vs.

Civil No. 90-321

THIOKOL CORPORATION

*

Third Party Defendant

*

THIS MATTER came on before the Court on the January 28 through February 10, 1992, Plaintiff appearing personally and the Court having made and entered its Findings of Fact and Conclusions of Law, now enters the following Judgment and Decree:

1. That Plaintiff Interwest Construction, a Utah corporation, is hereby awarded a judgment against Thiokol Corporation in the sum of \$200,000 together with interest at the rate of 10% per annum from the 2nd day of May, 1989, to the date of judgment and thereafter at the rate of 12% per annum.

2. That R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons is hereby awarded judgment against the Plaintiff Interwest Construction Company in the amount of \$93,673.70, together with interest at the rate of 10% per annum from the 2nd day of May, 1989, to the date of judgment and thereafter at the rate of 12% per annum.

3. That Interwest Construction Company, a Utah corporation, is hereby awarded judgment against Thiokol Corporation for costs of Court in the amount of \$ ____.

4. That R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons are hereby awarded judgment against Interwest for costs of Court in the sum of \$____, to bear interest at the rate of 12% per annum.

5. That Interwest Construction Company's Complaint is hereby dismissed with prejudice against R. Roy Palmer, Val W. Palmer, dba, A. H. Palmer & Sons.

6. That the third party complaint of R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons against John Rysgaard, dba, Fiberglass Structure Company and Fiberglass Structure Company, Inc., is hereby dismissed with prejudice.

7. That the third party complaint by Fiberglass Structures, aka, Fiberglass Structures Company and John Rysgaard against Thiokol Corporation is hereby dismissed with prejudice.

8. That the counterclaim by John Rysgaard, dba, Fiberglass Structures Company and Fiberglass Structures Company, Inc. against R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons is hereby dismissed with prejudice.

9. That the counterclaim by Thiokol Corporation against Fiberglass Structure Company, Inc., John Rysgaard, dba, Fiberglass Structure Company, Inc., is hereby dismissed with prejudice.

10. That the counterclaim and cross claim by Thiokol Corporation against R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons, Fiberglass Structures and Interwest Corporation are hereby dismissed with prejudice.

DATED this ____ day of August, 1992.

District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of
the above and foregoing SECOND AMENDED JUDGMENT to the following:

Anthony B. Quinn
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Salt Lake City, UT 84111

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Robert C. Keller
Snow, Christensen & Martineau
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P.O. Box 45000
Salt Lake City, UT 84145

on this ____ day of August, 1992.

Third Amended Findings of Fact and Conclusions of Law

Robert R. Wallace
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P.O. Box 2970
Salt Lake City, Utah 84110-2970

George W. Preston
PRESTON & CHAMBERS
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Logan, Utah 84321
(801) 752-3551

Attorneys for Defendants
and Third Party Plaintiffs

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

INTERWEST CONSTRUCTION,
a Utah corporation

Plaintiff,

vs.

R. ROY PALMER and VAL W.
PALMER, dba, A. H. PALMER
& SONS

Defendants.

THIRD

A M E N D E D

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

R. ROY PALMER and VAL W.
PALMER, dba, A. H. PALMER
& SONS

Third Party Plaintiffs

vs.

JOHN RYSGAARD, dba,
FIBERGLASS STRUCTURES COMPANY
and FIBERGLASS STRUCTURES
COMPANY, INC.

Third Party Defendants

FIBERGLASS STRUCTURES AND
TANK COMPANY, fka, FIBERGLASS
STRUCTURES COMPANY of St.
Paul Inc.

Third Party Plaintiff

Civil No. 90-321

vs.	*
THIOKOL CORPORATION	*
Third Party Defendant	*

THIS MATTER came on before the Court on January 28, 1992 through February 10, 1992, Plaintiff Interwest appearing and being represented by its attorneys Steven D. Crawley and Robert C. Keller. A. H. Palmer & Sons appeared and was represented by their attorney George W. Preston of Logan, Utah and Robert R. Wallace of Salt Lake City, Utah; Third Party Defendants, John Rysgaard, dba, Fiberglass Structures Company and Fiberglass Structures Company in Court and being present and represented by its attorney John Daubney of St. Paul, Minnesota; Thiokol Corporation being present and being represented by its attorneys Keith Kelly and Anthony Quinn of Salt Lake City, Utah; and the Court having on May 1, 1992, issued its Memorandum Decision referring to A. H. Palmer & Sons and Interwest's post trial briefs, now makes and enters the following:

FINDINGS OF FACT

1. That Interwest is a Utah corporation which maintains its principal place of business in Salt Lake County, State of Utah.
2. Interwest was, at the time the cause of action arose, and is presently properly licensed to carry on business of a general contractor in the State of Utah.
3. That R. Roy Palmer and Val W. Palmer are sole general partners of A. H. Palmer & Sons and are residents of Cache County, Utah. They are properly licensed to carry on the business of a plumbing contractor in the State of Utah.

