

1989

John Call Engineering v. Manti City Corporation : Reply Brief

Utah Court of Appeals

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Dale F. Gardiner, Robert J. Debry; Attorney for Appellant.

Paul R. Frischknecht; Attorney for Respondent.

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Reply Brief, *Call Engineering v. Manti*, No. 890384 (Utah Court of Appeals, 1989).

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BRIEF

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DOCKET NO. 89-0384

IN THE UTAH COURT OF APPEALS

JOHN CALL ENGINEERING, INC.,)	
a Utah corporation,)	
)	
Plaintiff/Appellant,)	CORRECTED APPELLANT'S
)	REPLY BRIEF
v.)	
)	Case No. 890384-CA
MANTI CITY CORPORATION,)	
a municipal corporation,)	Category 14b
)	
Defendant/Respondent.)	

APPEAL FROM A FINAL JUDGMENT OF THE SIXTH
JUDICIAL DISTRICT COURT OF SANPETE COUNTY
HONORABLE DON V. TIBBS, JUDGE

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DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

JOHN CALL ENGINEERING, INC.,)	
a Utah corporation,)	
)	
Plaintiff/Appellant,)	CORRECTED APPELLANT'S
)	REPLY BRIEF
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v.)	Case No. 890384-CA
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Appellant, John Call Engineering, Inc., ("Call")
respectfully submits Appellant's Reply Brief.

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Clerk of the Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, UT 84102

RE: John Call Engineering, Inc. v. Manti City
Case No. 89-0384CA

Dear Clerk:

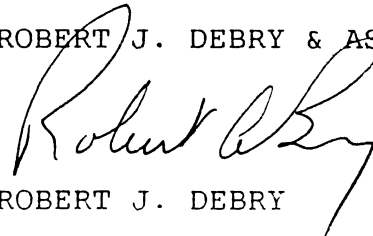
Pursuant to Rule 24(j) of the Rules of the Utah Court of Appeals, appellant John Call Engineering, Inc. submits the following additional authority that supplements Point I of Appellant's Brief. The Utah Supreme Court in Golding v. Ashley Central Irrigation District, 133 Utah Adv. Rep. 3 (April 23, 1990) ruled:

- 1) That a responsive pleading must set forth any and all applicable affirmative defenses;
- 2) Any affirmative defense not set forth in a pleading are waived; and
- 3) A moving party is entitled to an order striking any affirmative defenses not pled.

A copy of the case is attached to this letter.

Sincerely,

ROBERT J. DEBRY & ASSOCIATES



ROBERT J. DEBRY

RJD\jn
Enclosure

cc: Paul R. Frischknecht
50 North Main Street
Manti, UT 84642

Cite as
133 Utah Adv. Rep. 3

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

**Gerald GOLDING, individually, and as
representative of the heirs of Randal Golding,
deceased,**

Plaintiff and Appellant,

v.

**ASHLEY CENTRAL IRRIGATION
COMPANY, a Utah corporation,
Defendant and Appellee.**

No. 880025

FILED: April 23, 1990

Seventh District, Uintah County,
Honorable Dennis L. Draney

ATTORNEYS:

Richard I. Ashton, David A. Wilde, Murray,
for appellant

Clark B. Allred, Gayle F. McKeachnie,
Vernal, for appellee

**This opinion is subject to revision before
publication in the Pacific Reporter.**

ZIMMERMAN, Justice:

Gerald Golding appeals from the grant of a motion by defendant Ashley Central Irrigation Company for judgment on the pleadings and the consequent dismissal of Golding's wrongful death action against the irrigation company. Golding asserts that the trial court erred in concluding (i) that the Limitation of Landowner Liability Act ("the Act") applied to the facts of this case, thereby shielding the irrigation company from liability for negligence, and (ii) that the complaint did not adequately allege a "willful or malicious failure to guard or warn against a dangerous condition" on its property that would permit Golding to recover under section 57-14-6 of the Act. We conclude that the pleadings are insufficient to demonstrate that the Act's protections are available to the irrigation company. Therefore, we reverse and remand to the trial court for further proceedings.

The grant of a motion for judgment on the pleadings is reviewed under the same standard as the grant of a motion to dismiss, i.e., we affirm the grant of such a motion only if, as a matter of law, the plaintiff could not recover under the facts alleged. And in considering the factual allegations in the complaint, we take them as true and consider them and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff. *E.g.*, *Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669, (Utah 1989); *Arrow Indus., Inc. v. Zions First*

Nat'l Bank, 767 P.2d 935, 936 (Utah 1988). The facts are stated here in accordance with this standard of review. See, e.g., *State v. Verde*, 770 P.2d 116, 117 (Utah 1989).

On June 25, 1986, Randal Golding, seventeen, and four teenaged friends went swimming in an irrigation canal owned by Ashley Central Irrigation Company. There were no warnings posted of any dangers posed by swimming in the canal. While swimming, one of the boys went over a spillway and became trapped in the backwash created at the bottom. Jumping in to save his friend, Randal was caught in the backwash and swept under the surface. He was found approximately 150 feet downstream from the spillway some twenty minutes later. He died two days later.

Randal's father, Gerald Golding, filed an action against the irrigation company in June 1987 for wrongful death. The complaint was couched in negligence terminology and alleged basically that the irrigation company failed to properly maintain its waterways and post warnings. The irrigation company answered in July 1987, denying all claims and alleging as a defense, *inter alia*, that the complaint "failed to state a claim upon which relief could be granted." It then filed a motion for judgment on the pleadings. As a ground for the motion, the irrigation company raised for the first time a claim that because the boys were using the canal for recreational purposes, any cause of action against the irrigation company sounding in mere negligence was barred under the Limitation of Landowner Liability Act. See Utah Code Ann. §§57-14-1 to-7 (1986) (amended in part 1987 & 1988).¹ Golding filed a memorandum in opposition, arguing that the irrigation company could not claim the protection of the Act for a number of reasons, but he did not raise the argument that the irrigation company had waived the defense of the Act by not asserting it in its answer. Alternatively, Golding contended that even if the Act were applicable, the allegations of the complaint were sufficient to state a claim under section 57-14-6(1) of the Act, which provides, "Nothing in this act limits in any way any liability which otherwise exists ... for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity" Utah Code Ann. §57-14-6 (1986) (amended 1988).

The court granted the irrigation company's motion for judgment on the pleadings. It held that the Act applied and that Golding's complaint did not allege a willful or malicious failure to warn which would bring the action under section 57-14-6. The case was ordered dismissed. Golding appealed.

Before addressing the merits of the appeal, we address the pleading and the procedure that led to the ruling below, because it raises a practice issue of general concern to the courts and bar. Had Golding timely moved, he would

have been entitled to an order striking that portion of the motion for judgment on the pleadings that relied on the Act as a defense to any negligence claim. Utah Rule of Civil Procedure 12(b) provides that any defense shall be asserted in a responsive pleading. Utah R. Civ. P. 12(b). Utah Rule of Civil Procedure 8(c) provides that a responsive pleading must set forth any matter "constituting an avoidance or affirmative defense." And rule 12(h) provides that a party "waives all defenses ... which [he or she] does not present either by motion ... or ... in his [or her] answer or reply" The Act certainly constitutes an "affirmative defense" or an "avoidance," inasmuch as it denies liability not because the allegations of the complaint are not true, but because the legislature is claimed to have relieved the irrigation company of the liability usually associated with negligence. Therefore, to preserve the Act as a defense, it had to be raised in the irrigation company's answer. *Valley Bank & Trust Co. v. Wilken*, 668 P.2d 493, 493-94 (Utah 1983); Utah R. Civ. P. 8(c).

