

1989

Jacobsen, Morrin and Robbins Construction Company v. St. Joseph High School Board of Financial Trustees : Brief of Respondent

Utah Court of Appeals

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CKET NO.

890468-CA

IN THE UTAH COURT OF APPEALS

JACOBSEN, MORRIN & ROBBINS
CONSTRUCTION COMPANY,

Plaintiff-
Respondent,

v.

Case No. 890468-CA

ST. JOSEPH HIGH SCHOOL
BOARD OF FINANCIAL TRUSTEES.

(Priority Classification 14(b))

Defendant-
Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER AND JUDGMENT
OF THE HON. JOHN F. WAHLQUIST
OF THE SECOND DISTRICT COURT OF UTAH
IN AND FOR WEBER COUNTY
DISTRICT COURT CASE NO. 94630

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JACOBSEN, MORRIN & ROBBINS
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Plaintiff-
Respondent,

v.

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JURISDICTION

Original appellate jurisdiction over the Judgment entered by the Second Judicial District Court in and for Weber County, Utah is vested in the Utah Supreme Court pursuant to UTAH CODE ANN. Section 78-2-2(3)(j) (1989 Supp.). The Supreme Court has elected, pursuant to UTAH CODE ANN. Section 78-2-2(4) (1989 Supp.), to transfer this appeal to the Utah Court of Appeals. Therefore, jurisdiction is vested in the Court of Appeals pursuant to UTAH CODE ANN. Section 78-2a-3(2)(j) (1989 Supp.).

STATEMENT OF ISSUES ON APPEAL

As a preface to its responses to the three issues raised on appeal by Defendant St. Joseph High School Board of Financial Trustees ("Defendant"), Plaintiff Jacobsen, Morrin and Robbins Construction Company ("Plaintiff") has raised two additional issues which are dispositive of the appeal without reaching its merits:

1. Whether the appellate court lacks jurisdiction over the appeal because of Defendant's failure to file a Notice of Appeal within the time provided by law; and

2. Whether the appeal is barred by Defendant's voluntary payment of the Judgment amount and the execution of a Satisfaction of Judgment which does not preserve any part of the appeal.

Defendant's issues presented on appeal are not restated here but are responded to in Points 3, 4 and 5 respectively.

STATEMENT OF THE CASE

A. Nature of the Case. The present case is a contract action by Plaintiff against Defendant on a written "cost plus" contract for the remodeling of St. Joseph's Gymnasium and the addition of a library. Plaintiff claimed that Defendant had failed to pay approximately \$30,000.00 of construction costs and contractor fees.

Defendant counterclaimed against Plaintiff for construction delay damages and for damages relating to the fact that actual construction costs exceeded the architect's estimate.

B. Course of Proceeding. The case was tried to a jury in the Second Judicial District Court for Weber County, Utah, the Honorable John F. Wahlquist presiding, from December 3 to December 8, 1987. Plaintiff specifically objects to the characterization of the proceedings below as contained in Defendant's Brief (pages 3-4). However, facts relating to the course of proceedings have been included only to the extent that they are relevant to the issues on appeal. Such facts are incorporated in the individual sections of Plaintiff's Brief as applicable.

C. Disposition of the Court Below. On December 8, 1987 the jury returned a Special Verdict awarding Plaintiff a Judgment of \$19,584.01. The jury also by Special Verdict found that Plaintiff owed Defendant nothing on its counterclaims. (Record pages 637-639.)

After the interest issue was briefed by counsel and argued to the Court, Judge Wahlquist granted interest of \$6,350.18 and \$6.40

per day thereafter until the Judgment was entered on February 1, 1988. (Record pages 821-825.)

Based on Plaintiff's Verified Memorandum of Costs and a hearing held thereon on March 23, 1988, Judge Wahlquist awarded costs in the amount of \$232.75. (Record pages 895, 896.)

STATEMENT OF FACTS

Plaintiff declines to give an independent statement of facts. All facts necessary to the disposition of the appeal are appropriately located in the Court's Findings of Fact (Record pages 821-825.)

SUMMARY OF ARGUMENT

POINT I

Defendant's failure to file a timely Notice of Appeal presents an absolute jurisdictional bar to its appeal.

POINT II

By voluntarily paying the full amount of the Judgment, and executing a Satisfaction of Judgment, Defendant has acquiesced in and received the benefit of the Judgment and therefore is barred from appealing any portion of the same.

POINT III

The failure of the Lower Court to give Defendant's requested jury instructions relating to its counterclaim is not a valid basis for reversing the Lower Court's Judgment, because Defendant failed to object to the Lower Court's refusal to give instructions, the instructions were given in essence and the requested instructions even if given could not have benefited Defendant.

POINT IV

The Lower Court's characterization of the architect as the agent of Defendant in the jury instructions was accurate. Even if it was inaccurate, it did not prejudice Defendant.

POINT V

The Lower Court's instruction regarding burden of proof is not a valid basis for appeal because Defendant failed to raise the issue at trial and the instruction as given correctly characterizes the law.

POINT VI

In light of the clear and obvious defects on appeal, Plaintiff is entitled to an award of damages and attorney's fees incurred in defending against this frivolous appeal.

ARGUMENT

POINT I

THE COURT LACKS JURISDICTION OVER THE PRESENT APPEAL BECAUSE DEFENDANT FAILED TO TIMELY FILE ITS NOTICE OF APPEAL.

Defendant's Statement of the Case (Defendant's Brief, pp. 2-4) omits several significant post-Judgment aspects of the present case. Most obviously absent is a statement of the date on which Judgment was entered by the Lower Court. Also absent is any reference to Defendant's Rule 60(b) Motion for Relief from Judgment which was filed, circulated to opposing counsel, argued, and granted on March 23, 1988. Defendant has good reason for deleting this information; a thorough review of the post-trial aspects of

the case conclusively demonstrates that Defendant's Motion for New Trial and Notice of Appeal were not timely filed and, therefore, this Court lacks jurisdiction over the appeal.

A detailed account of the post-trial proceedings is necessary to demonstrate the jurisdictional defect. The following numbered paragraphs recite, in detail, pertinent post-trial proceedings. A multi-colored time line is included as Addendum 1 to clarify the chronology of events described. The time line depicts actions of the Lower Court in black, the Defendant in blue, and the Plaintiff in red.

1. On December 8, 1987, the jury returned Special Verdicts which awarded the Plaintiff an amount of \$19,584.01 on its claim and awarded nothing to Defendant on its counterclaim.

2. On December 18, 1987, counsel for Plaintiff submitted Findings of Fact, Conclusions of Law and a proposed Judgment to the Lower Court after first delivering them to opposing counsel. The Findings, Conclusions and Judgment were consistent with the Special verdicts returned by the jury. (Addendum 2)

3. On January 4, 1988, counsel for Defendant filed a blanket objection to the proposed Findings of Fact and Conclusions of Law alleging that they were unsupported by the evidence. Defendant's Notice of Objection was filed well after the time to object had expired pursuant to Rule 2.9(b) of the Rules of Practice for District and Circuit Courts in effect at that time. (Addendum 3)

4. Simultaneous with its objections, Defendant filed its own Findings of Fact and Conclusions of Law. Defendant's Findings and

Conclusions, inconsistent with the jury's Special Verdicts, purported to award Defendant \$19,012.00 for delay damages and \$83,970.30 for damages relating to the alleged cost overrun on the gymnasium. (Addendum 4)

5. On January 20, 1988, the Lower Court scheduled and held a lengthy hearing on Defendant's objections to the proposed Findings and Conclusions. The Lower Court resolved all objections by specifying several changes to be made in the Findings (the majority of changes related to interest calculations) and finding the remainder of Findings and all Conclusions to be adequate.

6. In Judge Wahlquist's ruling on Defendant's subsequent Motion for New Trial, he stated, "After verdict, the lawyers disputed over what the Court's Findings of Fact, etc., should be. A lengthy hearing was held. All rulings were made in open court in the presence of counsel. Everyone knew what the findings of fact and conclusions of law were to say before they were finally drafted." (Addendum 5)

7. One day later, on January 21, 1988, counsel for Plaintiff drafted new Findings of Fact incorporating the revisions announced by the Court. The revised Findings, along with the approved Conclusions of Law, were mailed to Judge Wahlquist with a cover letter requesting that he enter the same if no objection was received from Defendant's counsel within the period provided by the Rules of Practice. Copies of the Findings and Conclusions were hand delivered to Defendant's counsel on that same date with a copy of the cover letter sent to Judge Wahlquist.

8. Once again Defendant's counsel objected to the Findings of Fact and Conclusions of Law. Defendant's Notice of Objection was hand-delivered to Plaintiff's counsel on January 28, 1988 and was mailed to the Lower Court in Ogden, arriving after the expiration of the time for objections. (Addendum 6)

9. Defendant's second set of objections, like its first set of objections, allege that the Findings and Conclusions were unsupported by the evidence. On that basis, the Defendant objected to (1) the majority of the Findings that the Lower Court had approved on January 20, 1988 as originally drafted; (2) objected to the specific Findings announced by Judge Wahlquist in open court on January 20, 1988; and (3) objected to the Conclusions of Law which were identical to those originally submitted to the Lower Court and approved on January 20, 1988.

10. On February 1, 1988, Judge Wahlquist signed the proposed Findings of Fact, Conclusions of Law and Judgment and entered them in accordance with Rule 58A of the Utah Rules of Civil Procedure. Judge Wahlquist noted on the Judgment that the issue of costs be reserved. (Addendum 7)

11. On March 2, 1988, Plaintiff commenced execution on the Judgment by causing the Lower Court to issue a Writ of Garnishment against First Security Bank on March 2, 1988.

12. Plaintiff provided Defendant with a Notice of Entry of Judgment on March 7, 1988. (Addendum 8)

13. On March 23, 1988, at a hearing scheduled for the purpose of taxing costs, Defendant's counsel submitted a Rule 60 Motion for

Relief from Judgment, unaccompanied by supporting memoranda, to the Lower Court and to counsel for Plaintiff. (Addendum 9)

14. Without prior notice, Defendant's counsel proceeded to argue that counsel for Plaintiff was guilty of gross misconduct for failure to provide Notice of Entry of Judgment to Defendant until the time for appeal had expired. Defendant's counsel argued, on that basis, that the Judgment should be set aside and reentered to allow Defendant an opportunity to file a Motion for New Trial or Notice of Appeal. (Record at 888-890)

15. Over Plaintiff's objection, Judge Wahlquist ordered that the Judgment be "re-entered" as of March 23, 1988, "for the purposes of post-trial motions and notice of appeal." (Addendum 10)

16. The Findings of Fact, Conclusions of Law and Judgment signed on February 1, 1988 were not modified nor affected by the Lower Court's order granting Defendant relief from Judgment.

17. On April 1, 1988, Defendant filed a Motion for New Trial which Judge Wahlquist subsequently denied on April 25, 1989 (Defendant's Brief, page 4.)