4. Thiokol is a Delaware Corporation with its principal place of business in Box Elder County, State of Utah. Thiokol is the same as Morton Thiokol as it relates to contract documents.

5. Interwest entered into negotiations with Thiokol under which Interwest agreed to construct a waste water treatment facility known as building M705 for Thiokol. The contract consisted of a Notice to Proceed dated November 23, 1988, Exhibit 34, which incorporates by reference the terms of Thiokol's form no. TC8000CREV10-87 which form incorporates certain defense acquisition regulations. (Exhibit 35)

6. On or about December 1, 1988, Palmers entered into a subcontract agreement with Interwest by which Palmer agreed to perform labor and provide materials for the construction of building M705 (Exhibit 37).

7. Pursuant to the subcontract agreement Palmer was to provide, among other things, three fiberglass waste water storage tanks designated as T32, T33 and T34.

8. Palmer originally arranged to obtain the three tanks from Delta Fiberglass, however, Delta was unable to provide the tanks because of a higher priority commitment to the Air Force.

9. On February 28, 1989, Palmer entered into a Purchase Order Agreement with Fiberglass Structures under which Fiberglass Structures was to build and install tanks T32, T33 and T34 on or before April 30, 1989. (Exhibit 2)

10. On April 30, 1989, tanks 32, 33 and 34 were tested with water filled from a fire hose. During the test tank T34 failed.

11. Following the failure of Tank 34 the parties modified their contractual relationship with one another. Thiokol undertook

a direct contractual relationship by commencing direct negotiations with Fiberglass Structures in the engineering and supervision of the modification for the remanufacture of tank T34 and the repairs in accordance with Thiokol's specifications of tanks T32 and T33. The Court further finds that any failure on the part of Interwest, A. H. Palmers or Fiberglass Structures, Inc. to comply with the terms and provisions of the initial agreement between Interwest and Thiokol, were encouraged, accepted and waived by Thiokol by virtue of their direct negotiations with Fiberglass Structures.

12. Under Thiokol's supervision, Fiberglass Structures constructed the replacement tank. Thiokol tested and accepted Tanks T-32, 33 and 34, and Thiokol's engineer placed his stamp of approval on the plans and specifications for the replacement tanks. In a like measure, Interwest and Palmer were in a large degree left out of the loop of negotiations and responsibility.

13. On or about May 1, 1989, Thiokol inspected building M705 and notified Interwest that it considered M705 to be substantially complete notwithstanding the rupture of T-34 on April 30, 1989 and the necessary repairs to the three tanks by Fiberglass Structures. (Exhibit 45)

14. On May 1, 1989, Palmer issued a guaranty (see Exhibit 52) for a period of one year on Palmer's contract.

15. As a condition for Thiokol's acceptance of Fiberglass Structures' repair to the tanks T32 and T33 and replacing tank T34, Thiokol required an extended warranty directly from Fiberglass Structures. On June 13, 1989 Fiberglass Structures gave Thiokol an extended warranty for three years (Exhibit 18).

16. On May 2, 1989, Thiokol owed Interwest the sum of \$200,000 which amount draws interest at the rate of 10% per annum. That on May 2, 1989, Interwest owed A. H. Palmer & Sons the sum of \$93,673.70 together with interest at the rate of 10% per annum from said date.

17. At some time after June 2, 1989, Thiokol installed pumps to fill tanks T32, T33 and T34 replacing the gravity fill system specified in the plans and specifications.

18. On August 24, 1989, Tank 33 failed and released its liquid contents.

19. The Court finds that Thiokol has failed to show conclusively or even by a preponderance of the evidence the reason for the failure of tank 33 on August 24, 1989.

20. The Court received testimony that Fiberglass Structures failed to properly design and engineer the tanks, failed to sufficiently overlap the woven roving, failed to use a specified resin, failed to make the wall thickness and the tensile strength sufficient, failed to conduct proper testing and that all of the above contributed to the failure.

21. The Court further heard testimony that the hoop stress was so great on the tank, that the wall strength was insufficient to withstand the stress. There was contrary testimony however that there was sufficient tensile strength to withstand the hoop stress anticipated but not to satisfy a safety factor of 10. The coupon test of the segments near or similar to where the break occurred were in the Court's finding inconclusive. Overlapping of the woven roving as indicated on the coupon test was inappropriately controlled and in fact, though the coupon test may reveal mass,

weight, composition etc., there is some question in the court's mind about the accuracy of the overlapping of the woven roving as it was disclosed in the coupons. The Court finds that there was insufficient testimony given to this Court with regard to the controls placed on the manufacture of the tanks.