Here, defendant's responsive pleading was its answer, and that pleading did not mention the Act. It only asserted, in the general terms of rule 12(b)(6), that the complaint failed to state a claim upon which relief could be granted. Although such a defense is commonly pleaded in Utah as a matter of form and counsel for the irrigation company may have thought that by putting a 12(b)(6) statement in the answer he had preserved the question of the Act's applicability, such a generally pleaded defense adds nothing to an answer because it gives no notice of the substance of the defense. See generally Utah R. Civ. P. 8(b), (c), (e). Therefore, because the irrigation company did not properly preserve the Act as a defense, it was waived and plaintiff was entitled to object to its being raised in the motion for judgment on the pleadings. However, by not objecting, the plaintiff, in turn, waived this defective mode of placing the Act in issue. See *Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976). We therefore address the question of the Act's applicability.

The Act's applicability can be determined by reference to a decision of this court handed down after completion of the briefing of the instant appeal. In *Crawford v. Tilley*, 780 P.2d 1248 (Utah 1989), the trial court found that the Act freed the owner of a cabin with a negligently maintained wall heater from liability when sued by the parents of a young hunter who had been asphyxiated.² The cabin was located in a private development which was not made available to the public for recreational use and had locked entry gates on the roads but was not fenced or posted against trespassing. The cabin owners contended that under section 57-14-3 of the Act, owners of any property are freed from a duty of ordi-

nary care to recreational users to maintain their property in a safe condition or warn of hazards. We rejected this contention and held that the Act was inapplicable under the *Crawford* facts.

In the *Crawford* opinion, we delved into the background of the Act and found that the purpose of these provisions and of the provisions in section 57-14-3 and 57-14-4 that specifically limit the common law liability of a landowner who "directly or indirectly invites or permits" non-paying recreational use of its land to any such recreational users is "to promote the opening of private lands to public recreational use." 780 P.2d at 1250-51. We concluded that it would be inconsistent with this purpose to extend the protections of the Act to landowners "who actively discourage or preclude public access to their property." *Id.* *Crawford*, therefore, held that before a landowner could qualify for the limitations on common law liability, it must show that it has "made [its] property available to at least some members of the general public for recreational purposes." 780 P.2d at 1251; see Butler, *Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act*, 1988 Utah L. Rev. 47, 71-76 [hereinafter Butler].

Turning to the present case, the district court did not have the benefit of *Crawford* when presented with the irrigation company's motion. In granting that motion, the court held only that the provisions of the Act were applicable; it did not discuss the basis for that determination. Because *Crawford* teaches that the owner must have made the property available for recreational use to obtain the Act's protection, and because the record contains no evidence from which such a determination can be made, the irrigation company has not shown that it qualifies for the Act's limitations on liability. The district court's decision on the Act's applicability must be reversed and the case remanded for further proceedings on that question under the guidance of *Crawford*.

Should the trial court find the Act applicable, it will have to address the question of whether the allegations of the complaint are sufficient to satisfy section 57-14-6's preservation of liability for willful or malicious conduct. Because the issue has been fully briefed here and may well be presented on remand, we will discuss the trial court's finding that Golding's complaint contained no allegation of "willful or malicious failure to guard or warn against any condition existing in, on or about the canal." Such a step is appropriate under our rules. R. Utah S. Ct. 30(a); see *Hiltsley v. Ryder*, 738 P.2d 1024, 1026 (Utah 1987) (Zimmerman, J., concurring); *Anderson v. Utah County Bd. of County Comm'rs*, 589 P.2d 1214, 1216 (Utah 1979); *Salt Lake County v. Salt Lake City*, 570 P.2d 119, 121 (Utah 1977); *Lopes v.*

Lopes, 30 Utah 2d 393, 395, 518 P.2d 687, 688 (1974); *LeGrand Johnson Corp. v. Peterson*, 18 Utah 2d 260, 263, 420 P.2d 615, 617 (1966).

We have not had occasion to construe section 57-14-6 or to determine what is necessary to satisfy its requirements. The leading article on the Utah Act says that analogous provisions in other similar state acts have often been referred to as imposing a duty on landowners toward recreational users falling under the statute that is "analogous to a landowner's duty toward an unknown trespasser at common law." *Butler*, at 95. In *Ewell v. United States*, 579 F. Supp. 1291 (D. Utah 1984), *aff'd*, 776 F.2d 246 (10th Cir. 1985), the federal district court addressed the Utah Act. While it did not address the duty imposed by Utah trespass law, it did note that one reading we had given to the terms "willful misconduct" and "willful and malicious" in other contexts was "the intentional failure to do an act, with knowledge that serious injury is the probable result." *Id.* at 1295 (quoting *Brown v. Frandsen*, 19 Utah 2d 116, 117, 426 P.2d 1021, 1022 (1967)) (defining "willful misconduct"). Another reading we have given the terms noted is "such gross neglect of duty as to evince a reckless indifference of the rights of others on the part of the wrongdoer, and an entire want of care so as to raise the presumption that the person at fault is conscious of the consequences of his carelessness." *Id.* at 1295-96 (quoting *Clayton v. Crossroads Equip. Co.*, 655 P.2d 1125, 1131 (Utah 1982)) (dictum relying on non-Utah sources equating "willful and malicious" with "gross negligence" or "reckless indifference"). But see *Atkin Wright & Miles v. Mountain States Tel. and Tel. Co.*, 709 P.2d 330, 335 (Utah 1985) (dictum defining "willful misconduct" as one step beyond "gross negligence," which is defined as "reckless indifference," in that "a defendant must be aware that his conduct will probably result in injury"). The federal court also noted that Prosser describes "willful or wanton misconduct" as "an aggravated form of negligence, different in quality rather than degree from ordinary lack of care." *Id.* at 1296 (quoting W. Prosser, *Law of Torts* §34, at 184 (4th ed. 1971)). The federal district court did not attempt to reconcile any conflict in the Utah cases, but simply found the complaint insufficient to allege the degree of "intent, knowledge or reckless indifference ... of any dangerous condition" required by section 57-14-6.

According to *Butler*, the standard quoted by the federal court from *Brown v. Frandsen*, which incorporates the elements of knowledge of the dangerous condition and of the fact that serious injury is a probable result, and inaction in the face of such knowledge, is consistent with Utah case law, with the Act's legislative history, and with the decisions of a

majority of courts that has addressed analogous recreational use statutes. *Butler*, at 95-96. We also note that it is consistent with our statement in *Atkin Wright & Miles* and not obviously inconsistent with the general law regarding the duties of a landowner to trespassers, which has never been spelled out in Utah in great detail. See, e.g., *Tjas v. Proctor*, 591 P.2d 438, 441 (Utah 1979); *Stevens v. Salt Lake County*, 25 Utah 2d 168, 478 P.2d 496 (1970); *In re Wimmer's Estate*, 111 Utah 444, 182 P.2d 119 (1947); *Zillman, Utah Tort Law* 40-42 (1987). We, therefore, are inclined to adopt the interpretation of the term "willful or malicious" in section 57-14-6 suggested by *Butler*.

Applying that standard to the facts of the instant case, we conclude that these three elements are not alleged. Paragraph 11(e) states:

Defendant breached the duty of care owed to Plaintiff and was negligent in at least the follow [sic] particulars[:]

...;

(e) in failing to take reasonable action to protect the public in the face of knowledge and information that its canals, ditches, spillways and waterways were unreasonably dangerous to life and limb

Nothing in the quoted allegations avers a knowledge of a dangerous condition, a knowledge that serious injury is the probable result of contact with the condition, or a failure to take any action in the face of this knowledge. *Golding's* allegation is only of a failure to take "reasonable" action to protect the public in the face of knowledge of an unreasonably dangerous condition. This is an allegation of negligence only.³ Therefore, if the Act is found to apply here, the allegations of the complaint, as presently framed, are insufficient to bring it within section 57-14-6.

On the other hand, if the trial court finds that the Act does not apply because the property was not made available by the irrigation company for public recreation by directly or indirectly inviting or permitting that use, the court must then determine whether the complaint alleges a common law cause of action for negligence, an issue that has not been briefed and to which we see no reason to speak.

We reverse and remand to the trial court to determine the Act's applicability and to proceed further in accordance with this opinion.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
Christine M. Durham, Justice

Stewart, Justice, concurs in the result.