18. Subsequent to the Lower Court's denial of Defendant's Motion for New Trial, Defendant filed a Notice of Appeal on May 2, 1989. (Record at 949.)

A. THIS COURT LACKS JURISDICTION OVER THE APPEAL BECAUSE DEFENDANT FAILED TO FILE A NOTICE OF APPEAL, OR OTHER POST-TRIAL MOTION WHICH WOULD HAVE TOLLED THE TIME FOR FILING A NOTICE OF APPEAL, WITHIN THIRTY (30) DAYS OF THE ENTRY OF JUDGMENT ON FEBRUARY 1, 1988.

The Judgment entered on February 1, 1988, was valid in all aspects. The Findings of Fact, Conclusions of Law and a proposed Judgment were duly served on opposing counsel before being presented to the Lower Court for signature in compliance with Rule 2.9(b) of the Rules of Practice for District and Circuit Courts. Even though Defendant's objection was untimely under Rule 2.9¹, the Lower Court afforded Defendant a full opportunity to be heard in the hearing of January 20, 1988. The Findings and Conclusions, revised according to the Lower Court's instruction, were then again served on Defendant's counsel before submission to the Lower Court. When no objection had been received by the Lower Court during eleven (11) days following service of the Findings, Conclusions and Judgment on Defendant's counsel, the Lower Court signed and entered the Judgment. Under these facts, Defendant may not now complain that the Judgment was not properly filed and entered within the meaning of Rule 58A(c) of the Utah Rules of Civil Procedure. See Calfo v. D. C. Stewart Co., 717 P.2d 697 (Utah 1986).

¹Rule 2.9(b): Copies of the proposed findings, judgment, and/or orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be submitted to the court and counsel within five (5) days after service. (Rule 2.9 has been replaced by Rule 4-504 of the Utah Code of Judicial Administration without change in text).

Even had Defendant's second set of objections been timely filed, they would have had no effect on the finality of the Judgment. The Defendant's second set of objections, which were for practical purposes identical to the first set of objections, are barred by the "law of the case". Defendant's objection that the Findings and Conclusions were not supported by the evidence adduced at trial had been previously raised and argued before the Lower Court and decided.

There must be finality, a time when the case in the trial court is really over and the loser must appeal or give up. Successive post-judgment motions interfere with that policy and justice is not served by permitting the losing party to string out his attack on a judgment over a period of months, one argument at a time, or to make the first motion a rehearsal for the real thing the next month.

Sears v. Sears, 422 N.E. 2d 610, 611 (Ill. 1981), cited with approval in Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 969 (Utah App. 1989). See also Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977); Conder v. A.L. Williams & Associates, Inc., 739 P.2d 634, 636 (Utah App. 1987).

The record unequivocally reflects that Defendant failed to file a Notice of Appeal or any other post-trial motion within the allotted thirty (30) days following the February 1, 1988, Entry of Judgment. By referring to the time line at Addendum 1, it is clear that Defendant failed to file any motion whatsoever until March 23, 1988, approximately fifty (50) days after the Entry of Judgment. Further, it is clear that Defendant's 60(b) Motion filed on March

23 would not interrupt the running of the time for appeal even had it been filed during the allotted time for appeal.

A 60(b) motion does not extend or toll the thirty day period within which appeals in the original action must be filed. See Rules of Utah Supreme Court 4(b).

Fackrell v. Fackrell, 740 P.2d 1318 (Utah 1987). Therefore, the first post-Judgment motion filed by Defendant which conceivably could have had an effect on the Judgment was its Motion for New Trial dated April 1, 1988, approximately 60 days after the Entry of Judgment.

Defendant's failure to file a Notice of Appeal or a post-trial Motion which would suspend or toll the running of the time for appeal² is fatal to the appeal. Failure to file within the 30 days provided in Rule 4(a) of the Rules of the Utah Supreme Court strips the court of its jurisdiction over the appeal. Burgers v. Maiben, 652 P.2d 1320 (Utah 1982); Peay v. Peay, 607 P.2d 841 (Utah 1980); In Re Estate of Ratliff, 431 P.2d 571 (Utah 1967). The Utah Supreme Court and the Utah Court of Appeals are specifically precluded from extending the time for appeal by Rule 22(b) of the Rules of the Utah Supreme Court and Rule 22(b) of the Rules of the Utah Court of Appeals, respectively:

²Rule 4(b) of the Rules of the Utah Supreme Court lists only 4 post-trial motions which will suspend the running of the 30 day period:

1. Rule 50(b) Motion for Judgment Notwithstanding the Verdict;
2. Rule 52(b) Motion to Amend or Make Additional Findings;
3. Rule 59(b) Motion for a New Trial; and
4. Rule 59 Motion to Alter or Amend the Judgment.

(b) Enlargement of time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit any act to be done after the expiration of such time, but the court may not enlarge the time for filing a Notice of Appeal . . . except as specifically authorized by law. . . . (emphasis added)

It is apparent from the face of the record that this Court lacks jurisdiction over the appeal. An inquiry of jurisdictional scope is appropriately raised at any point in the proceeding. The issue of jurisdiction may be raised by either party or by the Court sua sponte when it appears on the face of the record. Albertson v. Judd, 709 P.2d 347 (Utah 1985); Neider v. State, 665 P.2d 1306 (Utah 1983).

Presumably, Defendant will argue that the facial jurisdictional defect is cured by the Lower Court's grant of its March 23, 1988 Motion for Relief from Judgment; in granting the 60(b) Motion, the Lower Court declared the effective date of Entry of Judgment to be March 23, 1988 rather than February 1, 1988, thereby extending the time for a Notice of Appeal or post-trial Motion. Therefore it is necessary to examine the validity of the Lower Court's actions and the rationales upon which it relied.

B. THE LOWER COURT CANNOT EXTEND THE TIME FOR APPEAL BY GRANTING RELIEF FROM JUDGMENT AFTER THE TIME FOR APPEAL HAS EXPIRED.

The sole and exclusive means by which the time for filing an appeal can be extended after the thirty (30) day period has expired is pursuant to Rule 4(e) of the Rules of the Utah Supreme Court and its counterpart in the Rules of the Utah Court of Appeals. In 1955, the Utah Supreme Court observed that "[Rule 73(a) of the Utah

Rules of Civil Procedure] prescribes the only circumstance under which the court may extend the time for filing notice of appeal."³ Anderson v. Anderson, 282 P.2d 845, 847 (Utah 1955). The Anderson court indicated further that a trial court cannot extend the time for filing a Notice of Appeal by granting relief from Judgment under Rule 60(b) of the Utah Rules of Civil Procedure when a Notice of Appeal has not been filed in time. Id.

In Utah, relief from a Judgment may be obtained from the trial court or the appellate court by utilizing separate and distinct procedures. The trial court may grant certain forms of relief under Rules 50(b), 52(b), 59(b) or 59(e) if relief is requested within ten (10) days of the Entry of Judgment. The interplay between these rules and separate relief requested from the appellate court can be compared to the function of the esophagus and trachea. If the movant has timely pursued relief from the trial court he is not required to pursue an appeal at the same time. The treatment of a Rule 60(b) motion is, however, quite different.

A 60(b) motion by its own terms "does not affect the finality of a judgment or suspend its operation." Therefore, the movant must pursue the 60(b) Motion and appellate relief simultaneously, including filing a Notice of Appeal within thirty (30) days of the

³In 1985 when the Utah Supreme Court adopted the Rules of Appellate Procedure, the provisions for extending the time of appeal found in Rule 73a were incorporated into Rule 4(e) of the Rules of Appellate Procedure, with certain substantive changes which are discussed in Section C below.

Entry of Judgment. In the present case, Defendant erroneously relies on its 60(b) motion filed fifty (50) days after the Entry of Judgment to cure the jurisdictional defect of failing to file a timely Notice of Appeal. If this were possible, a trial court could extend the time for appeal by several months, or even years, by granting a 60(b) motion at some distant point. The effect would be to obliterate the 30 day time limit for appeals and the limited provisions for extending the time for appeal under Rule 4(e) of the Rules of the Utah Supreme Court.

In Holbrook v. Hodson, 466 P.2d 843 (Utah 1970), the Utah Supreme Court unanimously rejected the same type of "end run" around the appellate rules which Defendant now attempts. In that case, Judgment was entered for plaintiff. Defendant thereafter filed an untimely motion for new trial. After the time for filing an appeal had passed, defendant realized his motion for new trial was untimely and moved pursuant to Rule 60(b) for relief from the late filing. The trial court subsequently granted the motion for relief from the late filing but denied the motion for new trial. Defendant then filed a Notice of Appeal within thirty days of the denial of new trial. The Utah Supreme Court denied the appeal, reasoning that the trial court's grant of a 60(b) motion, after the time for appeal has expired, cannot reinstate the appeal. "There is no manner by which the district court can then subsequently confer jurisdiction upon this court." Id. at 845.

The Holbrook decision is dispositive of the present case. Defendant, like the defendant in Holbrook, filed a 60(b) motion

after the time for appeal had expired. In Holbrook, the defendant sought relief from an untimely filing. In the present case the Defendant seeks relief for a complete failure to file within the time prescribed by law. Both trial courts attempted, by granting 60(b) relief, to retroactively reinstate the jurisdiction of the appellate court. The present case, therefore, must suffer the same fate as Holbrook.

C. THE GROUNDS FOR GRANTING DEFENDANT'S 60(b) MOTION DO NOT MEET THE REQUIREMENTS FOR AN EXTENSION UNDER RULE 4(e), RULES OF THE UTAH SUPREME COURT.

Defendant's 60(b) motion in reality was not for relief from the Judgment. Nor did the Lower Court grant relief from Judgment. Rather, Defendant's 60(b) motion was for relief from the jurisdictional defect of failing to file a timely Notice of Appeal. Ultimately, the Lower Court purportedly granted relief from the failure to file a timely appeal, not from the Judgment itself. However, Defendant's error was not simply in mislabelling the requested relief. The grounds advanced by Defendant simply did not justify an extension of time to appeal. The grounds submitted by Defendant in support of requested Rule 60 relief was that Plaintiff's counsel failed to give Defendant notice of Entry of Judgment until the time for appeal had expired and thereby prevented the defendant from moving for a new trial under Rule 59 or filing a notice of appeal. Based on that sole rationale, Judge Wahlquist granted the 60(b) motion, purportedly relieving Defendant from its failure to file a timely appeal. In a letter written on the same day that Judge Wahlquist granted the 60(b) motion,

Defendant's counsel describes Judge Wahlquist's reasoning in granting the motion.