22. The failure of tank T-34 on April 30, 1989 was caused by a breach of warranty given to Thiokol by Interwest Construction Company and A. H. Palmer & Sons, Inc.

23. Notwithstanding evidence to the contrary the Court finds that the tanks were built pursuant to Thiokol's design specifications. There is little question, however, that the tanks were under-designed, that they did not have sufficient hoop or tensile strength and likely may have eventually failed in any regard.

24. The Thomas Report addressed these issues to some degree and testimony from the stand elaborated thereon. The Court is not convinced that the specifications included those standards for the reasons argued by Interwest and Palmer. The Court is, however, of the opinion that manufacturers of tanks such as this (as well as Thiokol) in all likelihood should have been aware of the need for higher standards as applied to wall thickness, woven roving overlapping and safety factors.

25. The fact remains that Thiokol knew of the wall thickness or lack thereof and of the safety concerns and accepted tanks T32, T33 and T34 with said deficiencies. Whatever deficiencies there may have been were fully accepted by Thiokol.

26. The Court has heard substantial evidence as to the change in the method of filling the tanks from gravity feed to overhead

feed. Though that is a substantial change which in and of itself may void any warranties given, the Court was not persuaded that the method of filling without more resulted in the failure of the tank on August 24, 1989. The evidence of vibration or trauma to the tanks from overhead fillings was insufficient to persuade the Court that the vibration was a causative factor.

27. The installation of pumps and an overhead method of filling the tanks allowed Thiokol to fill the tanks beyond their capacity. The Court finds that this was the most likely cause of the failure. The Court further finds that an overfilling of the tank would not have occurred had the gravity feed system remained in place. The Court finds that at least one of the tanks was overfilled on prior occasions. Tank T-33 had been overfilling for some time prior to its rupture on August 24, 1989.

28. The Court finds that the overfilling was most likely the cause of the failure which created an uplifting force on the tank which the tank was not designed to withstand. The uplifting force then caused the tank to rupture at the base of the tank and the rupture thereafter propagated up the side of the tank causing the entire failure. The court finds that given the pumping capacity of the pumps and the testimony relative to the spaces along the top of the tank and the man way that there was not sufficient area to allow the escape of fluids with sufficient speed to eliminate the uplifting pressures at the bottom of the tank.

29. Warranties were given by Interwest Construction Company, A. H. Palmers & Sons and Fiberglass Structures to Thiokol.

30. After tank T33 failed Thiokol withheld from Interwest the sum of \$200,000 from the contract. Of this amount, \$93,653 was withheld from Palmers by Interwest.

31. The Court finds that Thiokol is the author of the plans and specifications of the contract documents as it relates to Interwest.

32. That Interwest and A. H. Palmer executed an agreement Exhibit 37 which provided for the payment of attorney's fees in the event of litigation.

From the foregoing Findings of Fact the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. That the contracts between Thiokol and Interwest and the modifications thereto between Thiokol, Interwest, A. H. Palmer and Fiberglass Structures were drafted and prepared by Thiokol and by reason thereof any ambiguities in the contracts or parts thereof such as specifications should be resolved against Thiokol.

2. This case is controlled entirely under contract law. The parties agreed between themselves by contract as to what duties were being undertaken and what liability and damages may have accrued as a result of breach of contract.

3. The Court concludes that after the failure of tank T34 Thiokol entered into what amounted to a separate agreement with Fiberglass Structures.

4. The Court concludes that Thiokol negotiated for and bargained with Fiberglass Structures for the remanufacture of tank 34 and the repairs to tanks 32 and 33 on terms and conditions

specified by Thiokol. Thiokol bargained for a separate warranty from Fiberglass Structures on the retro-fitted tanks.

5. The court concludes that under Thiokol's supervision, the parties jointly constructed the tanks. Thiokol accepted the tanks and the engineer placed his stamp of approval on the same. In a like measure, Interwest and Palmers were, in a large degree, left out of the loop and being left out of the loop is one of the very reasons Thiokol is finding itself directly in the liability loop.

6. The Court concludes that the most likely cause of the failure was the overfilling of the tanks causing uplift which the tank was not designed to withstand.

7. The Court concludes that Thiokol has failed to prove by a preponderance of the evidence the cause of the tank failure on August 26, 1989.

8. The Court concludes that the failure of the tanks was not a warranty matter and therefore no claim under warranty is appropriate in this case.

9. The Court concludes that NBS/PS15-69 standards were not incorporated into the contract by Thiokol with sufficient clarity in the contract for the designer and manufacturer to be aware of their application; specifically with respect to wall thickness and safety factors.

10. There have been issues raised between the parties as to whether or not Interwest, Palmer and Fiberglass Structures are liable under the theory of comparative fault as it applies to the warranty. The Court concludes that the action by Thiokol in this case in overfilling the tanks bars recovery by Thiokol under the provisions of warranty.