1. These sections provide in pertinent part:

57-14-1. Legislative purpose.

The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for those purposes.

....

57-14-3. Owner owes no duty of care or to give warning--Exceptions.

Except as specifically provided in Subsections (1) and (2) of §57-14-6, an owner of land owes no duty of care to keep the premises safe for entry or use by any person using the premises for any recreational purpose, or to give any warning of a dangerous condition, use, structure, or activity on those premises to those persons. 57-14-4. Owner's permitting another to use land without charge--Effect.

Except as specifically provided in Subsection (1) of §57-14-6, an owner of land who either directly or indirectly invites or permits without charge any person to use the land for any recreational purpose does not thereby:

(1) make any representation or extend any assurance that the premises are safe for any purpose;

(2) confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;

(3) assume responsibility for or incur liability for any injury to persons or property caused by an act or omission of the person or any other person who enters upon the land; or

(4) owe any duty to curtail his [or her] use of his [or her] land during its use for recreational purposes.

....

57-14-6. Liability not limited where willful or malicious conduct involved or admission fee charged.

Nothing in this act limits in any way any liability which otherwise exists:

(1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity or for deliberate, willful, or malicious injury to persons or property

Utah Code Ann. §§57-14-1 to-6 (1986) (amended in part 1987 & 1988).

2. The trial court's decision in *Crawford* was the subject of a lengthy and scholarly law review article. See Butler, *Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act*, 1988 Utah L. Rev. 47.

3. It is worth noting that this allegation would not be sufficient, even under the weaker "reckless disregard" standard of *Clayton v. Crossroads Equipment Co.*, 655 P.2d 1125 (Utah 1982).

Cite as

133 Utah Adv. Rep. 6

IN THE SUPREME COURT
OF THE STATE OF UTAH

CHRIS & DICK'S LUMBER AND
HARDWARE, a Utah corporation,
Petitioner,

v.

TAX COMMISSION of the State of Utah,
Respondent.

No. 880188

FILED: April 24, 1990

Original Proceeding in this Court

ATTORNEYS:

R. LaMar Bishop, Salt Lake City, for
petitioner

R. Paul Van Dam, Stephen G. Schwendiman,
Bryce H. Pettey, Salt Lake City, for
respondent

This opinion is subject to revision before
publication in the Pacific Reporter.

ZIMMERMAN, Justice:

Chris & Dick's Lumber and Hardware, Inc., seeks a writ of review of a final decision of the Utah State Tax Commission ordering Chris & Dick's to pay a 10 percent penalty, plus interest, on over \$90,000 due on an untimely filed prepayment of sales tax return. Chris & Dick's claims that the penalty was improperly assessed under the terms of section 59-15-5.1 of the code or, alternatively, that the language of the statute is so vague as to violate the due process clause of the fourteenth amendment of the United States Constitution. We affirm.

Section 59-15-5.1 of the code requires certain entities to prepay a portion of their state and local sales tax liability by June 15th. Utah Code Ann. §59-15-5.1 (1985) (current version at §59-12-108 (Supp. 1989)). Chris & Dick's, through its accountant, filed its prepayment return thirty-eight days late. The Utah State Tax Commission levied a 10 percent penalty against Chris & Dick's under section 59-15-5.1(3), which provides in pertinent part: "In addition to any other penalties for late payment provided in Section 59-15-5, there shall be a penalty of 10% of the total amount of the prepayment due from the date the prepayment return is due." Utah Code Ann. §59-15-5.1 (1985) (current version at §59-12-108 (Supp. 1989)).¹ This penalty was ultimately determined to be \$9,287, plus interest. Upon Chris & Dick's motion for a formal hearing, the commission affirmed the penalty in April

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FILED

MAY 15 1990

COURT OF APPEALS

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May 15, 1990

Clerk of the Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, UT 84102

RE: John Call Engineering, Inc. v. Manti City
Case No. 89-0384CA

Dear Clerk:

Pursuant to Rule 24(j) of the Utah Rules of the Appellate Procedure, appellant John Call Engineering, Inc. submits the following additional authority. The additional authority supplements Point III of Appellant's Reply Brief Argument.

A motion in limine is a motion requesting the Court to prohibit opposing counsel from referring to or offering evidence so highly prejudicial to the moving party that curative instructions cannot prevent the predispositional effect on the jury. Messler v. Simmon's Gun Specialties Inc., 687 P.2d 121 (Okla. 1984). The motion also avoids juror bias generated by objection to the prejudicial evidence at trial. Davidson v. Beco Corp., 733 P.2d 781, 784 (Idaho App. 1986).

The motion recognizes that the mere asking of an improper question in the hearing of the jury may prove so prejudicial that, notwithstanding an instruction by the court to disregard the offensive matter, the moving party will be denied his right to a fair trial. It is the prejudicial effect of the questions asked or statement made in connection with the offer of evidence and not so much the prejudicial effect of the evidence itself, that this very practical tool was designed to reach.

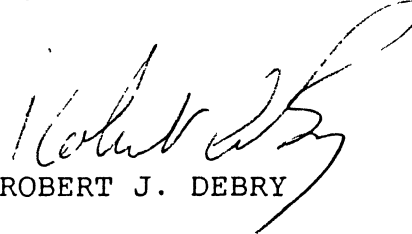
Gendron v. Pawtucket Mutual Insurance Co., 409 A.2d 656, 659 (Me. 1979).

Utah Court of Appeals
May 15, 1990
Page Two

A motion in limine should be granted when two factors are present: 1) the evidence is inadmissible; and 2) the offer, reference or statements made during trial concerning the evidence will tend to prejudice the jury. Whittley v. City of Meridian, 530 So.2d 1341 (Miss. 1988). State v. Evans, 634 P.2d 845, 847-48 (Wash. 1981). See, Caserta v. Allstate Insurance Co., 470 N.E.2d 430, 434-35 (Ohio App. 1983).

Sincerely,

ROBERT J. DEBRY & ASSOCIATES

A handwritten signature in dark ink, appearing to read "Robert J. Debry", is written over the typed name. The signature is fluid and cursive, with a large, sweeping initial "R".

ROBERT J. DEBRY

RJD\jn
cc: Counsel of record

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III.
SUMMARY OF ARGUMENT

POINT I - THE UTAH SUPREME COURT DID NOT DIRECT THE TRIAL COURT TO DETERMINE WHETHER CALL MITIGATED ITS DAMAGES

The mandate of John Call Engineering, Inc. v. Manti City Corporation, 743 P.2d 1205, 1210 (Utah 1987) was "to determine plaintiff's damages and enter judgment in favor of Call." Id. The majority opinion did not instruct the lower court to determine whether Call mitigated his damages. Only a two judge minority concurring opinion suggested that mitigation of damages was an issue. A concurring opinion is no direction to the lower court. It is only an expression of minority views. McGowan v. University of Scranton, 759 F.2d 287 (3d. Cir. 1985).

POINT II - CALL DID NOT HAVE NOTICE THAT MANTI WOULD BE ALLOWED TO AMEND ITS ANSWER TO INCLUDE MITIGATION OF DAMAGES AS AN AFFIRMATIVE DEFENSE

The record establishes that Call had no notice that Manti would be allowed to try the mitigation of damages affirmative defense. The first trial did not try mitigation of damages. Manti never filed a motion to amend its answer. Manti did not include any mitigation of damages issue in the pre-trial order.

POINT III - THE RECORD SHOWS THAT THE LOWER COURT ALLOWED MANTI TO PRESENT IRRELEVANT AND PREJUDICIAL ISSUES AND ARGUMENTS TO THE JURY

The record establishes that the lower court allowed

Manti to inject the following false and prejudicial issues into the trial:

1. The contract was in dispute, when in fact, the Utah Supreme Court ruled that the only issue was Call's damages.

2. Call was paid for everything he did, so he should not be able to recover lost profits.

3. Call could not proceed without written authority, an argument rejected by the Utah Supreme Court in this very case.

4. The taxpayers would have to pay Call.

The lower court did not grant Call's Motion in Limine, nor sustain the majority of Call's objections. The Court also failed to instruct the jury to disregard the arguments.