Judge Wahlquist said that it was apparent to him that whoever lost at trial would want to appeal, and so there was a real prejudice in the plaintiff not notifying us of the entry of judgment, and so judgment would be reentered as of today so that we could file a motion for new trial and/or appeal. (Addendum 11)

The basis on which Defendant's Motion for Relief was submitted and admittedly decided does not satisfy the requirements necessary for an extension of time to appeal under Rule 4(e). Rule 4(e) of the Rules of Utah Supreme Court provides, in part:

The district court, upon a showing of excusable neglect or good cause may extend the time for filing a notice of appeal upon motion filed not later than thirty days after the expiration of the time prescribed by subparagraph (a) of this rule. . . .

By reading Rule 4 of the Rules of the Utah Supreme Court in conjunction with Rule 58A(d) of the Utah Rules of Civil Procedure it is obvious that the Plaintiff's failure to give notice of Entry of Judgment cannot constitute excusable neglect or good cause. Rule 58A(d) provides:

The prevailing party shall promptly give notice of the signing of entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

Rule 58A(d) of the Utah Rules of Civil Procedure clearly demonstrates that the failure to give Notice of Entry of Judgment, as a matter of law, does not constitute excusable neglect nor good cause for extending the time within which to file a notice of appeal pursuant to Rule 4(e).

The clear intent of the Utah Rules of Civil Procedure and Appellate Rules is illustrated by reviewing specific changes made to the rules and the development of the current rules. Prior to January 1, 1985, Rule 73(a) provided:

(a) When and how taken. When an appeal is permitted from a District court to the Supreme Court, the time within which an appeal may be taken shall be one month from the entry of the judgment or order appealed from unless a shorter time is provided by law, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment, the district court in any action may extend the time for appeal not exceeding one month from the expiration of the original time herein prescribed. (emphasis added)

With the adoption of the Utah Rules of Appellate Procedure in 1985, the failure of a party to receive notice of entry of judgment, which had been hailed by Utah Courts as the only circumstance under which the trial courts might extend the time for filing a notice of appeal, (Anderson v. Anderson, supra, Holbrook v. Hodson, supra), was deleted from the rule. Almost concurrently, Rule 58A(d) was amended in 1986 to add the final sentence, "However, the time for filing a Notice of Appeal is not affected by the notice requirement of this provision."

The changes in the Rules of Civil Procedure and Appellate Rules evidence a clear intent to eliminate failure to give or receive notice of entry of judgment as a basis for extending the time of appeal. Under the present rules of the Utah Supreme Court "excusable neglect" is governed by a strict standard. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984). The

Advisory Committee Note to Rule 4 of the Rules of the Utah Supreme Court explains:

Excusable neglect and good cause under this paragraph refer generally to an extraordinary circumstance that prevented the movant from filing a timely notice of appeal and not to inadvertence or oversight on the part of counsel or to the failure of the client to authorize an appeal.

Under the facts of the present case, Plaintiff's failure to provide Notice of Entry of Judgment does not constitute an extraordinary circumstance that prevented the Defendant from filing a timely notice of appeal. As discussed above, two separate sets of Findings and Conclusions were submitted to Defendant's counsel, a lengthy hearing was held on Defendant's objections to the proposed Findings and Conclusions, the Lower Court announced its Findings and Conclusions in open court and Defendant's counsel knew or had reason to know of the imminence of Entry of Judgment. Under those circumstances, Defendant's failure to file a timely Notice of Appeal was, most likely, a result of inadvertence, oversight or a lack of vigilance on the part of counsel. At a minimum, Defendant's counsel apparently did not inquire nor attempt to ascertain whether Judgment had been entered for more than five weeks following his receipt of the Findings, Conclusion and Judgment which were ultimately signed and entered by the Lower Court.

POINT II

DEFENDANT IS BARRED FROM PURSUING THIS APPEAL BY THE DOCTRINE OF ACQUIESCENCE AND ACCEPTANCE OF BENEFITS OF JUDGMENT.

On April 25, 1989, Judge Wahlquist denied Defendant's Motion for New Trial, holding that Defendant's payment of the full Judgment amount constituted a complete end to the matter and estopped Defendant from seeking a limited new trial. (Addendum 5) Judge Wahlquist's ruling is not only dispositive of Defendant's Motion for a New Trial but is also dispositive of this appeal. Utah courts have consistently held since the case of Sierra Nevada Mill Co. v. Keith O'Brien Co., 156 P. 946 (Utah 1916) that when a Judgment is voluntarily paid, the amount accepted, and the Judgment satisfied, "the controversy has become moot and the right to appeal is waived." Jensen v. Eddy, 514 P.2d 1142, 1143 (Utah 1973). Under the facts of the present case and applicable law, no basis exists for disturbing this matter, which came to final rest on April 14, 1988. A brief review of only a few facts is necessary to verify Judge Wahlquist's conclusion. The facts set forth below are also included in the multi-colored time line at Addendum 1.

1. On March 2, 1988, Plaintiff began executing on its Judgment by serving a Writ of Garnishment on Defendant's bank.
2. On March 8 in a telephone conversation, Defendant's counsel agreed to immediately deliver a check in the amount of \$19,634.71 and the remainder of the Judgment balance within 30 days if Plaintiff would suspend its execution attempts. Plaintiff agreed and received the partial payment that same day.
3. On April 4, 1988, Defendant hand-delivered a check for the remaining Judgment balance and a

Satisfaction of Judgment to counsel for Plaintiff.

4. On April 6, 1988, Defendant's counsel mailed Plaintiff a Satisfaction of Judgment which had been revised at the request of Plaintiff's counsel.
5. On April 14, 1988, Plaintiff's counsel executed the Satisfaction of Judgment and filed it with the Lower Court.

In Trees v. Lewis, 738 P.2d 612 (Utah 1987), the Utah Supreme Court stated as a general rule that one who accepts a benefit under a Judgment is estopped from later attacking the Judgment on appeal, and one who acquiesces in a Judgment cannot later attack it. Hence, in the present case, Defendant may not appeal having acquiesced by payment of the Judgment; Plaintiff may not appeal having accepted the benefit of payment. Utah courts have also recognized that a party paying a Judgment may accept benefits of the Judgment and thereby be precluded from appeal. Trees at 613. By paying the Judgment, Defendant obtained the benefit of avoiding execution and additional costs and interest. Defendant benefited by avoiding Plaintiff's appeal of the Judgment, which was significantly smaller than prayed for in the Complaint.

Defendant now claims that the only portion of the case at rest is plaintiff's Complaint. Defendant alleges, however, that its Counterclaim for approximately \$150,000.00 remains vital even though the Satisfaction of Judgment drafted by Defendant's counsel fails to reference any intention to preserve the right of appeal upon any portion of the case. In Hollingsworth v. Farmers Insurance Co., 655 P.2d 637 (Utah 1982), the Utah Supreme Court refused to sanction such tactics. There, a Judgment creditor

drafted a general Satisfaction of Judgment with no reference to an intent to appeal any portion of the case. Thereafter, the Judgment creditor attempted to appeal a portion of the Judgment. The Utah Supreme Court refused to allow the appeal, ruling that absent some contrary expression in the Satisfaction of Judgment, the matter was completely at rest and the right to appeal foreclosed.

One of the basic policies of the doctrines of "acceptance of benefits" and acquiescence is to avoid the "surprise attack" tactics which Defendant now seeks to employ.

The rule embodies a valid protection of the successful party in the trial court. An appellant who accepts the benefits of a judgment from which he is appealing accomplishes a significant shift in the burden of risks; he exposes the respondent to the possibility not only to a possible loss on appeal, but also the potential loss of the benefit he has provided to the appellant. (emphasis added)

Trees v. Lewis, 738 P.2d at 613. Defendant should not be allowed to lull Plaintiff into foregoing any appeal of the matter while secretly harboring the intent to subsequently appeal a portion of the Judgment from which only it may benefit.

Defendant relies on the fact that counsel for Plaintiff struck out general release language in the April 4, 1988 Satisfaction of Judgment. (Brief of Defendant, page 4.) In reality, the language stricken out was a unilateral release of the Defendant from any further liability. In light of the fact that the satisfaction itself is a general release of both parties the deleted language was superfluous. Under the Hollingsworth case, the inclusion or exclusion of the stricken language would not justify the

Defendant's subsequent appeal. In Judge Wahlquist's April 25 ruling, he also rejected this argument, stating:

The release in question was executed by plaintiff's attorneys at the invitations of defense counsel. It is, in its general terms, a complete release. Neither side should be permitted to set aside this release. The defendant should be estopped to ask for a limited trial. (Addendum 4)

The requested appeal of Defendant's counterclaims doesn't fall within an exception to the general rule which precludes a post-Satisfaction appeal. Defendant alleges that the doctrines of Acquiescence and Acceptance of Benefit do not preclude an appeal of its counterclaim alone because it is a separate and distinct claim. The Utah Supreme Court in Jensen v. Eddy, supra, recognized an exception to the general rule under the following circumstances:

If a judgment is entered as to one part of a controversy, which is separate and distinct from another part, and disposition of the latter cannot affect the disposition of the former, a party may accept the money or property to which he is entitled and not be deemed to waive his right to appeal as to other independent claims which the court refused to grant. Id.

Unfortunately, Defendant's Counterclaim is not a separate, distinct, independent claim. The Lower Court so ruled in his April 25 ruling on Defendant's Motion for a New Trial:

The issues are so interwoven that it would be illogical to permit the defendant to pick and choose from the accounting, etc., and the delay in construction events, issues only that he wishes to be granted a new trial on. These issues that he chooses to present at a new trial are interwoven with the other issues and cannot in an intelligent manner be separated. (Addendum 5)

The issues of construction costs, delays, and overruns are inextricably interwoven in the threads of both the counterclaim and

complaint. The jury's award to Plaintiff was premised, in part, on the finding that Plaintiff was not responsible for delays and overruns. Therefore, an appeal of Defendant's Counterclaims unavoidably effects the other part of the judgment and is barred.

POINT III

THE LOWER COURT'S FAILURE TO GIVE DEFENDANT'S REQUESTED JURY INSTRUCTIONS IS NOT GROUNDS FOR UPSETTING THE JURY VERDICT.

Defendant complains that the Lower Court improperly failed to give its requested Jury Instructions 1, 2 (Counterclaim for gymnasium cost overruns) 3, and 4 (Counterclaim for delay damages). Defendant's requested jury instructions 1 through 4 are, in fact, stock jury instructions unrelated to its Counterclaims. For the purpose of responding to Defendant's Brief, Plaintiff has assumed that Defendant intended to address the Lower Court's failure to give Defendant's requested jury instructions 9, 10 (Counterclaim for gymnasium cost overrun) 11, and 12 (Counterclaim delay damages).

A. DEFENDANT DID NOT OBJECT TO THE LOWER COURT'S FAILURE TO GIVE REQUESTED INSTRUCTIONS 11 AND 12 AND, THEREFORE, MAY NOT RAISE IT ON APPEAL.

