1980

Burrell Construction and Supply Company, A Utah Corperation v. U-Dev-Co, A Utah Corporation, Construction Systems, Inc. , A Utah Corporation, and Concrete Pumping,Inc. , A Utah Corporation : Brief of Appellant

Utah Supreme Court

WILLIAM B. PARSONS III; Attomey for Defendant-Appellant HEBER GRANT IVINS; Attomey for Plaintiff-Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

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BURRELL CONSTRUCTION and SUPPLY COMPANY, a Utah Corporation, Plaintiff-Respondent, vs. U-DEV-CO, a Utah Corporation, CONSTRUCTION SYSTEMS, INC., a Utah Corporation, and CONCRETE PUMPING, INC., a Utah Corporation, Defendant-Appellants.	)	Case No. 16868

BRIEF OF APPELLANT

Appeal from a Judgment entered pursuant to trial and hearing on the merits in the Fourth Judicial District Court in and for Utah County, State of Utah, in favor of Plaintiff-Respondent.

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NATURE OF CASE

The Defendant-Appellants are appealing a Judgment entered pursuant to a trial and hearing on the merits in the Fourt Judicial District Court in and for Utah County, State of Utah. The Plaintiff-Respondent was suing for a failure to pay on an open account for materials delivered. The Defendant-Appellants answered the Complaint, alleging failure of the materials to conform to minimum standards and to the character of the order as specified, and Counterclaimed for damages arising out of the use of the defective materials supplied.

DISPOSITION IN THE LOWER COURT

The trial Court in the Fourth Judicial District found Judgment in favor of the Plaintiff-Respondent on the basis of their Complaint and denied Judgment to the Defendant-Appellants on their Counterclaim, ordering the Defendant-Appellants to pay the amounts prayed for in Plaintiff's Complaint plus fees and costs without offset.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellants request that the Judgment entered in the lower Court be overturned and that the matter be remanded for a new trial on the merits of the case, both in regard to the Complaint and the Counterclaim involved in this cause of action.

STATEMENT OF FACTS

The Appellants defended an action, as indicated, that arose as a result of materials delivered on an open account from the Respondent to the Appellants. There were three relevant invoices, and in the Respondent's First Cause of Action, $1,651.97 was prayed for under invoice number 13020. Under Respondent's Second Cause of Action, $89.04 was prayed for under invoice number 13030, and under the Third Cause of Action, $451.39 was requested pursuant to invoice number 13014. The Appellants admitted the receipt of all of the bags covered by these invoices but asserted in their defense and Counterclaim that the special mix, covered under invoice number 13020, and additional special mix, which had already been paid for that was delivered simultaneously with the material delivered under invoice number 13020, was defective in that it failed to perform according to the specifications outlined in the purchase order and communications between the representatives of the Respondent-Plaintiff and Mr. LaForrest Twitchell, owner of the Defendant corporations. As uncontroverted fact, it was established that a nine bag mix was required and that the nine bag mix must be pumpable for the shot-creteing process that the Appellants were to use the particular mix for. The materials covered under the two latter invoices, numbered 13030 and 13014, performed according to their expected standards. The payments had not been made for those because of the severe damages suffered by the Defendant-Appellants

as a result of the use of this special mix. The Counterclaimants-Appellants allege that as a result of the special mix, that while on site at the Kennecott Copper Corporation's Bingham Canyon Mine, while engaged in a shot-creteing operation the special mix dry packed the shot-creteing lines and caused plugging which resulted in a repeated necessity to break down the equipment, causing delays of an additional two-plus days and damages in the amount of at least $7,328.60, which was the amount of the negotiated credit given to the Kennecott Copper Corporation because of these delays resulting from the dry packing of the shot-creteing lines.

ARGUMENT

POINT I: THE PLAINTIFFS, IN THE LOWER COURT ACTION, WHO ARE RESPONDENTS IN THIS APPEAL, FAILED TO CARRY THEIR BURDEN OF PROOF OF SHOWING THAT THE PRODUCT DELIVERED UNDER INVOICE NUMBER 13020, IDENTIFIED AS "SPECIAL CONCRETE MIX," MET THE STANDARD REQUIRED PURSUANT TO THE ORDER INVOICE AND THE NEGOTIATIONS OF THE PARTIES.