POINT IV - THE LOWER COURT, OVER THE OBJECTIONS OF CALL, FAILED TO INSTRUCT THE JURY ON HOW TO CALCULATE LOST PROFITS

In this case, Call submitted three jury instructions and a special verdict to tell the jury that lost profits were calculated by determining gross receipts that would have been earned and subcontracting expenses saved by not performing the contract. The Court rejected the jury instructions and the special verdict. Call's legal theory of damages was not presented to the jury in a jury instruction.

POINT V - FROM THE EVIDENCE SUBMITTED AT TRIAL, IT IS IMPOSSIBLE FOR RATIONAL MINDS TO CALCULATE CALL'S LOST PROFITS AT LESS THAN \$56,000

Manti did not call any witnesses. Call's expert witness testified that Call's lost profits were \$136,334.

The time records of the engineer who replaced Call multiplied by Call's contract rates establishes the gross receipts. Call testified about the expenses he saved. Call testified that his damages were more than \$106,00 but somewhat less than \$183,846.

Averaging Call's profit margins taken from his financial record establishes lost profits of \$70,278.

Multiplying the gross receipts by the profit margin of the engineer who replaced Call establishes lost profits of \$56,377.60. It is impossible to rationally calculate damages in a lesser amount.

POINT VI - THERE IS NOT ONE IOTA OF TRIAL EVIDENCE TO SUPPORT MANTI'S MITIGATION OF DAMAGES AFFIRMATIVE DEFENSE

Manti, in its brief, fails to cite to the record one iota of evidence to establish that Call did not mitigate damages. Manti has the burden of proof to establish the mitigation of damages affirmative defense.

All witnesses called were Call's witnesses. Not one of the witnesses furnished any evidence suggesting that Call did not mitigate his damages.

POINT VII - UNLESS CALL IS AWARDED HIS EXPERT WITNESS FEE COSTS, HE DOES NOT HAVE A REMEDY FOR MANTI'S BREACH, AS GUARANTEED BY ARTICLE I, SECTION 11 OF THE UTAH CONSTITUTION

Article I, Section 11 of the Utah Constitution guarantees to Call "a remedy by due course of law which shall be administered without denial . . ."

Call's case required expert testimony to establish lost profits. Expert testimony does not come cheap. Unless Call is awarded his expert witness costs, Call has no effective legal remedy for Manti's breach. The lower court recognized that Call should be awarded his expert witness fee costs.

You can argue that my personal feeling [Judge Tibbs] is expert witness fees in a reasonable rate ought to be allowed.

(Tr. p. 32 line 25, p. 33, line 1.)

VI. ARGUMENT

POINT I - THIS CASE MUST BE REVERSED BECAUSE THE TRIAL COURT DID NOT FOLLOW THE UTAH SUPREME COURT'S MANDATE. THE UTAH SUPREME COURT DID NOT DIRECT THE TRIAL COURT TO DETERMINE WHETHER CALL MITIGATED HIS DAMAGES

A. Introduction.

Manti alleges that the trial court expressly followed "the directions of the Supreme Court by considering mitigation evidence" because "when damages are at issue, mitigation is always a factor to be considered." (Respondent's brief, p. 9, citing no authority.)

Manti is clearly wrong. The Utah Supreme Court did not direct the trial court to consider the mitigation of damages, affirmative defense. Further, the Utah Supreme Court has ruled that mitigation of damages is not always a factor to be considered when damages are the issue.

B. The Utah Supreme Court did not direct the trial court to consider whether Call mitigated his damages.

The mandate of John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205, 1210 (Utah 1987) was "to determine plaintiff's damages, and enter judgment in favor of Call."

No directions were given to the trial court to try any mitigation of damages affirmative defense. A concurring opinion of two justices said that "plaintiff's mitigation efforts should be evaluated with reasonable care." Call at 1210. However, a minority concurring opinion is not a mandate and it is no direction to the lower court. Nothing is decided by a concurring opinion. Boode v. Allied Mutual Co., 458 P.2d 653 (Wyo. 1969). A concurring opinion is not the opinion of the appellate court unless it is joined in by a majority of the appellate judges. State v. Dowe, 352 N.W.2d 660 (Wis. 1984). In summary, the concurring opinion is only an expression of views by a minority of the court and nothing more. McGowan v. University of Scranton, 759 F.2d 287 (3d. Cir. 1985). c.f. Rule 30(c) of the Rules of the Utah Supreme Court:

Any justice concurring or dissenting therefrom may likewise give his reasons in

writing and file the same with the clerk.

In short, the notion that the Utah Supreme Court directed the trial court to try an unpled mitigation of damages affirmative defense is sheer nonsense.

C. Mitigation of damages is not always an issue in breach of contract cases.

Without citation to any authority whatsoever, Manti argues that the lower court followed the Utah Supreme Court mandate because "when damages are at issue, mitigation is always a factor." (Respondent's brief, p. 9).

Manti's unsupported argument is contrary to Utah law in the following particulars:

1. Mitigation of damages is only an issue, when it is affirmatively, pled. Gill v. Timm, 720 P.2d 1352 (Utah 1986). In this case, Manti never pled mitigation of damages.

2. Several Utah Supreme Court cases have held that mitigation of damages is not an issue in a particular contract case. See Hector, Inc. v. United Savings & Loan Ass'n., 741 P.2d 542 (Utah 1987); Alexander v. Brown, 646 P.2d 692 (Utah 1982); Double D. Amusement Co. v. Hawkins, 438 P.2d 811 (Utah 1968).

3. In only one case has the Utah Supreme Court applied the mitigation of damages affirmative defense to a lost profits case. In Utah Farm Production Credit Assoc. v. Cox, 627 P.2d 62 (1981), the Utah Supreme Court held that a turkey

grower voluntarily closed his business and, therefore, could not seek lost profits from a lender who reneged on a loan. Utah Farm Production Credit is a far cry from this case. Call stayed in business. He did not voluntarily quit anything. In a case like Call, the measure of damages is determined by the difference between gross receipts and the expenses which would have been incurred in earning the receipts. Mitigation of damages is not an issue.

D. The lower court's failure to follow the mandate is reversible error.

When a judgment is rendered and remanded with special instructions, (as was the case in Call), the lower court is bound to follow those instructions. Hidden Development Co. v. Miles, 590 P.2d 1244 (Utah 1979).

POINT II - CALL DID NOT HAVE NOTICE THAT MANTI WOULD BE ALLOWED TO AMEND ITS ANSWER TO INCLUDE MITIGATION OF DAMAGES AS AN AFFIRMATIVE DEFENSE

A. Introduction.

Manti, in its brief, argues that Call was not prejudiced by the court allowing Manti to amend its answer because Call had notice that mitigation of damages was a trial issue. Manti's argument is contrary to the record.

B. The record in this case conclusively establishes that Call did not have notice that Manti would seek to try the mitigation of damages affirmative defense.

Any examination of the record of this case conclusively establishes that Call did not have notice that Manti would at-

tempt to try mitigation of damages. Manti's answer to plaintiff's complaint does not plead mitigation of damages. Further, Call submitted comprehensive interrogatories to Manti to discover the factual basis for Manti's affirmative defenses. The answers, copies attached in the addendum, show no indication whatsoever that Manti would seek to try the affirmative defense of mitigation of damages. The record also reveals that Manti did not attempt to amend its pleadings prior to the first trial.

The first trial occurred in April of 1984. Call put on a complete case including damages. An examination of the trial transcript reveals that Manti did not try mitigation of damages. Manti did not ask any mitigation of damages questions on direct or in cross-examination.

For the second trial, Judge Tibbs ordered the parties to prepare and file a pre-trial order. The parties did so. The pre-trial order, copy attached in the addendum, shows that mitigation of damages was not a trial issue.