Prior to instructing the jury and closing argument, the Lower Court distributed jury instructions it intended to give, and gave counsel the opportunity to review them and place objections, if any, on the record. (Transcript at page 602.) Defendant's counsel placed several objections on the record but failed to object to the Court's refusal to give instructions 11 and 12. (Transcript 606 through 608.) Rule 51 of the Utah Rules of Civil Procedure

provides, in pertinent part, "no party may assign as error the giving or the failure to give an instruction unless he objects thereto." Therefore, Defendant may not now for the first time on appeal raise that issue.

Rule 51 goes on to state, "Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice may review the giving or failure to give an instruction." While the appellate court may, if it chooses, depart from the general rule and review the failure to give an instruction for which no objection was raised at the trial court, such departures are only made "under unusual circumstances where the interests of justice urgently so demand" (citations omitted), Williams v. Lloyd, 403 P.2d 166, 167 (Utah 1965). Furthermore, the party pursuing the appeal has the burden to present persuasive reasons why the appellate court should invoke such discretion. E. A. Strout W. Realty Agency, Inc. v. W. C. Foy and Sons, 665 P.2d 1320 (Utah 1983). In the instant case, Defendant has advanced no reason whatsoever why this Court should invoke its discretion and depart from the general rule. Under the circumstances, Defendant's appeal of the Lower Court's failure to give requested instructions 11 and 12 must be rejected.

Even ignoring Defendant's failure to preserve its objection at trial, independent grounds exist for rejecting the appeal. Instructions 11 and 12 relate to Defendant's counterclaim allegedly caused by Plaintiff's construction delays. Defendant's theory of delay damages was adequately presented to the jury in special

interrogatories 5A and 5B with their accompanying explanation. (Record at pages 632, 633.) In 1987 this Court rejected an appellant's claim that the trial court failed to instruct the jury on his theory of the claim by failing to give a specific instruction. Jorgensen v. ISSA, 739 P.2d 80 (Utah 1987). In denying the appeal, the Court stated, "It is not prejudicial error to fail to use specific instructions if the substance of the requested instruction is covered in the instructions given." Stratton v. Nielsen, 477 P.2d 152, 153 (Utah 1970). The court explained, "The exact language need not be given but the basic theory espoused must be explained to the jury in ordinary, concise and understandable language." Gilhespie v. DeJong, 520 P.2d 878, 880 (Utah 1974).

The evidence adduced at trial proved conclusively that the completion dates included in the contract were target dates only. Alan Lipman, Defendant's president, was asked if the completion dates were estimates. He responded, "I guess they were target dates. Estimates to me is a broad based guess. Sure, they weren't hard, there was no guarantee in that contract that if they didn't finish it on such and such a date that there was a penalty." (Transcript page 307.) In the absence of a contractual duty to complete construction on a specific date, Interrogatory No. 5A and its accompanying explanation accurately charge the jury with determining if the Plaintiff had unreasonably delayed completion.

B. THE LOWER COURT'S FAILURE TO GIVE INSTRUCTIONS 9 AND 10 WAS NOT CLEARLY ERRONEOUS.

[The failure to give a requested instruction] is not reversible if it is not material; or it did not seriously affect or alter the result; or cause no substantial injury to the complaining party; or if the introduction could not in any event have benefited the party requesting it. (footnotes omitted, emphasis added)

75 Am. Jur.2d Trial Section 589 (1962). In refusing to give instructions 9 and 10, Judge Wahlquist stated that an award under the counterclaim theory would necessarily be offset by the value of the benefit conferred on Defendant. Therefore, Defendant could not have benefited from the instructions had they been given. (Transcript page 606.)

A brief review of undisputed facts condensed from Defendant's witnesses in the trial transcript verifies the correctness of Judge Wahlquist's ruling:

1. The agreement entered into between Plaintiff and Defendant was a cost plus contract (testimony of architect Mike Sanders, Transcript page 36; testimony of Alan Lipman, Transcript page 301). Plaintiff was to be paid the cost of construction plus a mark-up or percentage of 5 percent for profit and overhead (Transcript page 19).

2. The contract was performed under a "fast track" construction mode. (Testimony of Mike Sanders, Transcript page 36; testimony of Alan Lipman, Transcript page 303). In fast track construction a contractor is selected and begins work prior to the completion of plans

and specifications. Final construction documents are completed during the course of construction (Transcript page 17).

3. The architect, prior to completing construction plans or specifications, estimated the cost of the gymnasium remodeling to be \$48,239. That amount was included in the contract as a "budgetary target price" (Transcript page 42). The budgetary target did not constitute a hard dollar figure or firm bid for completing construction (Transcript pages 325, 531).

4. Plaintiff remodeled or renovated the gymnasium according to plan in a good workmanlike manner. (Transcript page 80). The work was completed in accordance with the architect's plans and specifications despite Plaintiff's request to make modifications in order to reduce costs (Transcript pages 127 through 141). The architect admitted that construction could not have been completed, according to his plans for the amounts he estimated (Transcript page 77).

5. All witnesses testified that the \$137,000 charged by Plaintiff actually represented the value of the gymnasium improvements. None of the costs submitted were erroneous, trumped-up or falsified (Transcript pages 88, 314-316).

When Alan Lipman was asked if the \$137,000 accurately represented the value of improvements to the gymnasium he responded

"basically the overall value I guess is there. It's value that we couldn't afford. It's value that we didn't want to spend" (Transcript page 314). Mr. Lipman's testimony accurately depicts the basis of Defendant's Counterclaim for the return of the difference between what Defendant hoped the cost would be and what the cost actually was. Defendant does not claim that it did not ask for the improvements performed by Plaintiff. Defendant does not claim that it got more or less than what it asked for. Defendant does not claim that Plaintiff promised to perform the work for a fixed price. Nor does Defendant claim that Plaintiff's bill misrepresents the actual value of the work performed. What Defendant does claim is that it cost more than what it had anticipated or wanted to pay. No such cause of action exists in American jurisprudence.

The record is devoid of any allegation that Plaintiff acted as an intermeddler, volunteer or otherwise forced an unwanted benefit on Defendant. Defendant requested that the work be performed, Plaintiff performed the work in accordance with the plans and specifications provided. The work was performed by the Plaintiff with the reasonable expectation that it would be paid for the value of its services under a cost plus contract. And, Plaintiff's bill was equal to the value of the services rendered. Under these circumstances, even if Defendant had a valid cause of action, quantum meruit would offset anything awarded to Defendant. Therefore, under the facts of the case and pertinent law Judge

Wahlquist's refusal to give requested jury instructions 9 and 10 was correct.

POINT IV

REFERENCES TO THE ARCHITECT AS AGENT OF THE DEFENDANT
DOES NOT CONSTITUTE PREJUDICIAL ERROR.

Based on the facts of the case, the architect probably was the agent of the Defendant. However, even if no agency existed, the instructions given are not clearly erroneous. At page 13 of Defendant's Brief Defendant cites 5 Am. Jur.2d Architects Section 6 (1962) for the general proposition that "An architect, as far as preparation of plans is concerned, acts as an independent contractor . . ." The language in the ellipsis which Defendant chose to omit is "but so far as regards the performance of his supervisory functions with respect to a building under construction he ordinarily acts as the agent and representative of the person for whom the work is being done." Id. at page 668.

In the present case the architect (1) designed and prepared plans (Transcript page 13); (2) solicited proposals from contractors (Transcript page 15); (3) interviewed the contractors (Transcript page 17); (4) drafted Defendant's contract with Plaintiff (Transcript page 36); (5) reviewed all payment applications for Defendant (Transcript page 54); (6) supervised construction and attended weekly construction meetings (Transcript page 424); and (7) performed final inspections and certified completion of the construction (Transcript page 80).

Under the facts of the case Judge Wahlquist's characterization of the architect as the Defendant's agent was most likely correct. However, even if the architect was, in fact, not the agent of the Defendant, no prejudicial error occurred. The scope of Defendant's appeal is limited, by its own terms, to the counterclaim. Special Interrogatory No. 5A, consistent with Defendant's counterclaim, requested the jury to determine if Plaintiff was responsible for the construction delays (Transcript page 632). If, as the jury determined, the Plaintiff was not responsible for the delay, Defendant has failed to prove an essential element of its counterclaim, causation. See Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1047 (Utah 1984).

If Plaintiff did not cause Defendant's damages it makes no difference who did, unless Plaintiff can be held responsible for the actions of that party. Clearly, Plaintiff was not responsible for the architect's acts. The architect, under its contract, may or may not have been an agent of the Defendant; however, the architect certainly was not an agent of Plaintiff or otherwise in privity of contract. Therefore, as it relates to Defendant's counterclaim against Plaintiff, the Lower Court's characterization of the architect as the Defendant's agent is not clearly erroneous.

POINT V

THE LOWER COURT'S BURDEN OF PROOF INSTRUCTION ACCOMPANYING SPECIAL INTERROGATORY 5B IS NOT SUBJECT TO APPEAL NOR IS IT CLEARLY ERRONEOUS.

The burden of proof issue raised by Defendant at page 14 of Defendant's brief is, again, raised for the first time on appeal.

Defendant failed to object to the burden of proof aspect of Interrogatory 5B and its accompanying explanation (Transcript pages 606 through 608). As stated above in Point III(A), a party may not assign as error the giving or the failure to give an instruction unless he objects at the trial level. Rule 51 specifically provides, "In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection." The objection must be sufficiently specific to give the trial court notice of the claimed error. Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47 (Utah 1974); E. A. Strout Western Realty v. W. C. Foy and Sons, 665 P.2d 1320, 1322 (Utah 1983).

The trial record is totally devoid of any reference to the burden of proof issue or the grounds for an objection thereto. Likewise, Defendant has failed to demonstrate any extraordinary or special circumstance which would necessitate an invocation of this Court's discretion to consider the matter. Therefore, the issue is not properly presented on appeal.

Even if Defendant's failure to object at the trial level is disregarded, Defendant's appeal fails on its facts. Defendant's brief asserts that Plaintiff's argument, that the Defendant or architect actually caused the delay, is an affirmative defense for which Plaintiff bears the burden of proof. Defendant misconstrues the burdens of the respective parties. As Counterclaimant, Defendant bears the burden of proving the elements of its counterclaim. Lima School District No. 12 v. Simonson, 683 P.2d

471, 477 (Montana 1984). One of the essential elements of Defendant's counterclaim for delay damages is that Plaintiff's acts legally caused its damage, or causation. See Highland Construction Co., supra at 1047. The Lower Court's specific instruction that "The defendant must bear the burden of proof, and prove that some delays were unreasonably caused by the plaintiff . . ." merely restates the general rule that a claimant must show that a particular defendant caused it damages in order to recover. No affirmative defense of any nature relieves Defendant from proving the essential elements of its claim.

POINT VI

THIS APPEAL IS SO FRIVOLOUS THAT THIS COURT SHOULD AWARD DAMAGES AND ATTORNEY'S FEES TO PLAINTIFF.