11. That the contract prepared and drafted by Thiokol was neither specific or sufficiently clear to require certain performance of which Thiokol now complains. Specifically and only by way of example the Court concludes that the contract and specifications did not require a safety factor of 10 nor a certain wall thickness. The Court further concludes that Fiberglass Structures, Interwest Construction Company or A. H. Palmer & Sons did not fail to comply with the provisions of the contract in any way which caused or resulted in the failure claimed by Thiokol.

12. The Court concludes that Interwest, A. H. Palmer & Sons, Fiberglass Structures are contractors and are not suppliers or merchants as contemplated within the language of the Uniform Commercial Code, therefore provisions of the Uniform Commercial Code as it relates to this case, are inapplicable.

13. That Plaintiff Interwest Construction, a Utah corporation, is hereby awarded a judgment against Thiokol Corporation in the sum of \$200,000 together with 10% interest from May 2, 1989 to the date of judgment and thereafter at the rate of 12% per annum.

14. That R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons is entitled to judgment against Interwest in the sum of \$93,673.70, together with 10% interest from the 2nd day of May, 1989.

15. Pursuant to stipulation between the parties the attorney's fees awarded herein are to be determined by separate hearing.

16. That judgment should enter dismissing Interwest Construction Company's Complaint with prejudice against R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons.

17. That judgment should be entered on the counterclaim of R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons, against Interwest Construction Company as set forth by the counterclaim of A. H. Palmer & Sons.

18. That judgment should be entered dismissing the third party complaint of R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons against John Rysgaard, dba, Fiberglass Structures Company and Fiberglass Structures Company, Inc.

19. That judgment should enter dismissing the third party complaint by Fiberglass Structures and tank company aka Fiberglass Structures Company of St. Paul, Minnesota and John Rysgaard against Thiokol Corporation.

20. That judgment should enter dismissing the counterclaim by John Rysgaard, dba, Fiberglass Structures Company and Fiberglass Structures Company, Inc. against R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons.

21. That judgment should enter dismissing Thiokol Corporation's counterclaim against Fiberglass Structures Company, Inc., and John Rysgaard, dba, Fiberglass Structures Company.

22. That judgment should enter dismissing Thiokol Corporation's counterclaim and cross claims against R. Roy Palmer and Val W. Palmer, dba, A. H. Palmer & Sons, Fiberglass Structures, Inc. of St. Paul, Minnesota and John Rysgaard and Interwest Construction.

23. The failure of Tank 34 on April 30, 1989 was caused by a breach of the warranties given to Thiokol by both Interwest and A. H. Palmers.

DATED this ____ day of August, 1992.

Gordon J. Low,
DISTRICT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing SECOND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

Anthony B. Quinn
WOOD & WOOD
500 Eagle Gate Tower
Salt Lake City, UT 84111

Robert R. Wallace, Esq.
HANSON, EPPERSON & SMITH
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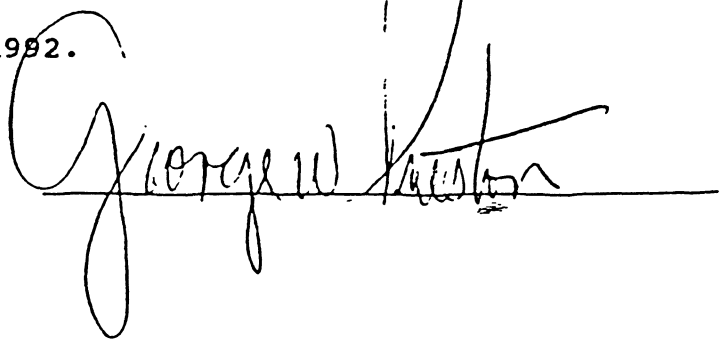
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John Daubney
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Robert C. Keller
Snow, Christensen & Martineau
10 Exchange Place #1100
P.O. Box 45000
Salt Lake City, UT 84145

on this 26 day of August, 1992.



George W. Hunter

Transcript of Record of Hearing on
August 18, 1992, Pages 2431 through 2433

IN THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

INTERWEST CONSTRUCTION,

Plaintiff,

vs.

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS and THIOKOL
CORPORATION,

Defendants.

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER &
SONS.

Third-Party
Plaintiffs,

vs.

JOHN RYSGAARD, dba FIBERGLASS
STRUCTURES COMPANY and
FIBERGLASS STRUCTURES COMPANY,
INC..

Third-Party Defendant.

FIBERGLASS STRUCTURES AND TANK
COMPANY, fka FIBERGLASS
STRUCTURES COMPANY of ST. PAUL,
INC.,

Third-Party Plaintiff,

vs.

THIOKOL CORPORATION,

Third-Party Defendant
and Counterclaimant.