The second trial commenced on January 13, 1989. Still Manti made no motion to amend its answer.

Prior to trial, Call made a motion in limine to exclude evidence of mitigation of damages. Manti had not moved to amend its answer and Call was not willing to let mitigation of damages be tried by Call's express or implied consent pursuant to Utah Rule of Civil Procedure 15(b). The court chose

to hear Call's Motion in Limine after the jury was impanelled. Only after the court heard and denied Call's Motion in Limine did Manti move to amend its answer by alleging the mitigation of damages affirmative defense. (Tr.p. 72.)

In short, from the first day of the litigation until after the jury was impaneled, neither the pleadings, the responses to discovery nor the pre-trial order placed Call on any notice whatsoever that Manti would try the mitigation of damages affirmative defense.

C. Call was prejudiced.

Call's opening brief, cites to the record wherein the court and Manti's counsel effectively acknowledged that Call was prejudiced by the court's injection of the mitigation of damages defense into the trial.

Manti, responds that Call was not prejudiced because Manti's strategy was to rely on cross examination rather than calling its own witnesses. (Brief of respondent, p. 14.)

Manti's brief misses the point. As shown in Point VI of this brief, Manti failed to meet its burden of proof that Call failed to mitigate his damages. However, Call was prejudiced because the court, by allowing the amendment, also allowed Manti to argue mitigation of damages in its opening argument (Tr. p. 83). The Court followed up with a confusing jury instruction telling the jury that Call had a duty to cut his losses. (Jury instruction No. 21.)

In summary, Call was prejudiced in the following ways:

1. Manti argued to the jury that Call did not mitigate his damages, even though no evidence was submitted by Manti either directly or on cross examination that Call did not mitigate damages.

2. The court, over the objection of Call (Tr. 306) told the jury that Call had a duty to cut his losses. The jury instruction lacked a factual basis. c.f. Powers v. Gene's Building Materials, Inc., 567 P.2d 174 (Utah 1977).

3. Because the amendment was not sought nor granted until after the impanelling of the jury, neither Call nor his witnesses were prepared to try the mitigation of damages issue.

This case cries out for reversal. If it is not reversed, any defendant, after a jury is impanelled, can seek to amend his answer by alleging a new undisclosed affirmative defense. And if the judge grants the motion, the affirmative defense will be tried, despite the fact that Utah Rule of Civil Procedure 15(b) allows trial amendments only by the express or implied consent of the parties. In this case, Call did not consent to trying any mitigation of damages defense.

POINT III - THIS CASE MUST BE REVERSED BECAUSE THE
LOWER COURT ALLOWED MANTI TO PRESENT
IRRELEVANT AND PREJUDICIAL ISSUES AND
ARGUMENTS TO THE JURY

A. Introduction.

At trial and prior to the taking of testimony, Call made a motion in limine seeking to exclude evidence and argument on two irrelevant and prejudicial issues: (1) whether Call should be paid for work not performed; and (2) whether the judgment could be paid out of the taxpayers' pockets. The trial court denied the motion but stated it would sustain objections. (Tr. p.22, 67, 71.)

The trial court's denial of the Motion in Limine invited Manti to inject prejudicial arguments and issues into the trial. Manti accepted the invitation, arguing:

1. The contract was in dispute when, in fact, the Utah Supreme Court had held that the only issue was Call's damages.

2. Call was paid for everything he did so he should not recover lost profits.

3. Call could not proceed without written authority; an argument rejected by the Utah Supreme Court.

4. The taxpayers would have to pay Call's judgment.

Manti argues that Call's allegations are baseless and that no damage was done because the lower court sustained Call's objections. Manti is wrong on both counts.

B. The record shows that Manti presented false, irrelevant, and prejudicial issues and arguments to the jury.

1. The "contract was in dispute" issue.

In Manti's opening statement, Manti's counsel argued to the jury that the contract was in dispute.

This contract that's in dispute, folks is one that goes back to May of 1981.

(Tr. p. 79, lines 15-16.)

The foregoing argument was false and prejudicial. Call established that Manti and Call had a contract for engineering services; that Call had satisfactorily performed up to the time of Manti's breach; and that Manti, without excuse, breached the engineering service contract with Call by hiring another engineer. John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205 (Utah 1987).

Contrary to Manti's brief, the trial court did not sustain Call's objection to the foregoing remarks.

Well its preliminary. I think it's preliminary to put the parties in the respective positions. The objection is overruled.

(Tr. p. 80, lines 10-12.)

2. The "Call was paid for everything he did" issue.

In Manti's opening statement, Manti's counsel stated:

Mr. Call investigated and prepared a design for a sewer system in Manti and was paid the \$22,000 . . . was paid for that service.

(Tr. p. 81, lines 1-4.)

After the design stage was completed by Mr. Call and he was paid approximately \$22,000, Mr. Call provided no further engineering services to Manti City.

(Tr. p. 82, line 35; p. 83 lines 1-2.)

The foregoing statements were prejudicial because the message to the jury was that Call had been paid for everything he did, so he was not damaged. Such an argument is contrary to Utah law which provides for an award of lost profits. e.g. Cook Associates v. Warnick, 664 P.2d 1161 (Utah 1983).

3. The "Call could not proceed without written authority" issue.

During the cross examination of Call, Manti's counsel, relying on a clause in the contract, attempted to show to the jury that Call Engineering would not perform services without written authority.

Q. You wouldn't do it [any right of way work] unless you got together with Manti and had specific written authorization?

(Tr. p. 210, lines 11-13.)

Q. [S]urveying couldn't be done without written authorization from Manti City either, could it?

(Tr. 210, lines 19-20.)

Q. [Referring to the contract addendum] [d]o you get that from this provision of the contract, the middle paragraph that says: "the engineer will not proceed with additional phases of the project until authorization from the Owner?"

(Tr. p. 212, lines 9-12.)

The foregoing quotes were prejudicial, irrelevant and planted false ideas with the jury. During the first trial and appeal, Manti took the position that Call could not proceed without written authorization. That argument was forcefully rejected by the Utah Supreme Court in Call I:

The addendum did not provide a reason whereby Manti City could choose to proceed with the project avoid the valid agreement and hire another engineer.

Call at 1209.

Again, contrary to Manti's brief, the trial court did not sustain Call's objections.

Mr. Gardiner: Objection, Your Honor. The Utah Supreme Court has already construed that contract provision . . . and Mr. Frischknecht knows that.

The Court: I don't know what it is. May I see it please?

Mr. Gardiner: I direct the Court to the Utah Supreme Court's opinion on that very issue.

The Court: Well, the objection is noted and overruled.

(Tr. p. 211, lines 1-11.)

4. The "Taxpayer would have to pay Call" issue.

In closing arguments, Manti's counsel told the jury that taxpayers would have to pay any judgment awarded to Call.

(Tr. p. 318, lines 10-16.)

Call's counsel quickly objected.

Your Honor, I object to this. This is prejudicial. It's an absolute appeal to the taxpayers' prejudice in this case.

(Tr. p. 318, lines 13-16.)

The court sustained the objection. However, the Court did not tell the jury that they were not to consider whether the judgment was to be paid from the taxpayers' pocket.

The objection is sustained. Ladies and gentlemen of the jury, Manti City is the defendant in this action. Not you.

(Tr. p. 318, lines 17-19.)

The Court's failure to properly admonish the jury is reversible error. Annot. Counsel's Appeal in Civil Case to Self-interest or Prejudice of Jurors as Taxpayers, as a Ground for Mistrial, New Trial or Reversal, 93 A.L.R.3d 556 (1979.)

C. Conclusion.

Contrary to Manti's responding brief, Call's allegation that Manti's counsel injected irrelevant and prejudicial issues into the trial are not baseless. Further, the court did not sustain the objections and admonish the jury as to the true facts and correct legal principles involved. The Court's failure to do so is reversal error.

POINT IV - THIS CASE MUST BE REVERSED BECAUSE THE LOWER COURT FAILED TO INSTRUCT THE JURY ON HOW TO CALCULATE LOST PROFITS.