The Plaintiff-Respondent alleged that the Defendant-Counterclaimants-Appellants had failed to pay for the three invoices and materials covered thereunder as hereinbefore identified. The Defendants in the lower Court admitted the receipt of certain quantities of materials, but in the defense of the action denied receiving a nine bag equivalent mix which was pumpable through the pressure pumping system of the Appellants for a shot-creteing job at the Kennecott Copper Corporation site, as was required by the order invoice, a portion of the record of these proceedings.

The Plaintiff's first witness, Jeffrey Lee Colten, attempted to testify in regard to the character of the delivery of the order and the materials delivered in that order, and the value of the materials delivered in that order to the Defendants, which order gave rise to this cause of action.

At page 6 of the Transcript of Proceedings, beginning at line 9 and ending at line 16, this witness admits knowing nothing of the character of the order placed or the circumstances surrounding this order.

Thereafter on page 23 Mr. Colten, under cross examination at line 27, admits that he had no knowledge of what was sent to the Defendant companies and for all he knew it could have been an "empty bag of rocks." This witness was not rehabilitated, and his testimony of the value of the product, type of material delivered, circumstances surrounding the order, or the type of material ordered, broke down entirely upon cross examination into a recognition of his having no personal knowledge of the circumstances surrounding any of these issues.

Thereafter, the Plaintiff called Charles Booth, who is the plant manager of the Plaintiff corporation locally, and his testimony, beginning on page 29 and ending on page 58 of the Transcript of Proceedings, evidences no direct testimony in regard to the quality or the specifications of the material from his personal knowledge that was delivered to the Defendant-Appellants. Further, this witness had no personal knowledge whatsoever of the circumstances surrounding the request for the supplying of this material or the invoice involved, except for having seen the invoice. On page 36 of the Transcript of Proceedings, beginning at line 14, this witness asserts that he does not even have as plant manager knowledge of what percent cement is involved in his regular mix, even though he has represented himself to be an expert in the field. On page 51 beginning at line 12 on cross examination, this witness was questioned pertaining to granulations and standards of gradation in regard to sand, and for the next three pages proceeds to admit that he has no knowledge of what industry standards are in regard to granulations or gradations of sand

beyond a very rudimentary understanding that differences do exist. The Plaintiff's counsel had attempted to qualify this individual's testimony for purposes of verification of testing results given by this individual, and Mr. Booth testified in regard to certain test results which were the result of his personal examination of the proposed, or supposed, problem of the special mix. On page 50 at line 19, Mr. Booth admitted that he had prior knowledge of a problem with his cement mix but had done nothing independent for purposes of determining what that problem could have been until after the Defendant-Appellants damages were sustained.

Mr. Booth, as a Plaintiff's witness, did testify of the hypothetical value of the special mix but did not have personal knowledge as to the ingredients contained therein or the conformity of this special mix to the order placed for it.

Don Alger testified, beginning on page 59 of the Transcript of Proceedings, that the important elements of the order were two-fold: number one, that the mix contain a nine bag equivalent, and number two, that the special mix be pumpable. Don Alger testified that he had attempted to find out what a nine bag equivalent was by determination through the American Testing Laboratory in Salt Lake City, Utah, and had been given information in regard to a percentage of cement to be placed in this at the rate of 30 percent cement and 70 percent sand. The Court itself recognized in the transcript that there existed a substantial difference between a nine bag equivalent dry mix and a nine bag equivalent wet mix--something the Plaintiff had failed to recognize entirely, since the 30 percent cement to 70 percent sand, for the special mix, equated to only, by the testimony of its own witness Don Alger, a nine bag equivalent mix. This mix would be off substantially because water was added to this mixture, and the nine bag equivalent wet mix would have required

substantially more cement, which the Plaintiff further admitted was not contained in the special mix even though so ordered.

Thus, the Plaintiff failed to sustain its burden of proof in the lower Court in regard to the issue of the material represented to be special mix tendered under invoice number 13020, and a second invoice number not a subject matter to this litigation, as conforming to the order involved for a pumpable nine bag equivalent mix. As a result of this, the Plaintiff was not entitled to Judgment on this invoice in the amount of $1,651.97 or costs and fees in regard thereto.