Case No. 900000321

Volume 11

Pages 2407 - 2485

(Transcript of
videotaped hearing)

1 BE IT REMEMBERED that a hearing was held tele-
2 phonically on the 18th day of August, 1992, in the
3 Cache County Hall of Justice, Logan, Utah, commencing
4 at the hour of 1:25 o'clock p.m., the Honorable Gordon
5 J. Low presiding.

6
7 * * *

8
9 APPEARANCES:

10 For Interwest: STEVEN D. CRAWLEY
11 Walstad & Babcock
12 Attorneys at Law
13 254 West 400 South
14 Second Floor
15 Salt Lake City, UT 84101

16 ROBERT C. KELLER
17 Snow, Christensen &
18 Martineau
19 Attorneys at Law
20 1100 Newgate Building
21 #10 Exchange Place
22 Salt Lake City, UT 84111

23 For Palmer and A. H. ROBERT W. WALLACE
24 Palmer & Sons: Hanson, Epperson & Smith
25 Attorneys at Law
4 Triad Center
Suite 500
Salt Lake City, UT 84180

GEORGE W. PRESTON
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APPEARANCES (Cont'd.)

For Thiokol:

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For Fiberglass
Structures and
John Rysgaard:

JOHN DAUBNEY
Attorney at Law
1010 Degree of Honor
Building
325 Cedar Street
St. Paul. MN 55101-1012

* * *

1 out of the contract language.

2 THE COURT: I think that's a given. It seems to
3 me if there's language in the contract, and I don't
4 have it before me, but it's been suggested here that
5 there's language in the contract which allows a
6 withholding by Interwest. If that's the case, then
7 there's no breach on their behalf for doing so.

8 MR. PRESTON: Then I think the only thing the
9 court can do is determine whether that withholding was
10 with good cause and --

11 THE COURT: I think I'm prepared to make that
12 finding right now. I said before I think this lawsuit
13 was meretorious and I think it was meretorious on all
14 sides. I think Interwest's withholding of the money
15 was certainly fair. It was not unreasonable. If it's
16 provided in the contract, and we're assuming for our
17 discussion purposes that it was, then I would find
18 that not to be a breach and the only question then is
19 was the filing of the lawsuit by Interwest against
20 Palmers a breach entitling Palmers to attorney fees.
21 If there's no contract language to that effect, then I
22 don't think Palmers would be entitled to fees. I'm
23 not sure how to word that any differently than I just
24 did.

25 MR. CRAWLEY: This is Steve Crawley again, Your

1 Honor. From our point of view it's no different than
2 if Interwest sued Palmer for some failure to provide
3 pipe that met the specifications. If we were
4 successful in that kind of a lawsuit Palmer wouldn't
5 be entitled to its attorney fees or its costs of
6 replacing pipe. All we were doing was trying to get
7 them to live up to their contract and provide us with
8 the contract obligation that they bargained for with
9 us.

10 THE COURT: There is another way to look at that
11 and that is this: Let's assume that Interwest says to
12 Palmer we're not going to pay you, whereupon Palmer
13 files a lawsuit for payment and Interwest says, well,
14 we have a right to withhold payment until we have this
15 resolved. Therefore, Palmer loses its claim against
16 Interwest for that payment until it's resolved because
17 Interwest had a right to withhold. Could Interwest
18 then make a claim of attorney fees against Palmer for
19 filing that lawsuit when they had no right to do so?

20 MR. CRAWLEY: It would (inaudible) on those
21 particular issues. But Palmer would not be allowed to
22 seek later attorney fees. For example, in that kind
23 of circumstance that you just described, if they were
24 to sue Thiokol in a separate action to resolve the
25 liability on failure and incurred the same attorney

1 fees they incurred in this case and then say here,
2 Interwest, we've resolved the problem, pay us our
3 92,000 under the contract plus all the costs we
4 incurred to prove that we did what we did correctly.

5 THE COURT: I frankly tend to agree with you, Mr.
6 Crawley. Based on our discussion here as we've
7 wandered through this thing, it strikes me that the
8 claim by Palmers for attorney fees against Interwest
9 could only be based upon the fact that Interwest filed
10 an action. I'm not sure that triggers any kind of
11 attorney fee award. I'll allow you, Mr. Preston and
12 Mr. Wallace, to take a look and see if you can find
13 language to that effect. If you can't, then I would
14 hold that in fact no award of attorney fees would be
15 made.

16 MR. WALLACE: I have somebody trying to locate
17 the contract right now, Your Honor.

18 THE COURT: Well, okay. You know, your opening
19 statement keeps coming back to me, Mr. Wallace, what a
20 simple case this is.