In this case, Call sought lost profits resulting from Manti's breach of the engineering services contract.

Lost profits are determined by computing the dif-

ference between the gross receipts that would have been received but for the breach, less the expenses saved by not having to perform the contract. Cook Associates v. Warnick, 664 P.2d 1161 (Utah 1983); Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984); Sawyers v. FMA Co., 722 P.2d 773 (Utah 1986).

Call submitted two proposed jury instructions to assist the jury in calculating lost profits, instructions No. 8, and No. 12.

Instruction No. 8 told the jury the contract rates Manti agreed to pay Call for services rendered. Only by taking the rates and multiplying them by the hours Call would have earned on the contract, could the jury determine the gross receipts, the first element requisite to determining lost profits. The Court refused the instruction.

Call also submitted jury instruction no. 12 and amended jury instruction No. 12. These instructions set forth the Utah Supreme Court's formula for calculating lost profits. These jury instructions were also rejected by the Court.

Manti's brief argues that the instructions taken as a whole were adequate. (Respondent's brief, p. 16.)

Manti's assertion is nonsense. For jury instructions to be adequate, the applicable principle of law must correctly be presented to the jury in a clear and understandable manner. Wellman v. Noble, 12 U.2d 350, 366 P.2d 701 (Utah 1961). The court is required to instruct the jury on how to measure

damages and to tell the jury the elements for which damages can be awarded. Judd v. Rowley's Cherry Hill Orchard, Inc., 611 P.2d 1216 (Utah 1980); City of Phoenix v. Wade, 428 P.2d 450 (Ariz. App. 1967); c.f. Dixon v. Stewart, 658 P.2d 591 (Utah 1982).

The jury instructions, without Call's proposed instructions 8, 12, and special verdict form, provided no assistance to the jury on how to calculate the lost profits. The jury instructions also failed to present Call's damage legal theory. The failure to give the instructions was reversible error requiring a new trial. Startin v. Madsen, 237 P.2d 834 (1951); Hardman v. Thurman, 239 P.2d 215 (1951).

POINT V - FROM THE EVIDENCE SUBMITTED AT TRIAL, IT IS IMPOSSIBLE FOR RATIONAL MINDS TO CALCULATE CALL'S DAMAGES AT LESS THAN \$56,000

In this action, Call seeks lost profits. Lost profits may be established by:

1. Expert opinions. Cook Associates v. Warnick, 664 P.2d 1161 (Utah 1983); or
2. Evidence of gross receipts that would have been received less expenses that would have been incurred. Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984); Sawyers v. FMA Leasing Co., 722 P.2d 773 (Utah 1986); or
3. Records and testimony of a similar business owner. Cook, supra. Call put on all three types of evidence. Each type of evidence shows that Call sustained

damages of at least \$56,000. Manti put on no evidence to rebut Call's evidence. (Tr. p. 315-316.) Call made a motion for a directed verdict and for a judgment notwithstanding the verdict. Both motions were denied.

In Call's opening brief, Call argued it was impossible to rationally calculate lost profits of less than \$56,000. Manti responded by taking the \$56,000 figure and subtracting \$22,000 paid to Call, for previous work. Manti then says the jury could have found that Call did not mitigate his damages, so the \$13,440 verdict is justified. (Respondent's brief p.22.)

There are two problems with Manti's hypothesis. First, the \$22,000 cannot be deducted from the \$56,000. Call contracted with Manti to do an engineering service contract. The first phase of the contract called for a preliminary report. Call at 1207. Call completed phase I and was paid \$22,000. Thurgood Engineering was then hired by Manti. Thurgood completed the other phases of the contract. The \$56,000 figure was obtained by taking the gross receipts (Call's contract rate times Thurgood's hours) and multiplying it by Thurgood's profit margin. There is no rational reason for deducting the \$22,000 Call was paid for work not duplicated by the replacement engineer.

There is also no rational reason for deducting any amount for failure to mitigate damages. More importantly,

there is no evidence to support any made-up deduction. See Point VI of this Brief.

In summary, the unimpeached and uncontroverted evidence shows that Call's lost profits cannot be less than \$56,000.

POINT VI - THERE IS NOT ONE IOTA OF EVIDENCE TO SUPPORT MANTI'S MITIGATION OF DAMAGES AFFIRMATIVE DEFENSE

With little or no citation to the record, the theme of Respondent's Brief is that the jury accepted Manti's mitigation of damages affirmative defense. (e.g. Respondent's Brief p. 22.) Manti's failure to cite to the record is not surprising. There is nothing in the record supporting a mitigation of damages affirmative defense.

Mitigation of damages is, pure and simple, an affirmative defense. Gill v. Timm, 720 P.2d 1352 (Utah 1986); Pratt v. Board of Education, 564 P.2d 294 (Utah 1977).

The affirmative defense burden of proof is on the party asserting it. It is up to the defendant to prove that a plaintiff failed to mitigate his damages. Pratt v. Board of Utah County School District, 564 P.2d 294 (Utah 1977). The defendant must prove each and every fact material to his affirmative defense. Pacific Insurance Co. of New York v. Frank, 452 P.2d 794 (Okla. 1969); Wendell v. Foley, 594 P.2d 750 (N.M. App. 1979).

In this case, Manti freely admits it did not call any

witnesses nor present any evidence of its own on the mitigation of damages issue. It relied solely on cross examination.

[I]nstead of producing numerous witnesses or evidence of its own regarding mitigation, Respondent's trial strategy relied on cross examination of appellant's own witnesses.

(Respondent's Brief p. 14.)

However, a review of the trial transcript shows that Manti failed to present any evidence, on cross examination, or otherwise, that Call failed to mitigate his damages. Mitigation of damages means only that:

[T]he aggrieved party [to a contract] may not, either by action or inaction aggravate the injury occasioned by the breach, but has a duty to actively mitigate his damages.

Utah Farm Production Credit Assoc. v. Cox, 627 P.2d 62 (Utah 1981); see Angelos v. First Interstate Bank of Utah, 671 P.2d 772 (Utah 1983); DeBry & Hilton Travel v. Capitol International Airways, 583 P.2d 1181 (Utah 1978).

In this case, there is no evidence that Call aggravated the injury either by action or inaction.

The witnesses called at trial were:

David Thurgood - The engineer hired by Manti to replace Call.

Randy Peterson - Call's CPA.

Charles Peterson - Call's economic consultant; and

John Call - Principal of Call Engineering.

Manti's counsel did not ask any questions about

mitigation of damages to David Thurgood or Randy Peterson. Further, the few questions asked by Manti's counsel to John Call conclusively shows that Call did not aggravate the damages either by action or inaction:

Q. [S]o on the 23rd of March 1982, when you became aware of the problems [Manti's breach], what did your firm do?

A. Well, I wrote a letter, I think to you, to respond and indicated that the contract was still in force.

Q. In 1982, Mr. Call, did you provide any engineering services to anyone?

A. Oh, sure.

Q. So, since March 23rd of 1982, when you became aware of the problems with the contract, your engineering firm went forward and you continued to do other work. . .and your revenue, ranged from \$150,000 to over \$300,000 for each of the years since 1981.

A. That's correct, except. . .1982. That was a down year.

(Tr. of Proceedings p. 242 lines 3-9; p. 243 lines 14-19, 23.)

In short, Call continued in business after Manti's breach. There is no showing that Call aggravated the damages caused by Manti's breach, either by action or inaction.

Further, the evidence conclusively showed that Call did not recover the lost profits, flowing from Manti's breach in 1982.

A. 1982. That was a down year.

Q. Was there ever a time from 1982 to 1985 that your firm didn't have the capacity to do Manti project, as well as the work you were doing?

A. No. We could have done that.

(Tr. p. 245 lines 13-16.)