POINT II: THE SPECIAL MIX ORDERED BY INVOICE BY U-DEV-CO COMPANY, WHICH INVOICE IS A PART OF THIS RECORD ON APPEAL, FAILED TO CONFORM TO THE REQUIREMENTS OF THE INVOICE, AND AS A RESULT OF THE FAILURE TO SO CONFORM, DRY PACKED IN THE LINES OF THE COUNTERCLAIMANTS-APPELLANTS AT THE JOB SITE, DAMAGING THE APPELLANT IN THE AMOUNT OF $7,328.60.

LaForrest Twitchell, president of the Defendant-Appellant corporations, beginning his testimony at page 73 of the Transcript of Proceedings, established himself as an expert in the area of concrete pumping, and thereafter his testimony was received as an expert in this field without objection. At page 79 of the Transcript of Proceedings beginning at approximately line 28, LaForrest Twitchell, as an expert witness, testified that the plugging and dry packing of the special mix in the Defendants' pumping system was a result of either an inadequacy of cement in the mix, or an improper type of sand, or the cement mix, and that it was impossible to determine which was the case but that under either circumstance, the addition of additional cement to the mix could and did correct the problem, and that under either circumstance, the control of the quality of sand and the prep-

aration of the mix in regard to the quantity of cement added thereto, were under the total and absolute control of the Plaintiff-Respondent at all times relevant to these proceedings, including the time frame from the order of the special mix through the time when the special mix caused extraordinary delays and damages to the Defendant-Appellants. Mr. LaForrest Twitchell further testified that there were two elements to the order: number one, that the mix have a nine bag equivalency, and number two, that the mix be pumpable. LaForrest Twitchell admitted that he was not an expert in concrete or cement makeup but only an expert in the area of concrete pumping, and that he taught regularly at the University of Utah in their College of Engineering in that capacity.

Thereafter, witnesses Bill Smith and Ronald Anderson testified that through their many years of experience in concrete pumping, they were satisfied that the problem involved here was either an inappropriate quality of sand in the BURRELL mix or an inappropriate quantity of cement in the BURRELL mix, both of which should not have occurred had the instructions of the invoice and order been fulfilled. Both Bill Smith and Ronald Anderson further testified that a correction of this problem was handled in as timely a fashion as was humanly possible but that the problem caused delays of approximately two days. Betty Twitchell then testified that these delays caused damages which exceeded, in fact, the request for damages of $7,328.60, which was ultimately negotiated and compromised with the Kennecott Copper Corporation, the employer on the job.

Roger Shepard testified as the president of the American Testing Laboratory of Salt Lake City, Utah, that he was an expert in the field of testing procedures in regard to concrete. His testimony was thereafter received, beginning at page 104 of the Transcript of Proceedings, as an expert

in witness. As an expert witness, Roger Shepard testified that the type of tests conducted by Charles Booth, the plant manager for the Plaintiff, was fallible and would have resulted in fictitious data and would have proven nothing in regard to the conformity of the special cement mix to the order placed by Defendants.

The testimony of LaForrest Twitchell, Bill Smith, and Ronald Anderson in regard to the character of the problems resulting in the delays and damages was not refuted by any direct testimony or by breaking down this testimony on cross examination by the Plaintiff. Additionally, the testimony of LaForrest Twitchell and Roger Shepard as experts was not refuted by competent experts from the Plaintiff's side, nor was there any destruction of their representations made in regard to the problems with the special mix during the cross examination of these expert witnesses. As such, these expert witnesses, and the testimony in regard to the character of the problems, sustained the Counterclaimants' burden of proof without question in regard to the failure of the BURRELL special mix to meet the standards as demanded in the order invoice and conversations between LaForrest Twitchell and Don Alger at the time of the order.

The testimony of LaForrest Twitchell and Betty Jean Twitchell in regard to the damages sustained as a result of the payment of overtime to between 14 and 17 employees, and the negotiation of a credit memo in favor of the Kennecott Copper Corporation, sustained the burden of proof the Defendant-Counterclaimants bore in regard to their measure of damages. This was received without any evidence to the contrary, or without these evidences having been broken down by cross examination by Plaintiff.

POINT III: THE JUDGE IN THE TRIAL PROCEEDING MADE NUMEROUS LEGAL ERRORS WHICH WHEN VIEWED IN TOTAL, PREJUDICED THE ABILITY OF THE DEFENDANTS TO HAVE A FAIR TRIAL ON THE MERITS OF THE ISSUES.