21 MR. PRESTON: You know, maybe this is just a
22 point of personal feelings, but it really chaps me
23 that Interwest has the gall to start an action and
24 start backwards because they're trying to maintain a
25 good relationship. They force Palmers to defend

Memorandum Decision, August 19, 1997

IN THE FIRST DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

INTERWEST CONSTRUCTION,
a Utah corporation,

Plaintiff,

vs.

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Defendants.

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MEMORANDUM DECISION

Case No. 900000321

Judge Gordon J. Low

THE ISSUE BEFORE THE COURT is whether A. H. Palmer & Sons ("Palmer") is entitled to the attorney's fees incurred in defending an indemnity suit on behalf of Interwest Construction ("Interwest") against Thiokol Corporation ("Thiokol"). The Court has reviewed the file and considered the memoranda and affidavits submitted by counsel and issues the following ruling:

Factual Context

In 1988, Interwest agreed to construct a waste treatment facility for Thiokol and subcontracted with Palmer to provide materials and perform the labor necessary for the construction of part of the treatment facility. Under the Subcontract Agreement, Palmer was to provide three fiberglass wastewater storage tanks. In order to fulfill this commitment, Palmer

entered into an agreement with Fiberglass Structures, Inc., ("Fiberglass"), under which Fiberglass agreed to manufacture and install the storage tanks.

Upon completion of the tanks in April 1989, Thiokol tested the three storage tanks. During the trial test, one of the tanks ruptured. Notwithstanding this failure, Thiokol inspected the waste treatment plant the following month and notified Interwest that it considered the facility to be substantially complete. Under Thiokol's supervision, the failed tank was replaced and the remaining tanks were reinforced according to the design specifications suggested by Fiberglass and approved by Thiokol. However, Thiokol subsequently modified the wastewater tanks by changing the method of filling from the gravity feed system to an overhead feed. In August 1989, as a direct result of the modifications made by Thiokol, one of the tanks overfilled and ruptured, spilling its liquid-waste contents. At the time the tank failed, Thiokol owed Interwest \$200,000 under the contract. Of this amount, Interwest owed Palmer \$93,673.70. Thiokol withheld the balance due Interwest as compensation for the damages Thiokol alleged it suffered as a result of the tank's failure, and Interwest, in turn, withheld payment from Palmer.

This case proceeded in an unusual manner in that Interwest did not initiate a cause of action against Thiokol for the amount due under the contract, nor did Thiokol sue Interwest for breach of warranty, negligence, or breach of contract. Instead, Interwest commenced this action by filing a complaint against Palmer for breach of contract, indemnity; negligence, and breach of warranty. Interwest also sought indemnification from Palmer for attorney fees, costs, and expenses incurred as a result of the tank failure. Interwest later filed an amended complaint adding Thiokol as a defendant and seeking recovery from Thiokol under theories of breach of

contract and unjust enrichment. Palmer then filed a third-party complaint against Fiberglass, which, in turn, filed a third-party complaint against Thiokol. Thiokol responded by bringing counterclaims and third-party complaints against Fiberglass and Palmer and a counterclaim against Interwest.

At trial, Palmer shouldered the burden of defending itself and Interwest against the allegations raised by Thiokol. As a result of Palmer's efforts, both Palmer and Interwest were found not to have breached the agreement with Thiokol. Moreover, the Court also found that Interwest should have paid Palmer the \$93,653.70 it owed under the contract for completion of the project.

Analysis

Introduction

Palmer is entitled to the attorney's fees it incurred in enforcing its right to final payment under the contract, including the fees incurred for defending Interwest against Thiokol. This entitlement is based upon two separate principles of recovery: First, Palmer is entitled to attorney's fees because it satisfactorily performed the work required and because Interwest breached the final payment provision in the Subcontract Agreement. Second, Interwest itself could have commenced a cause of action against Thiokol for the \$200,000 owed to Interwest and subsequently sought attorney's fees for prosecuting its claim. However, because Interwest sued Palmer, seeking indemnification, this battle was largely fought by Palmer. Thus, Palmer is entitled to the attorney's fees against Interwest because Interwest would have been entitled to

these same fees had it chosen to pursue its claim against Thiokol and defend itself rather than have Palmer do the work.

I. Palmer's Entitlement to Attorney's Fees

In order to enforce its right to full payment, Palmer must show that Interwest breached the final payment provision of the subcontract. This may be accomplished by demonstrating that both Palmer and Interwest satisfactorily completed their work on the wastewater storage tanks and complied with all other agreements made with Thiokol. In doing this, Palmer will have shown that Interwest's withholding of the final payment was unjustified and, moreover, that Palmer's defense of itself and Interwest against the allegations of breach of contract by Thiokol was integral to its efforts to collect final payment from Interwest.