The only other witness who testified on the mitigation of damages issue was the economic consultant. He testified that Call's gross revenues for 1982, the year the contract was breached, were \$314,000, but that Call had the capacity to gross an additional \$240,000 in revenue. (Tr. p. 282 lines 7-14.) Of course, Call did not generate that extra revenue because Manti breached the engineering service contract. Call's lost profits were \$136,324 (Tr. p. 278, lines 208.)

In summary, mitigation of damages is an affirmative defense. There is nothing in the record suggesting that Call aggravated the contract damages. The same evidence shows that Call did not regain the lost profits. Manti did not call any witnesses of its own. There is no evidence, none, that proves that Call failed to mitigate damages.

POINT VII - UNLESS CALL IS AWARDED HIS EXPERT WITNESSES FEE COSTS, HE DOES NOT HAVE A REMEDY BY DUE COURSE OF LAW, AS GUARANTEED BY ARTICLE I SECTION 11 OF THE UTAH CONSTITUTION

Manti argues that prior cases have denied expert witness fee costs. However, not one of those cases considered whether denying expert witness fee costs in a complex contract case denies a plaintiff a remedy as guaranteed by Article I Section 11 of the Utah Constitution.

Article I Section 11 of the Utah Constitution guaran-

tees to citizens, including Call, the following rights:

All courts shall be open, and every person for an injury done to him in his person, property or reputation shall have remedy by due course of law which shall be administered without denial. . . .

Thirty-three states have open court's constitutional provisions similar to Utah's. Berry v. Beech Aircraft Corp., 717 P.3d 670 (Utah 1985). The open court's provisions originated with the "Magna Carta." Id. at 674. The open court's guarantee applies to judicial as well as legislative action. e.g. Saylor v. Hall, 497 S.W.2d 218 (Ky.App. 1973). The open court's clauses are designed to accomplish several purposes. "The clear language of the section guarantees access to the courts" to obtain a remedy. Berry, at 675. A primary purpose of these provisions is to assail the once existing evil of paying fines to the king and his officers for delaying or expediting lawsuits or for obtaining justice. Swann v. Kidd, 79 Ala. 431 (1885); or to prevent justice from being equated with affluence.

The plain and simple fact is that although Call won in the lower court, unless he is granted his expert witness fee costs of \$9,812.54, he is denied a remedy because his award is eaten up by necessarily incurred witness fee costs. Others like Call will be effectively denied access to the court and a remedy. Justice will be equated with affluence.

Manti, in its brief, concludes that if the law (re-

garding witness fee awards) should be rewritten, this is certainly not the case for it. Manti's conclusion is contrary to that of the trial court judge.

[N]ow there's a Supreme Court decision saying I can't award expert witness fees, and it seems to me that for me to come to a contrary conclusion is just ridiculous. However. . . personally, I've always felt just like you. . . but I'm not going to rule that way. But I put it on the record, and you can go up and if you are arguing the rest of it, you can argue that my personal feeling is expert witness fees in a reasonable rate ought to be allowed.

You've got my statement on the record how I personally feel about it. (Emphasis added.)

(Tr. of Proceedings March 3, 1989, pp. 32 lines 19-25; 33 line 1.)

V. CONCLUSION

The record in this case shows that the lower court's verdict and judgment must be increased to \$56,377 or a new trial held on the issue of Call's damages. The remedy shows that the lower court:

1. Did not follow the Utah Supreme Court's mandate;
2. Was not directed by the Utah Supreme Court to try any mitigation of damages affirmative defense;
3. Prejudiced Call by allowing a pleading amendment after the jury was impanelled;
4. Prejudiced Call by revoking a trial continuance;
5. Allowed Manti to present false and prejudicial

arguments; and

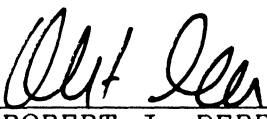
6. Failed to instruct the jury on how to calculate lost profits.

The record also shows there is no evidence supporting the notion that Call did not mitigate his damages. Further, Call did not have notice that mitigation of damages was a trial issue.

Finally, unless Call is granted his expert witness costs, he is denied a judicial remedy for Manti's breach of contract.

DATED this 14th day of February, 1990.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By: 
ROBERT J. DEBRY
DALE F. GARDINER

CERTIFICATE OF MAILING

I certify that on the 23 day of February, 1990 I mailed four true and correct copies of the foregoing CORRECTED APPELLANT'S REPLY BRIEF (Call v. Manti) by depositing the same, postage prepaid, U.S. Mail to:

Paul R. Frischknecht
Attorney for Defendant\Respondent
50 North Main Street
Manti, Utah 84642



SP2A-041\jn

ADDENDUM

PAUL R. FRISCHKNECHT
Attorney for the Plaintiff
50 North Main Street
Manti, Utah 84642
Telephone: 835-4391

Libbyne Wells
SANTA FE COUNTY
SANPETE COUNTY
Wells
11-1-83

IN THE SIXTH JUDICIAL DISTRICT COURT FOR
SANPETE COUNTY, STATE OF UTAH

JOHN CALL ENGINEERING INC.,
a Utah Corporation,

Plaintiff,

ANSWER TO PLAINTIFFS
INTERROGATORIES

vs.

Civil No. 8606

MANTI CITY CORPORATION,
a Municipal Corporation,

Defendant.

Comes now the defendant by and through their counsel
and answers the Interrogatories submitted by the plaintiff
in the above entitled matter as follows:

INTERROGATORIES

1. Describe in reasonable detail the factual basis
for your first defense, that plaintiff's complaint fails
to state a cause of action upon which relief can be granted.

Answer: Utah Code Annotated, Section 63-30-1 et.

al. denies recovery.

2. Describe in reasonable detail the factual basis
for your second defense, that plaintiff's claim is barred
by U.C.A. 63-30-1 et. al.

Answer: Utah Code Annotated, Section 63-30-1 et.

al. grants immunity from suit against a political subdivision.

3. Describe in reasonable detail the factual basis for your third defense, that there has been an accord and satisfaction.

Answer: Plaintiff was paid in excess of \$22,000.00 as work he performed.

4. Describe in reasonable detail all services that you claim plaintiff has rendered for you pursuant to the contract attached to the complaint in this case.

Answer: The plaintiff, John Call Engineering was engaged by defendant Manti City Corp. to conduct a sewer study on the installation of a sewer in Manti City.

5. Itemize all payments you claim to have made for the services described in Interrogatory 4 above.

Answer: See Attachment #1.

6. Have you employed anyone to perform services described in the contract attached to the complaint in this case?

Answer: Yes.

7. If so:

(a) -- Describe in reasonable detail the services performed, and;

(b) -- Itemize all payments made for those services.

Answer: Following the release of Call Engineering by Manti City, (referenced letter from Manti City signed

by Paul Frischknecht, dated March 22, 1982 and letter to Call Engineering signed by Mayor Robert Bessey dated April 23, 1982); Manti City then engaged Thurgood and Associates to conduct a sewer study. (See attached copies of Sewer Contracts with Thurgood and Associates labeled descriptive attachment for Page 6, Item 7a).

See attachment #2 -- payments made to Thurgood and Associates.

8. Identify every person to defendant's knowledge who was present at the May 6, 1981 Manti City Council meeting.

Answer: Review of the minutes of the May 6, 1981 Manti City Council meeting lists the following persons present:

Mayor Ben Kjar; Councilman Robert Bessey; Councilman Bryan McArthur; Councilman Lionel Kind, Councilman Stan Voorhees, Councilman Jay Cluff and City Recorder William A. Mickelson. Citizens present before the discussion with John Call, Mr. Lynn Cox, citizens present after the discussion with John Call included Mr. Lynn Cox and Mr. Wilbur Lund.

9. Describe in reasonable detail the following:

(a) -- The substance of all discussions at the May 6, 1981 Manti City Council meeting regarding the subject of contracting with plaintiff;

(b) -- Those who took part in those discussions;

(c) -- What each person said during the discussion.

Answer: Reference copy of minutes May 6, 1981, copy attached hereto.