Rule 33(a) of the Rules of the Utah Supreme Court provides as follows:

If the court shall determine that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party.

In O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987), the Utah Court of Appeals defined a frivolous appeal as "one having no reasonable legal or factual basis as defined in Rule 40(a)." The Court of Appeals realized this may create a lesser standard than the standard created by UTAH CODE ANN. Section 78-27-56 (1953, as amended), but "since a party has already been to court once and has had the benefit of one ruling, the decision to appeal should be reached only after careful consideration by the party and counsel."

O'Brien, 744 P.2d at 310. See Cady v. Johnson, 671 P.2d 149 (Utah 1983) (construing the standard created by UTAH CODE ANN. Section 78-27-56 (1953, as amended)).

In Barber v. Emporium Partnership, 750 P.2d 202 (Utah App. 1988), the court awarded the plaintiff costs and attorney fees, finding that the defendant failed to make a timely appeal. Here, Defendant seeks to appeal even though it failed to file any post-trial motion for over 50 days after the Entry of Judgment. Additionally, Defendant is appealing a Judgment for which it sought and received a Satisfaction of Judgment. Finally, Defendant attempts to appeal jury instructions to which it failed to object at trial, without presenting any circumstance justifying review. This makes the Defendant's position as egregious as that of the defendant in Barber.

The Court of Appeals has also cited with approval Auburn Harpswell Association v. Day, 438 A.2d 234 (Me. 1981), which helps define when imposition of sanctions is appropriate. Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988). The court in Day said that sanctions should be applied when "an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment of the lower court; increased costs of litigation; and dissipation of time and resources of the Law Court." Day, 438 A.2d at 239. Here, for the reasons stated above, Defendant has certainly increased the cost of litigation and caused a dissipation of the time and resources of this Court. Furthermore, Defendant

is appealing a Judgment which is not appealable and has been voluntarily satisfied.


Neither Defendant nor its counsel reached the decision to appeal "after careful consideration." O'Brien, 744 P.2d at 310. Had they carefully considered the facts and law they would have realized that there is no legal or factual basis for this appeal. Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Utah App. 1988); Brigham City v. Mantua Town, 754 P.2d 1230 (Utah App. 1988). The record in this case leaves no doubt that the appeal is frivolous. Therefore, Plaintiff suggests that this is an appropriate case in which to award double costs (including attorney's fees) and damages, and remand the matter to the Lower Court for a determination of attorneys' fees on appeal.

CONCLUSION

Based on the foregoing, Plaintiff requests that Defendant's appeal be denied, that the matter be set finally to rest and that Plaintiff be awarded damages and double costs (including attorneys' fees) incurred in defending against the appeal.

RESPECTFULLY SUBMITTED this 16th day of October, 1989.

TIBBALS, HOWELL, MOXLEY & WILKINS

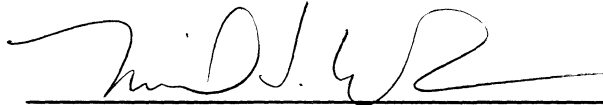
By 
Michael J. Wilkins

Attorneys for Plaintiff-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 1989, I hereby caused four true and correct copies of Respondent's Brief to be hand-delivered to the following counsel of record:

Edward J. McDonough
50 South Main Street, #1250
Salt Lake City, Utah 84144



ADDENDUM 1

Contractor submits Findings, Conclusions and proposed Judgment (hand delivered)			Hearing on Owner's Objection; Court adopts contractors Findings and Conclusions with minor specified revisions	Contractor submits revised Findings Conclusions and Judgment (hand delivered)		Court enters Findings, Conclusions and Judgment	Contractor give Notice of Entry of Judgment (mailed)	Court taxes costs re enters Judgment				Contr Satisf Judgn files	utes
Dec. 8	Dec. 18	Jan. 4	Jan. 20	Jan. 21	Jan. 28	Feb. 1	March 7	March 23	April 1	April 4	April 6	April 1	
ry returns ecial verdict rms		Owner files Objection to Findings, Conclusions, and proposed Judgment; submits own Findings, Conclusions (mailed)			Owner files Objection to revised Findings, Conclusions (hand delivered)			Owner files 60(b) Motion for Relief from Judgment (hand delivered (at hearing)	Owner files Motion for New Trial (mailed)	Owner hand delivers check for remaining Judgment balance and Satisfaction of Judgment	Owner mails revised Satisfaction of Judgment to counsel		

ADDENDUM 2

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Kendall S. Peterson, #4389
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Salt Lake City, Utah 84133
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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS	)	FINDINGS OF FACT AND
CONSTRUCTION COMPANY,	)	CONCLUSIONS OF LAW
)	
Plaintiff,)	
)	
vs.)	
)	
ST. JOSEPH'S HIGH-SCHOOL BOARD	)	CIVIL NO. 94630
OF FINANCIAL TRUSTEES,)	
)	
Defendants.	)	Judge Wahlquist
)	

After trial to the Court with an advisory jury, and upon receipt by the court of the findings of the jury with respect to those matters submitted to it by special interrogatories, the Court makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The parties entered into a written agreement on July 16, 1984 by which plaintiff agreed to supply construction services and materials at the St. Joseph High School in Ogden, Utah.
2. The contract language was drafted by defendant's agent.
3. Defendant agreed to pay plaintiff the construction costs allowed in the contract plus a 5% supervision fee.

4. Although the contract between the parties designates dates for substantial completion of September 21, 1984 for work on the gym and November 30, 1984 for work on the classroom and library, these dates were target dates and no specific penalty was to be attached to the failure of the plaintiff to meet these dates.

5. Although the contract between the parties designates budgetary target prices of \$48,239 for the gym work and \$299,953 for the classroom/library work, these amounts were estimates only, and were not binding upon plaintiff.

6. No guaranteed maximum cost was agreed between the parties at the time the contract was executed or thereafter.

7. All of the work expected of plaintiff under the contract was completed prior to May 13, 1985.

8. On May 28, 1985 the work of plaintiff was certified by defendant's architect as having fully met the requirements of the contract.

9. The work of plaintiff was accepted by defendant on May 13, 1985, and occupied and used from that date forward.

10. The work of plaintiff fully met the requirements of the contract, and defendant at no time raised objections to plaintiff that the work was deficient in any way.

11. Plaintiff made demand on May 13, 1985 for final payment of amounts owed it under the contract.

12. On June 12, 1985, plaintiff was provided with lien waivers and proof that all indebtedness on the project had been

paid.

13. As of June 12, 1985, plaintiff was entitled to be paid the remaining unpaid costs it had expended on the project, plus 5% as its fee. This amount included:

a. \$8,550.70, for the amount withheld from the billing submitted by E.M. Whitmeyer dated 13 May, 1985; and

b. \$2,046.30 for payments made by plaintiff for building permits on the project which were not included in the Whitmeyer billing; and

c. \$3,855.00 for labor overhead paid by plaintiff on the project and not included in the Whitmeyer building; and

d. \$5,182.71 for miscellaneous costs paid by plaintiff on the project and not included in the Whitmeyer building.

14. The total amount to which plaintiff was entitled as of June 12, 1985 was \$19,634.71.

15. Under the terms of the contract between the parties, plaintiff is entitled to interest on unpaid funds at the rate of 1.25% per month.

16. The interest provided for under the contract from June 12, 1985 until December 12, 1987 amounts to \$8,867.30.

18. As of December 12, 1987, the total amount of principle and interest owed plaintiff under the contract is \$28,502.01.

19. From December 12, 1987 until the date of judgment, interest continues to accrue at the rate of 1.25% per month on the unpaid total of \$28,502.01.

20. The plaintiff did not unreasonably delay completion of the project.

21. The defendant was not damaged by any act or failure to act required of the plaintiff by the contract.

CONCLUSIONS OF LAW

1. Plaintiff committed no material breach of the contract between the parties.

2. Defendant is not entitled to any recovery against plaintiff on its Counterclaims.

3. Defendant breached its obligations under the contract by failing to pay to plaintiff the amounts due, when due.

4. Plaintiff is entitled to judgment against the defendant in the amount of \$29,544.75 plus interest at 1.25% per month from December 13, 1987 until the date of judgment, and thereafter at the legal rate of 12% per annum, plus its costs.

Dated this ____ day of _____, 198__.

BY THE COURT:

John F. Wahlquist
District Judge

1490P.33

Michael J. Wilkins, #3470
Kendall S. Peterson, #4389
LARSEN & WILKINS
10 East South Temple, Suite 500
Salt Lake City, Utah 84133
Telephone: (801) 355-5775

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS CONSTRUCTION COMPANY,	)	JUDGMENT
)	
Plaintiff,)	
)	
vs.)	
)	
ST. JOSEPH'S HIGH-SCHOOL BOARD OF FINANCIAL TRUSTEES,	)	CIVIL NO. 94630
)	
Defendants.	)	Judge Wahlquist
)	

The Court, having heretofore entered its Findings of Fact and its Conclusions of Law, hereby grants judgment in favor of plaintiff and against the defendant in the amount of \$19,634.01, plus interest thereon in the amount of \$_____ to the date of judgment, plus costs of \$_____ for a total sum of \$_____, plus interest thereon at the rate of _____% per annum until fully paid.

DATED this _____ day of _____, 198_____.

BY THE COURT:

John F. Wahlquist
District Judge

1490P.32

Michael J. Wilkins, #3470
Kendall S. Peterson, #4389
LARSEN & WILKINS
10 East South Temple, Suite 500
Salt Lake City, Utah 84133
Telephone: (801) 355-5775

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS
CONSTRUCTION COMPANY,

Plaintiff,

vs.

ST. JOSEPH'S HIGH-SCHOOL BOARD
OF FINANCIAL TRUSTEES,

Defendants.

CERTIFICATE OF SERVICE

CIVIL NO. 94630

Judge Wahlquist

I here certify I caused a true and accurate copy of the proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW and proposed JUDGMENT and this CERTIFICATE OF SERVICE to be delivered to Edward J. McDonough, Esq., Berman & O'Rourke, 50 South Main, Suite 1250, Salt Lake City, Utah 84144, this 18th day of December, 1987.

LARSEN & WILKINS



Michael J. Wilkins

1490P.44

ADDENDUM 3

Edward J. McDonough, 2177
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

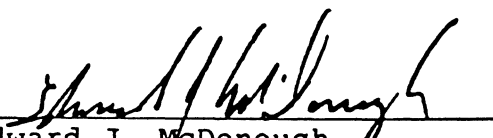
Attorney for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS	)	DEFENDANT'S OBJECTION TO
CONSTRUCTION COMPANY,	)	PLAINTIFF'S PROPOSED
	)	FINDINGS OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
)	
v.)	
)	
ST. JOSEPH HIGH SCHOOL)	
BOARD OF FINANCIAL TRUSTEES,	)	Civil No. 94630
)	
Defendant.)	