A

The Subcontract Agreement permits Palmer to be awarded attorney's fees if Interwest unjustifiably refused to tender final payment to Palmer. According to Section 3-Prosecution of Work, Delays, Etc., of the Subcontract Agreement "[t]he Subcontractor shall indemnify the Contractor and the Owner against, and save them harmless from, any and all loss, damage, expenses, costs, and attorney's fees incurred or suffered on account of any breach of the provisions or covenants of this contract." Although this provision of the subcontract only mentions the possibility of awarding attorney's fees to Interwest and Thiokol, pursuant to Utah law,

[a] court may award costs and attorney's fees to *either* party that prevails in a civil action based upon...[a] written contract...when the provisions of the...written contract...allow at least one party to recover attorney's fees.

Utah Code Ann. § 78-27-56.5 (emphasis added). Thus if Interwest was in breach of the final payment provision, Palmer would be entitled to attorney's fees.

Because Thiokol was not justified in withholding its payment to Interwest, Interwest was also not justified in failing to tender final payment to Palmer after Palmer had satisfactorily completed its obligations under the subcontract. Palmer contends that the final payment provision of the subcontract required Interwest to make final payment "when the work described in [the] subcontract [was] fully completed and performed in accordance with the contract documents and [was] satisfactory to the architect." Subcontract Agreement, Part 2-Payments. Accordingly, final payment was only predicated upon satisfactory completion of the contract. Interwest argues, on the other hand, that the final payment provision must be read in concert with the other paragraphs, in particular the provision which states that monthly payments by Interwest to Palmer were "to be made as payments were received by the Contractor from the Owner." Subcontract Agreement, Part 2-Payments. Thus, according to Interwest, final payment was required only after Palmer had satisfactorily completed the work *and* Thiokol had made its interim payments to Interwest. Since Thiokol failed to make these payments, Interwest argues that it was justified in withholding final payment to Palmer.

A plain reading of this provision of the subcontract indicates that only the *monthly* draws, and not the *final* payment, were contingent upon payments by Thiokol to Interwest. Moreover, given two plausible interpretations of a contract provision, any ambiguity must be construed in favor of Palmer and against Interwest because Interwest was the drafter of the subcontract. See Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982) ("The well-established rule in Utah is

that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement.").

Palmer also argues that neither itself nor Interwest failed to satisfactorily perform the work required pursuant to the agreement with Thiokol and, therefore, none of the subcontract provisions dealing with the withholding of payments to Palmer are applicable. First, paragraph two (as notated by the parties) of the subcontract provides that failure of Palmer to comply with any provisions of the agreement constitutes cause for withholding the payment. However, this Court previously found that Palmer complied with all the provisions of the contract. Second, paragraph three provides that Palmer must make good, without cost to Interwest, any defects due to faulty workmanship. Again, this Court previously found that no defects due to faulty workmanship were attributable to Palmer. Third, paragraph four provides that Interwest may deduct any amount due and linked to Palmer for breaches of the contract. Palmer, however, committed no breaches of the contract that would give rise to a claim entitling Interwest to deduct any amount from the contract. Fourth, paragraph five provides that Palmer agreed to indemnify Interwest and save it harmless from any and all loss, damages, cost, expenses, attorney's fees suffered or incurred on account of any breach its obligations and covenants or any other provisions or covenants of the subcontract. Again, Palmer was found not to have breached any covenant or obligation. Finally, paragraph six provides that Palmer indemnify and save harmless Thiokol and Interwest against all losses, damages, injuries, and liabilities resulting directly or indirectly from Palmer's performance of the contract. This Court previously found that no such losses occurred which resulted from Palmer's performance of the contract.

In addition, at the conclusion of the civil trial in which Palmer defended itself and Interwest against Thiokol, this Court also found that Interwest did not breach any contract provisions with Thiokol and that the work it performed was satisfactory in that regard. Thus, neither Palmer nor Interwest breached any contract provisions with Thiokol which would have affected Interwest's tendering of final payment for the work performed by Palmer.

Since Palmer satisfactorily completed its work, and since Thiokol was not justified in withholding its final payment to Interwest, Interwest should have tendered final payment to Palmer. By failing to do so, Interwest breached the final payment provision of the subcontract. Therefore, pursuant to the terms of the subcontract, and § 78-27-56.6 of the Utah Code, Palmer is entitled to the attorney's fees it incurred to enforce its right to full payment, including the attorney's fees spent defending Interwest against Thiokol because these were part and parcel of Palmer's attempt to collect the final payment.

B

Palmer's claim against Interwest for attorney's fees is also justified on the ground that Interwest itself could have sued Thiokol for payment of the amount owed and subsequently sought the same fees that Palmer is now requesting. In other words, had this action initially been brought by Interwest against Thiokol for payment of the remaining contract sum, Interwest would have been entitled to attorney's fees pursuant to the ruling of the Court, which found neither Palmer nor Interwest in breach of its agreements. However, this battle was largely fought by Palmer because of the inverse filing of Interwest. Though Palmer had the obligation of indemnification and defense, it did not have the obligation to collect on behalf of Interwest.