During the course of the proceedings, beginning on page 6 at approximately line 28, a legal error occurred by the Court. The witness was incompetent to testify in regard to the account and the order placed and knew nothing of the circumstances surrounding the placing of the order even though he was allowed by the Court to testify in regard to value. On page 8 additional legal error was made by the Court over the objection of Defendants' attorney, in that no foundation was given for the knowledge of what occurred at the time of the preparing of original documents pertaining to this order, as evidenced at approximately lines 1 through 7 of page 8 and immediately preceding these lines on page 7. Additionally on page 8 the Court erred at approximately line 15 through 19, for again, no foundation was laid, or improper foundation was laid, pertaining to the admission of an exhibit by the Court. On page 9 legal error occurred, and at lines 23 through 29, attorney for Counterclaimants-Appellants lays the basis for his objection as lodged at line 6 where legal error again involved an insufficiency of foundation for the testimony received.

On page 13 under cross examination, it becomes exceedingly clear that the Plaintiff had no foundation for the admission of Exhibit "1," and thus the document was received improperly. On page 15, legal error occurred in regard to the receiving into evidence of Exhibit "1" as tendered by the Plaintiff, which should have been stricken and not received. On page 25, legal error occurred at approximately lines 9 through 11 where questions were allowed beyond the scope of direct examination on redirect, and on page 26

legal error occurred where an objection pertaining to leading questions was overruled on redirect, even though the objection was properly founded and should have been sustained. Again, on page 35 at approximately lines 10 through 15, there is an evidence of legal error having occurred by the Court through the allowing of leading questions.

On page 144 a very important legal error occurred where the Court refused, finally, to allow the admission of a document tendered by the Counterclaimants which was clearly admissable because of the extensive foundation laid therefore and because of its relevance and materiality to the issues in dispute. It was upon this document that the Counterclaimants based a substantial portion of their claim for damages, even though their claims for damages were sustained in the testimony of Betty Jean Twitchell through the verification of the amounts paid in overtime to the employees, all caused by the extraordinary delay resulting from the failure of the BURRELL special mix to perform according to its specifications.

The Utah Rules of Civil Procedure, contained in the Utah Code Annotated (1953) as amended, provide for this opportunity of Appellant to seek recourse where the trier of fact in the lower Court clearly abused his discretion by failing to recognize the overwhelming evidence sustaining the allegations made by the counterclaimants for their right to an offset and their right to damages.

CONCLUSION

The legal errors as addressed in Point III of Appellants' Brief on Appeal, when viewed individually are not particularly significant, but when seen as a consistent pattern throughout the course of the proceedings, in and of themselves are sufficient for a setting aside of this Judgment and the remanding to a lower Court for new proceedings on the issues raised by the original pleadings.

The points raised by the Appellants in regard to the Appellants' Counterclaim and the clear sustaining of their burden of proof, requires this Court to recognize that the lower Court in these proceedings did abuse its discretion and did not recognize the overwhelming strength of the Counterclaimants' evidence supporting the proposition that the Plaintiff had failed to deliver a product according to the agreement between the parties, and that the product as delivered by the Plaintiff failed to perform as warranted by the Plaintiff, and that failure of the Plaintiff's product to perform damaged the Defendants severely.

These issues, as spoken of in Point III of the Appellants' Brief, are clear from a careful review of the Transcript of Proceedings and the Record on Appeal and are in such a condition and of such strength that the Supreme Court, in these circumstances, should exercise its rarely-used authority to determine that the trial Court had in fact abused its discretion in its decision and final Judgment.

A careful analysis of the Appellants' Brief on Appeal also shows that the Transcript of Proceedings clearly evidences that the Plaintiff-Respondent failed to sustain its minimum burden of proof in showing that a product delivered to the Defendant corporations met either minimum industry standards, met the standards of the invoice for the order, met the standards set by the conversations giving rise to the order for the special mix, or, in fact, was of the value ultimately charged, because the parties had no special or individual knowledge of the circumstances surrounding the order, the materials supplied, the quality or quantity supplied, or the specifications pertaining to the order itself.

It is the proposition of the Appellants that the Supreme Court should in this instance overturn the Judgment of the Fourth Judicial District

Court and remand these proceedings back to the District Court level for a new trial on the merits of the issues involved in the original pleadings.

Respectfully submitted this 27th day of March, 1980.

Wm. B. Parsons III

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Attorney for Defendant-Appellants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, this 27th day of March, 1980 to:

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Secretary