Defendant objects to the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff on the grounds that they are not accurately based upon the evidence at the trial. The defendant requests that the court enter the Findings of Fact and Conclusions of Law prepared by the defendant and submitted herewith.

DATED: January 4th, 1988.


Edward J. McDonough
50 South Main Street, #1250
Salt Lake City, Utah 84144

Attorneys for Defendant

CERTIFICATE OF SERVICE

On this 4th day of January, 1988, I hereby certify
that I caused to be hand-delivered a true and correct copy of
the foregoing DEFENDANT'S OBJECTION TO PLAINTIFF'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

Kendall S. Peterson
Michael J. Wilkins
LARSEN & WILKINS
10 East South Temple
Suite 500
Salt Lake City, Utah 84133



1008N

ADDENDUM 4

Judge Wallace

Edward J. McDonough, 2177
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

Attorney for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS CONSTRUCTION COMPANY,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiff,)	
v.)	
ST. JOSEPH HIGH SCHOOL BOARD OF FINANCIAL TRUSTEES,	)	Civil No. 94630
Defendant.)	

The jury made the following findings on special
interrogatories submitted to it:

1. The request for final payment submitted by the
plaintiff's agent E.M. Whitmeyer on May 13, 1985, did not
include an amount of \$2,046.30 for payments made by plaintiff
for building permits on the project; an amount of \$3,855 for
labor overhead paid by the plaintiff on the project; and an
amount of \$5,182.71 for miscellaneous costs paid by the
plaintiff on the project.

2. The plaintiff did not unreasonably delay
completion of the project.

3. The plaintiff was not entitled to charge for the time that E.M. Whitmeyer spent at the job site.

The Court makes the following additional findings of fact:

4. E.M. Whitmeyer responded to an invitation from the architect Michael Sanders to D.J. Company to submit a proposal for remodeling and additions to St. Joseph High School.

5. E.M. Whitmeyer submitted a proposal in the name of the plaintiff, explaining that the plaintiff and D.J. Company were involved in a merger.

6. The plaintiff and the defendant signed a written agreement on July 16, 1984 by which plaintiff agreed to supply construction services and materials at the St. Joseph High School in Ogden, Utah, in connection with a remodeling and expansion project that included two phases, the gymnasium phase and the classroom phase. E.M. Whitmeyer signed the agreement on behalf of the plaintiff.

7. E.M. Whitmeyer was the only person who represented the plaintiff with respect to the agreement and the carrying out of its terms.

8. Under the terms of the written agreement, the plaintiff was required to provide the defendant with full and detailed accounting records so that costs of the project could be monitored by the defendant. The plaintiff, prior to October 1, 1984, failed to do so.

9. On October 1, 1984, the defendant was informed for the first time that there had been a cost overrun on the gymnasium portion of the construction project, and that the gymnasium portion of the project cost more than 200% of the amount budgeted for the gymnasium.

10. The defendant had a limited fund for the project. Funds diverted to the gymnasium phase were not available for the classroom phase. The classroom phase was the primary purpose of the fund and was more important to the defendant than the gymnasium phase.

11. E.M. Whitmeyer, for and on behalf of the plaintiff, agreed to work closely with the defendant to insure that such a cost overrun would not occur on the classroom phase of the project.

12. E.M. Whitmeyer met weekly thereafter with members of the defendant for this purpose.

13. All subsequent requests for payment submitted by the plaintiff included specific cost figures which were approved by the defendant.

14. The plaintiff and defendant agreed that no expenditures beyond those included in the cost figure attached as a second sheet to the periodic requests for payment would be made by the plaintiff without prior agreement of the defendant.

15. On May 13, 1985, E.M. Whitmeyer, for and on behalf of the plaintiff, submitted a final request for payment

in an amount which coincided with the cost figures agreed upon by the plaintiff and the defendant at the weekly meetings and in the approval of the cost detail included in prior requests for payment.

16. On May 13, 1985, the plaintiff also submitted an additional request for payment, presented by the plaintiff's controller Richard Lambert. The request for payment submitted by Mr. Lambert exceeded the amount of the billing submitted by E.M. Whitmeyer.

17. The defendant relied upon the statements of Mr. Whitmeyer in the weekly meeting and representations of Mr. Whitmeyer in the cost detail provided with requests for payments prior to the final request. In October 1984, the defendant changed its position to its detriment in reliance upon the representations of the plaintiff, through Mr. E.M. Whitmeyer, by agreeing to go forward with the project and not to invoke its remedy of immediately cancelling the contract to prevent further cost overrun.

18. If the plaintiff, through its sole agent for the project E.M. Whitmeyer, had not assured the defendant that the budget for the classroom phase of the project would be adhered to and the budget would not be exceeded without prior permission of the defendant, the defendant would not have proceeded with the classroom phase of the project.

19. The written agreement provides that work on the

gymnasium would be substantially completed by September 21, 1984, and that work on the classroom and library phase would be completed by November 30, 1984. The written contract language was absolute and unmodified in any way. While no specific liquidated damages were included for failure of the plaintiff to meet the completion deadline set forth in the written contract, the defendant is entitled, under the language of the contract, to all actual damages attributable to any delay in completion of the work which was not approved by the architect pursuant to an extension of time granted by a change order to the contract, in accordance with the conditions of the contract.

20. Work on the project was not completed by the plaintiff until May 13, 1985.

21. The defendant suffered direct damages in loss of revenues and in extra utility costs of \$19,012.00 as a result of the failure of the plaintiff to complete the project on time.

CONCLUSIONS OF LAW

A. The plaintiff is estopped from claiming any sum greater than the amount of the Whitmeyer final request for payment. The plaintiff is estopped by the defendant's justifiable reliance upon the plaintiff's representations that the price of the total project would not exceed the amount agreed to by the plaintiff and the defendant as specified on the continuation sheets of the requests for payment submitted by the plaintiff prior to the final request for payment.

B. The plaintiff is entitled to \$8,550.70 from the defendant owing on the Whitmeyer final request for payment. Because this amount was tendered by the defendant to the plaintiff prior to the commencement of this action, and refused by the plaintiff, the plaintiff is entitled to no interest.

C. The defendant is entitled to the sum of \$19,012.00 against the plaintiff on the defendant's counterclaim for failure to complete the construction project on time.

D. The defendant is entitled to the sum of \$83,970.30 from the plaintiff on the defendant's counterclaim for failure of the plaintiff to provide accounting information prior to October 1, 1984 sufficient to avoid the cost overrun on the gymnasium.

E. The defendant is entitled to judgment against the plaintiff in the amount of \$94,431.60, plus interest and costs.

DATED: January _____, 1988.

BY THE COURT:

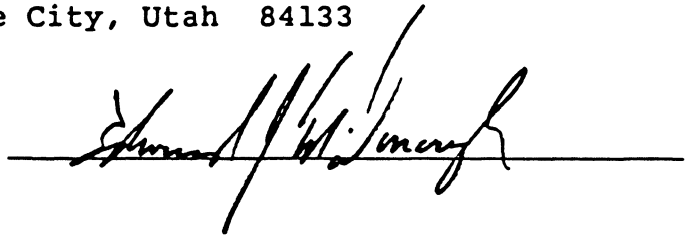
Hon. John F. Wahlquist

1009N

CERTIFICATE OF SERVICE

On this 4th day of January, 1988, I hereby certify that I caused to be hand-delivered a true and correct copy of the foregoing proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

Kendall S. Peterson
Michael J. Wilkins
LARSEN & WILKINS
10 East South Temple
Suite 500
Salt Lake City, Utah 84133

A handwritten signature, likely of Michael J. Wilkins, is written over a horizontal line. The signature is in cursive and appears to read "Michael J. Wilkins".

1009N

ADDENDUM 5

The defendant desired to update and add to its high school. It was desirable that the construction be completed as quickly as possible. The defendant employed an architect. The architect did some preliminary sketches and estimates. He hoped to complete details, etc., at a later date. The architect anticipated that he would complete this work during the early construction. The plaintiff and defendant signed a contract that is in evidence. It was a "cost plus" contract, and could be more accurately described as providing for a five percent management

supervision fee. It did contain "target budget figures". The contract provided that these were goals and not hard "cost quotes". The contract set out completion dates, but without penalties, etc. Without the completed plans and specifications, the target dates can be accepted only as goals. The undisputed working arrangements can be accurately described in local construction terms as a "fast track construction contract": that is, one that starts immediately and proceeds while the plans and specifications are being prepared. The "fast track contracts" are not uncommon in this area, and on occasion, have the effect of bringing on an early completion date. They also frequently have a desirable effect of permitting growth in design or changes in the construction project. When the dispute ends, long after the dated goal and far beyond the targeted budget, disagreements were broad. There were many sets of used or disgarded drawings. Thousands of cost records exist. The parties literally wanted the jury to perform a complete audit and evaluation of the wisdom of each expenditure. The endeavor they asked the jury to perform would have taken trained accountants and construction experts months. After the evidence was completed, the judge searched for a method of simplifying the issues for the jury.

It worked out that the parties' evidence does not dispute more than a few items of sufficient magnitude to justify discussing them, plus, of course, the parties' general dispute

and the blaming of one another for the delays. These issues were presented to the jury in a special verdict form.

The most serious question was, "Who is to blame for the delays?" There was no conflicting evidence as to whether any monies claimed spent were in fact spent, except as presented in the interrogatory forms. There is no issue that the actual construction work done was performed in accordance with reasonable standards. The delay issue was complex. Safety inspectors insisted on many changes. The library eventually lost a complete glass wall, etc. A committee was formed that met periodically to review "costs, etc." and re-design the construction. The jury placed the blame for the delays on the high school and the architect, not on the construction superintendent. At least they did not find defendant had carried his burden of proof on this issue. After verdict, the lawyers disputed over what the court's findings of fact, etc., should be. A lengthy hearing was held. All rulings were made in open court in the presence of counsel. Everyone knew what the findings of fact and conclusions of law were to say before they were finally drafted. Plaintiff's counsel prepared and circulated them, but apparently failed to re-circulate them after they were in fact signed.

Plaintiff began maneuvers that were intended to force payment of the judgment. Defense counsel eventually sent a check for the amount of the judgment to the plaintiff's counsel. This was done in a way to invite the exercise of a complete release. The defense counsel now wishes to be granted a new trial only on the issues concerning his counterclaim. Plaintiff objects on the grounds that the judgment which was granted in the plaintiffs favor is actually less than plaintiffs had hoped for. Plaintiffs contend that the release executed by plaintiff's counsel was done so at the invitation of defense counsel and actually should be viewed as a complete end to the matter. The court agrees. The issues are so interwoven that it would be illogical to permit the defendant to pick and choose from the accounting, etc., and the delay in construction events, issues only that he wishes to be granted a new trial on. These issues that he chooses to present at a new trial are interwoven with the other issues, and cannot, in an intelligent manner, be separated.