Thus, Palmer is entitled to the attorney's fees it incurred in seeking to enforce Interwest's right to full payment which include fees incurred defending Interwest against Thiokol.

II. Amount of Attorney's Fees

According to the affidavit submitted by counsel for Palmer, the attorney's fees incurred by Palmer in defending itself and Interwest against Thiokol, as well as itself against Interwest, amounted to \$24,319.50 through trial. In addition, \$562.50 in attorney's fees were incurred in enforcing the breach of contract issue. The costs incurred were \$135.00. Thus, the total amount of attorney's fees and costs incurred by Palmer in enforcing its right to full payment by Interwest is \$25,017.00. Counsel's affidavit also indicates that \$16,005.60 was incurred in representing Palmer in the appeals by Thiokol and Interwest. However, neither the Court of Appeals nor the Supreme Court awarded attorney's fees to Palmer. Therefore, this Court cannot award the amount of attorney's fees incurred in representing Palmer on appeal.

In addition, counsel for Palmer indicates that the total amount of attorney's fees incurred by Robert Wallace of Hanson, Epperson & Smith in dealing with the issue of indemnity as it relates to contractual indemnity on issues of warranty, strict liability, and contract comes to \$75,489.36. There is no indication, however, whether this amount is strictly for work done in preparing for and litigating the civil trial or whether this figure also includes amounts incurred in representing Palmer in the appeals by Thiokol and Interwest. Therefore, the Court reserves the issue of the award of attorney's fees with respect to Robert Wallace until a determination is

INTERWEST CONSTRUCTION v. A. H. PALMER & SONS, et al

#900000321

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Interwest Construction v. R. Roy Palmer, Val W. Palmer dba H. A. Palmer & Sons, et al, Case No. 900000321, postage prepaid, this 19 day of August, 1997, to the following:

STEVEN D. CRAWLEY, ESQ.	GEORGE W. PRESTON, ESQ.
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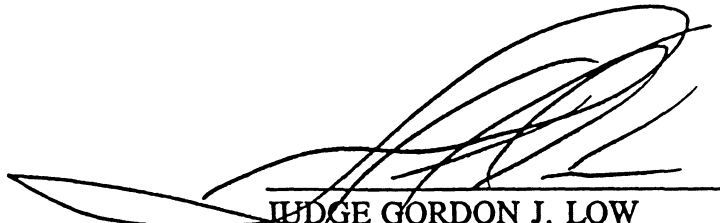
ROBERT W. WALLACE, ESQ.	courtesy copy to:
P.O. Box 2970	JOHN E. DAUBNEY, ESQ.
4 Triad Center, #500	1010 Degree of Honor Building
Salt Lake City, UT 84110	325 Cedar Street
	St. Paul, MN 55101-1012


Deputy Court Clerk

made whether the above-mentioned sum includes fees incurred in representing Palmer in the appeals by Thiokol and Interwest.

DATED this 19 day of August, 1997.

BY THE COURT:



JUDGE GORDON J. LOW
FIRST DISTRICT COURT

Memorandum Decision, February 11, 1998

IN THE FIRST DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

INTERWEST CONSTRUCTION,
a Utah corporation,

Plaintiff,

vs.

R. ROY PALMER and VAL W.
PALMER, dba A. H. PALMER
& SONS,

Defendants.

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MEMORANDUM DECISION

Case No. 900000321

Judge Gordon J. Low

THIS MATTER IS BEFORE THE COURT upon the isolated issue with respect to the award of attorney fees submitted by Attorney Robert W. Wallace pursuant to a Motion for the same. The issue with respect to fees incurred appears not to be the amount, except as to whether the fees can be segregated, but whether the same is awardable.

The Plaintiff argues that they are not awardable because no agreement on the part of Interwest Construction existed to pay fees incurred by Palmers' carrier, but only by Palmers itself and that the fees incurred for the defense of the case by Wallace should be segregated from those incurred by Palmers in prosecution of its claim for fees.

PAGE 2

The Plaintiff further argues that there is no subrogation right on behalf of the insurance carrier for fees incurred which were a result of the services by Wallace in that they were incurred on behalf of the insurance carrier and Interwest is not subject to those claims.

To the contrary, the Court finds on the issue in favor of Defendants and directs that the fees, as reflected in the Affidavit by Mr. Palmer, are hereby awarded.

Counsel for the Defendants are directed to prepare a formal Order and Judgment in conformance herewith.

DATED this 11 day of February, 1998.

BY THE COURT:



JUDGE GORDON J. LOW
FIRST DISTRICT COURT

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing
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dba H. A. Palmer & Sons, et al, Case No. 900000321, postage prepaid, this 11 day
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