10. Identify any statement, conversation or other communication, oral or written, between plaintiff and any officer of defendant concerning the subject matter of the contract attached to the complaint in this case, including:

(a) -- The time of such communication;

(b) -- The place of such communication;

(c) -- The persons present at the time and place of such communication;

(d) -- The substance of such communication.

Answer: Reference attached copies of written communications and minutes of the City Council meetings of November 18, 1981, February 9, 1982, February 17, 1982 and March 3, 1982.

11. Identify every written statement of a witness or party about the subject matter of the contract attached to the complaint in this case, including:

(a) -- The time such statement was made:

(b) -- The place of such statement;

(c) -- The person who took such statement;

(d) -- The substance of such statement.

Answer: None to our knowledge, with the exception of those in Item #10 above.

12. Identify every document referring to or relating to the subject matter of the contract attached to the complaint in this case.

Answer: Reference attached copies of the minutes, letters and memorandums.

13. Identify every witness you intend to call at trial, and summarize in reasonable detail the testimony you expect them to give.

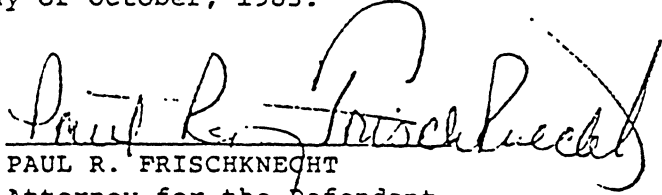
Answer: Ben Kjar, Robert Bessey, Bryan McArthur,
Lionel King, Stan Voorhees, Jay Cluff, and William Mickelson.

Each will testify they did not read the agreement and understood the agreement presented to them was limited to sewer study purposes only.

14. Identify each exhibit you intend to introduce into evidence at trial.

Answer: Those exhibits attached to this set of interrogatories will be introduced at trial. If others are determined to be used, such information will be made known before the time of trial.

DATED this 31 day of October, 1983.

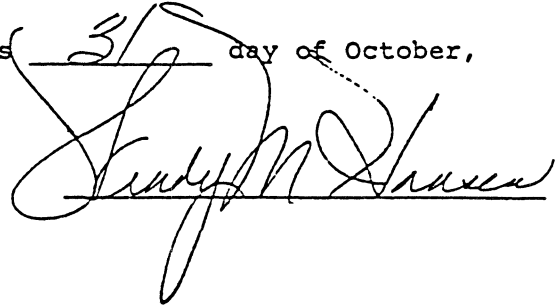

PAUL R. FRISCHKNECHT
Attorney for the Defendant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct
copy of the above and foregoing Interrogatories to:

Robert J. DeBry, Esq.
Attorney at Law
965 East 4800 South, Suite 2
Salt Lake City, Utah 84117

postage prepaid thereon, this 31 day of October,
1983.

A handwritten signature in cursive script, appearing to read "Linda M. Hansen", is written over a horizontal line.

DALE F. GARDINER -A1147
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff
4001 South 700 East, Suite 500
Salt Lake City, Utah 84117
Telephone: (801) 262-8915

IN THE SIXTH JUDICIAL DISTRICT COURT FOR
SANPETE COUNTY, STATE OF UTAH

JOHN CALL ENGINEERING, INC.,)	
a Utah corporation,)	
)	PRETRIAL ORDER
Plaintiff,)	
)	
vs.)	Civil No. 8606
)	
MANTI CITY CORPORATION,)	JUDGE DON V. TIBBS
a municipal corporation,)	
)	
Defendant.)	

IT IS ORDERED:

I.

This is an action for damages caused by defendant Manti City corporation's breach of an engineering service contract with plaintiff John Call Engineering, Inc.

II.

POSSIBILITY OF SETTLEMENT

The parties have discussed settlement and are approximately \$95,000 apart on their respective offers.

FILE COPY

III.

CONTENTION OF THE PARTIES

(A) Admitted Facts and Issues.

(1) This Court has jurisdiction over the parties;

(2) Venue is proper;

(3) Plaintiff is a consulting engineering firm;

(4) Defendant is a Utah municipality;

(5) On or about May 6, 1981, the parties entered into an engineering services contract for the study, design and supervising of construction of a sewer system for the defendant. The contract is Exhibit 1 previously admitted into evidence with this Court.

(6) Plaintiff performed phase I of the contract and presented the preliminary study report to Manti City in October 1981.

(7) Defendant paid plaintiff approximately \$22,000 for completing the services called for in Phase I of the contract.

(8) Subsequently, defendant Manti City breached the contract by declaring the contract null and void and by hiring the engineering firm of Thurgood and Associates to

design and supervise the construction of the sewer system, which they did.

(9) The cost of the completed sewer system was \$2,096,883.63.

(10) The amount paid to Thurgood and Associates Engineering for services performed on the sewer project was \$186,400.00.

(11) Call was in compliance with the contract up until the time Manti breached the contract. The purpose of this trial is to determine the amount of damages.

(12) Judgment is to be entered in favor of the plaintiff in an amount determined by the jury.

IV.

The reservations as to the facts cited in Paragraph III or as follows: None.

V.

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary: None.

VI.

The following issues of fact and no other remain to be litigated upon the trial:

a) The amount of damages sustained by the plaintiff by reason of defendant's breach of the contract.

VII.

The exhibits to be offered at the trial, together with a statement of all admissions, by and all issues between the parties with respect thereto are as follows:

A) Plaintiff's exhibits:

- (1) All trial exhibits previously admitted into evidence by the Court, that the Court rules are relevant to the issue of damages;
- (2) The contract entered into between Thurgood & Associates and Manti City;
- (3) The project time sheets of Thurgood and Associates on the sewer project;
- (4) The project time summary prepared by Thurgood and Associates;
- (5) Plaintiff's financial records for 1981-84

and 1979-81, if plaintiff can reasonably locate them;

- (6) Randy Peterson's projection of gross receipts that would have been paid to Call pursuant to the contracts;
- (7) Thurgood and Associates's invoices to Manti City for the sewer project;
- (8) Plaintiff's calculations as to the amount of net profits plaintiff would have received on the contract;
- (9) An updated lost profits analysis performed by Frank Stuart and Associates.

Defendant has no objection to exhibits identified in paragraphs (1), (2), (3), and (4), above and stipulate that they may be admitted into evidence. Defendant reserves his objections to exhibits 5-9 above.

(B) Defendant's exhibits: Defendant does not anticipate using any exhibits other than plaintiff's exhibits identified above.

VIII.

The following issues of law, and no other, remain to be litigated upon the trial.

(A) The formula to be used in measuring Call's damages.

IX.

This matter is set for ^{jury} trial on Thursday, January 12, 1989, at 10:00 a.m. Estimated time of trial is two days.

X.

WITNESSES

Plaintiff will call as witnesses:

John Call

Chuck Peterson

David Thurgood

Randy Peterson

Plaintiff may call as witnesses:

Frank Stuart

Brandon Tuttle

Rebuttal witnesses if needed and not anticipated at this time.

Defendant will call as witnesses:

David Thurgood, and rebuttal witnesses as needed and not anticipated at this time.

XI.

Discovery is complete.

XII.

The foregoing admissions have been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the Court of this case, unless modified to prevent manifest injustice.

DATED this _____ day of _____, 1989.

BY THE COURT:

DISTRICT JUDGE

ROBERT J. DEBRY & ASSOCIATES

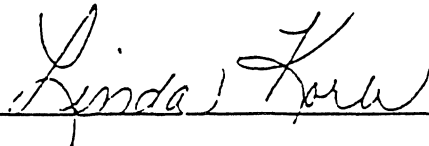
By 
Attorney for Plaintiff

PAUL FREISCHNECHT
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing PRETRIAL ORDER (John Call Engineering, Inc., vs. Manti City Corporation), was mailed this 10th day of January, 1989, by depositing same in the U.S. Mail, postage prepaid, to the following:

PAUL R. FRISCHKNECHT
Attorney for the Defendant
50 North Main Street
Manti, Utah 84642



/ek