RULING

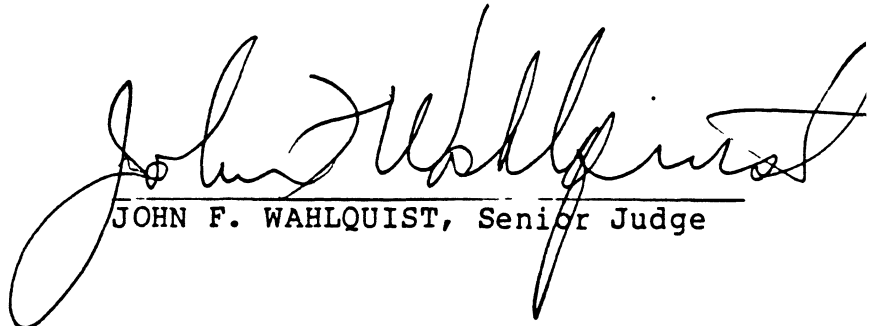
The motion for a partial new trial is denied for the following reasons:

1. There was no material error in the trial. The verdict rendered by the jury is a plausible interpretation of the evidence received.

2. The defendant's counterclaim cannot, in an evidence sense, be separated from defendant's contentions; therefore, a limited new trial cannot take place.

3. The release in question was executed by plaintiff's attorneys at the invitations of defense counsel. It is, in its general terms, a complete release. Neither side should be permitted to set aside this release. The defendant should be estopped to ask for a limited trial.

DATED this 25 day of April, 1989.



JOHN F. WAHLQUIST, Senior Judge


Page 6
Ruling on Motion for
New Trial
Case No. 860994630

CERTIFICATE OF MAILING

I hereby certify that on this 25 day of April, 1989, a true and correct copy of the foregoing Ruling on Motion for New Trial was mailed to the following:

Michael J. Wilkins
TIBBALS, HOWELL, MOXLEY & WILKINS
Attorney for Plaintiff
257 East 200 South
Salt Lake City, Utah 84111

Edward J. McDonough
Attorney for Defendant
50 South Main Street
Suite 1250
Salt Lake City, Utah 84144



PAULA CARR, Secretary

ADDENDUM 6

Edward J. McDonough, 2177
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

Attorney for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS	)	DEFENDANT'S OBJECTIONS
CONSTRUCTION COMPANY,	)	TO PLAINTIFF'S PROPOSED
	)	FINDINGS OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
	)	(Oral Argument Not
v.	)	Requested)
)	
ST. JOSEPH HIGH SCHOOL)	
BOARD OF FINANCIAL TRUSTEES,	)	Civil No. 94630
)	
Defendant.)	

Defendant objects to the proposed Findings of Fact and Conclusions of Law served by the plaintiff on January 21, 1988, on the grounds that the proposed findings are not accurately based upon the evidence at the trial. The defendant objects to specific proposed findings of fact as follows:

Finding No. 2, because the evidence presented at trial, and particularly the contract between the architect and the owner, establish that the architect was not "defendant's agent."

Finding No. 4, because the evidence presented at

trial, and most specifically the written "Standard Form of Agreement Between Owner And Contractor" did not refer to the contract completion dates as mere "target dates" but rather, to the contrary, set fixed dates for completion which became a contractual obligation of the plaintiff; and because Finding No. 4 misstates the language of the agreement with regard to its liquidated damages provision.

Finding No. 5, because it is unsupported by the evidence.

Finding No. 7, because there was no evidence presented at trial which indicated that the defendant "consented to the extension of performance time."

Finding No. 10, because it misstates the evidence with regard to the contracts being unchanged and interrupted. In this regard, Finding No. 10 is contradictory of Finding No. 6.

Finding No. 11, because the evidence showed that a guaranteed maximum cost was agreed to between the parties as a result of the weekly meeting with commenced on October 1, 1984, and which new guaranteed maximum cost was fixed at least by the time of the February interim request for payment.

Finding No. 16, because the jury did not find that the plaintiff was entitled to be paid the amounts listed in Finding No. 16, only that those amounts had, heretofore, not been paid.

Finding No. 17, as contrary to the evidence.

Finding No. 18, because it is not a finding of fact, but rather is a misplaced conclusion of law, and is erroneous as a conclusion of law because it misstates the nature and effect of the jury interrogatories.

Finding No. 19, because the evidence showed that the "Standard Form of Agreement Between Owner And Contractor" did not provide for interest on "any unpaid amounts" but rather on amounts to become due and owing under that document, and because the contract provided that no amounts became due and owing under the contract from the owner until a request for payment of the amount from the contractor was certified by the architect.

Finding No. 20, because, while it correctly states the Court's finding that interest would run at their legal rates for judgment, it misstates the amount due.

Finding No. 21, as contrary to the evidence.

Finding No. 22, because it misstates the daily amount of interest.

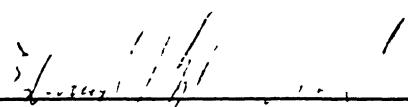
Finding No. 24, because it is contrary to the evidence.

The defendant objects to Conclusions of Law Nos. 1, 2, 3 and 4, as not being based upon proper findings of fact which were based upon the evidence at the trial.

The defendant submits its objections on the argument presented with regard to defendant's objections to the original

proposed Findings of Fact and Conclusions of Law proposed by the plaintiff, and the defendant does not request oral argument on these objections.

DATED: January 25, 1988.



Edward J. McDonough
50 South Main Street, #1250
Salt Lake City, Utah 84144

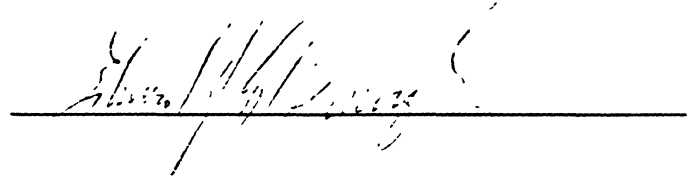
Attorney for Defendant

1069N

CERTIFICATE OF SERVICE

On this 25th day of January, 1988, I hereby certify that I caused to be hand-delivered, a true and correct copy of the foregoing DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Oral Argument Not Requested) to the following:

Kendall S. Peterson
Michael J. Wilkins
LARSEN & WILKINS
10 East South Temple
Suite 500
Salt Lake City, Utah 84133

A handwritten signature, likely of Michael J. Wilkins, is written over a horizontal line.

1069N

ADDENDUM 7

Michael J. Wilkins, #3470
Kendall S. Peterson, #4389
LARSEN & WILKINS
10 East South Temple, Suite 500
Salt Lake City, Utah 84133
Telephone: (801) 355-5775

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS
CONSTRUCTION COMPANY,

Plaintiff,

vs.

ST. JOSEPH'S HIGH-SCHOOL BOARD
OF FINANCIAL TRUSTEES,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

CIVIL NO. 94630

Judge Wahlquist

After trial to the Court with an advisory jury, and upon receipt by the court of the findings of the jury with respect to those matters submitted to it by special interrogatories, the Court makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The parties entered into a written agreement on July 16, 1984 by which plaintiff agreed to supply construction services and materials at the St. Joseph High School in Ogden, Utah.
2. The contract language was drafted by defendant's agent.
3. Defendant agreed to pay plaintiff the construction costs allowed in the contract plus a 5% supervision fee.

4. Although the contract between the parties designates dates for substantial completion of September 21, 1984 for work on the gym and November 30, 1984 for work on the classroom and library, these dates were target dates and no specific penalty was to be attached to the failure of the plaintiff to meet these dates.

5. During the course of performance it became apparent that the cost of the building as designed by the architect would greatly exceed the amount he had estimated.

6. In order to reduce costs, the scope of the project, the design and the management of costs were modified. The changes resulted in redrawing construction documents and weekly management meetings to incrementally review costs.

7. These changes effectively modified the terms of the contracted agreement between the parties with respect to time of performance. All parties were aware and consented to the extension of performance time beyond estimated schedules for completion contained in the contract.

8. The modification of the time terms of the contract did not effect the "cost-plus" nature of the contract.

9. Although the contract between the parties designates budgetary target prices of \$48,239 for the gym work and \$299,953 for the classroom/library work, these amounts were estimates only, and were not binding upon plaintiff.

10. The nature of the contract from beginning to end remained unchanged and uninterrupted as a "cost-plus" or cost and

material contract.

11. No guaranteed maximum cost was agreed between the parties at the time the contract was executed or thereafter.

12. All of the work expected of plaintiff under the contract was completed prior to May 13, 1985.

13. The work of plaintiff was accepted by defendant on May 13, 1985, and occupied and used from that date forward.

14. The work of plaintiff fully met the requirements of the contract, and defendant at no time raised objections to plaintiff that the work was deficient in any way.

15. Plaintiff made demand on May 13, 1985, for final payment of amounts owed it under the contract.

16. As of May 13, 1985, plaintiff was entitled to be paid the remaining unpaid costs it had expended on the project, plus 5% as its fee. This amount included:

a. \$8,550.70, for the amount withheld from the billing submitted by E.M. Whitmeyer dated 13 May, 1985; and

b. \$2,046.30 for payments made by plaintiff for building permits on the project which were not included in the Whitmeyer billing; and

c. \$3,855.00 for labor overhead paid by plaintiff on the project and not included in the Whitmeyer building; and

d. \$5,182.71 for miscellaneous costs paid by plaintiff on the project and not included in the Whitmeyer building.

17. The total amount to which plaintiff was entitled as of

May 13, 1985 was \$19,634.71.

18. As a matter of law, plaintiff is entitled to interest on unpaid funds as determined by the special jury verdicts.

19. The contract between the parties provides for interest on any unpaid amounts to accrue at 1.25% per month.

20. The Court found that interest should accrue on \$19,634.71 at the legal rate for judgments from May 13, 1985 until the time judgment is entered.

21. As of January 21, 1988, the total amount of principle and interest owed plaintiff under the contract is \$25,984.89.

22. From January 21, 1988, until the date of judgment, interest shall continue to accrue at the rate of 12% per annum or \$6.46 per day until paid in full.

23. The plaintiff did not unreasonably delay completion of the project.

24. The defendant was not damaged by any act or failure to act required of the plaintiff by the contract.

CONCLUSIONS OF LAW

1. Plaintiff committed no material breach of the contract between the parties.

2. Defendant is not entitled to any recovery against plaintiff on its Counterclaims.

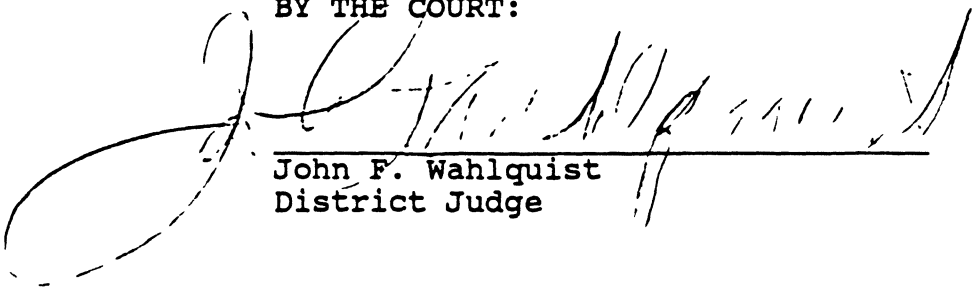
3. Defendant breached its obligations under the contract by failing to pay to plaintiff the amounts owed, when due.

4. Plaintiff is entitled to judgment against the defendant

as of January 21, 1988, in the amount of \$25,984.89 plus interest at 12% per annum or \$6.46 per day until the judgment is paid in full.

Dated this 1 day of Feb, 1988.

BY THE COURT:



John F. Wahlquist
District Judge

1490P.33

Michael J. Wilkins, #3470
Kendall S. Peterson, #4389
LARSEN & WILKINS
10 East South Temple, Suite 500
Salt Lake City, Utah 84133
Telephone: (801) 355-5775

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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS
CONSTRUCTION COMPANY,

Plaintiff,

vs.

ST. JOSEPH'S HIGH-SCHOOL BOARD
OF FINANCIAL TRUSTEES,

Defendants.

JUDGMENT

CIVIL NO. 94630

Judge Wahlquist

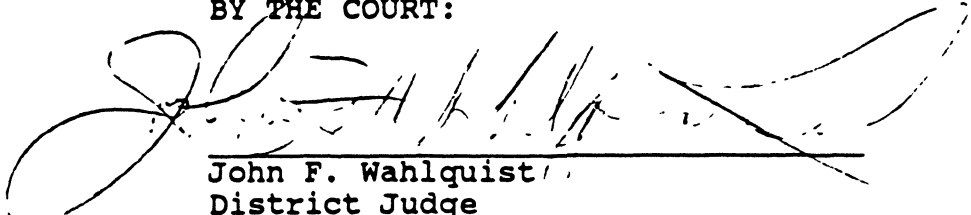
The Court, having heretofore entered its Findings of Fact and its Conclusions of Law, hereby grants judgment in favor of plaintiff and against the defendant in the amount of \$19,634.71, plus interest thereon accruing at the legal rate for judgments of 12% per annum. From May 13, 1985, until January 21, 1988, accrued interest amounted to \$6,350.18. Interest shall continue to accrue at 12% per annum or \$6.46 per day until the judgment is fully paid. Further, plaintiff is entitled to an award of its

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costs incurred in litigation. The total amount of judgment as of
January 13, 1988, is \$25,984.89 plus costs of

DATED this 7 day of Feb, 1988.

BY THE COURT:



John F. Wahlquist
District Judge

1490P.32

ADDENDUM 8

Michael J. Wilkins, #3470
Kendall S. Peterson, #4389
LARSEN & WILKINS
10 East South Temple, Suite 500
Salt Lake City, Utah 84133
Telephone: (801) 355-5775

✓

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS
CONSTRUCTION COMPANY,

Plaintiff,

vs.


ST. JOSEPH'S HIGH-SCHOOL BOARD
OF FINANCIAL TRUSTEES,

Defendants.

NOTICE OF ENTRY
OF JUDGMENT

CIVIL NO. 94630

Plaintiff Jacobsen, Morrin and Robbins, by and through
counsel of record hereby certifies that notice of the signing and
entry of judgment against St. Joseph's Board of Financial
Trustees was given on March 7, 1988 by placing a copy of the
signed judgment in the mail postage prepaid, addressed to Edward
J. McDonough, Berman & O'Rorke, 50 South Main Street, Suite 1250,
Salt Lake City, Utah 84144, this 8th day of March, 1987.


Rhonda Walker
LARSEN & WILKINS

1490P.62

ADDENDUM 9

Edward J. McDonough, 2177
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

Attorney for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS CONSTRUCTION COMPANY,	)	RULE 60 MOTION FOR RELIEF FROM JUDGMENT
Plaintiff,)	
v.)	
ST. JOSEPH HIGH SCHOOL BOARD OF FINANCIAL TRUSTEES,	)	Civil No. 94630
Defendant.)	

The defendant moves this Court for its Order setting aside the judgment entered on February 1, 1988, on the grounds that the judgment was entered by mistake or in error, resulting in prejudicial surprise to the defendant, was entered without notice by the plaintiff to the defendant as required by the Utah Rules of Civil Procedure and the rules of this Court, thereby preventing the defendant from moving for a new trial under Rule 59, that the failure of the plaintiff to notify the defendant of the entry of a judgment in time to move for a new trial or appeal constitutes misrepresentation and misconduct on

the part of counsel for the plaintiff, and was entered in violation of Rule 52 and Rule 58A of the Utah Rules of Civil Procedure.

Judgment was entered in violation of Rule 52 of the Utah Rules of Civil Procedure because it was entered without findings of fact and conclusions of law being first made by the court. Rule 52(a) requires that:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A . . ."

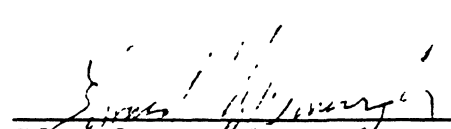
The defendant objected to the proposed Findings of Fact and Conclusions of Law prepared by the plaintiff, and submitted an alternate set of findings and conclusions. This Court has not ruled upon the defendant's objections to the plaintiff's proposed findings, and no findings have been entered.

The plaintiff has executed upon the judgment entered on February 1, and has garnished the defendant's bank accounts.

The plaintiff now seeks to add costs to the judgment which was entered on February 1 without judgment for costs. Instead of reopening the judgment and modifying the judgment to add costs for the plaintiff, justice requires in this case that the court set aside the judgment entered on February 1

entirely, make proper findings of fact and conclusions of law in accordance with the Rules of Civil Procedure, tax the costs pursuant to the defendant's motion that costs be taxed, and then enter a judgment with notice to the defendant of the entry of the judgment so that the defendant can move for a new trial or appeal.

DATED: March 22, 1988.



Edward J. McDonough
50 South Main Street, #1250
Salt Lake City, Utah 84144

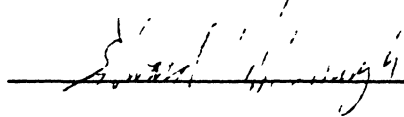
Attorneys for Defendant

1175N

CERTIFICATE OF SERVICE

On this 23rd day of March, 1988, I hereby certify that I ~~caused to be~~ hand-delivered a true and correct copy of the foregoing RULE 60 MOTION FOR RELIEF FROM JUDGMENT to the following:

Kendall S. Peterson
~~Michael J. Wilkins~~
LARSEN & WILKINS
10 East South Temple
Suite 500
Salt Lake City, Utah 84133



1175N

ADDENDUM 10

Edward J. McDonough, 2177
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

Attorney for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

JACOBSEN, MORRIN AND ROBBINS)	
CONSTRUCTION COMPANY,)	
)	
Plaintiff,	)	ORDER GRANTING RULE 60
	)	RELIEF, DENYING PLAINTIFF'S
v.	)	RULE 37 MOTION, AND
	)	TAXING COSTS.
ST. JOSEPH HIGH SCHOOL)	
BOARD OF FINANCIAL TRUSTEES,	)	Civil No. 94630
)	
Defendant.)	

This matter having come on for hearing on March 23, 1988, on defendant's Motion To Have Costs Taxed By The Court, filed February 12, 1988, the plaintiff's "objection to defendant's Motion To Have Costs Taxed By The Court", filed March 8, 1988, and the Order obtained by the plaintiff that the defendant's president, Allen Lipman, appear in supplemental proceedings, and the defendant having made its Motion in open Court pursuant to Rule 60 of the Utah Rules of Civil Procedure for relief from the judgment, and the Court having heard argument on that Motion as well as on the pending Rule 37

Motion of the plaintiff and the pending objection by the defendant to the plaintiff's second proposed Findings of Fact and Conclusions of Law, and the Court having heard argument of counsel, it is hereby,

ORDERED that the defendant's Rule 60 Motion For Relief From The Judgment is granted to this extent, that judgment for the plaintiff is hereby entered, de novo, as of and under the date of March 23, 1988, which date shall be the date of judgment for the purposes of all post-trial motions and notice of appeal; that the plaintiff is awarded costs in this action as set forth in the plaintiff's "Verified Memorandum of Costs" dated February 2, 1988, with the exception that the plaintiff is not allowed costs for photocopy charges or deposition transcripts; that the examination of the defendant's president, Allen Lipman, in a supplemental proceeding is continued until April 13, 1988 at 9:30 a.m.; that the second set of Findings of Fact and Conclusions of Law prepared and submitted by the plaintiff are adopted by the Court, and that the plaintiff's Rule 37 Motion is denied.

DATED this 29 day of March, 1988.

BY THE COURT:



Hon. John F. Wahlquist
District Judge

1178N

ADDENDUM 11

DANIEL L. BERMAN
PATRICIA A. O'RORKE
DOUGLAS J. PARRY
SAMUEL O. GAUFIN
PEGGY A. TOMSIC
BLAKE S. ATKIN
JESSE C. TRENTADUE
JUDY K. BROWN

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A PROFESSIONAL CORPORATION
SUITE 1250
50 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84144
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EDWARD J. McDONOUGH
OF COUNSEL

March 23, 1988

Allen Lipman, President
Amalgamated Sugar
P.O. Box 1520
Ogden, Utah 84402

Re: Jacobsen, Morrin, Robbins v.
St. Joseph's High School

Dear Allen:

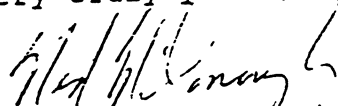
I have enclosed with this letter a copy of an Order which I have prepared for Judge Wahlquist's signature, encompassing his ruling at Court this morning, along with copies of the Motion for Continuance and Order. Judge Wahlquist continued the Order in Supplemental Proceedings which was served upon you for three weeks, until April 13, 1988. It wasn't until I stopped by your office and talked to your secretary after court that I found out that you were going to be in New York on April 13th. I shall ask Judge Wahlquist to continue the supplemental proceedings again for one week until April 20th, if that date is all right with you.

I made my complaints in court this morning about the plaintiff's having the judgment entered without notifying us, and then a month later proceeding to tie up the corporate bank accounts. I made a "Rule 60" motion for relief from the judgment that was entered on February 2nd. Judge Wahlquist said that it was apparent to him that whoever lost at trial would want to appeal, and so there was a real prejudice in the plaintiff not notifying us of the entry of judgment, and so judgment would be re-entered as of today so that we could file a motion for new trial and/or appeal.

Allen Lipman, President
March 23, 1988
Page 2

personal note deleted

Very truly yours,


Edward J. McDonough

EJM:ct

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