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 : Respondent'S Brief

Utah Supreme Court

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

IN THE SUPREME COURT

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,

Defendants/ Appellants.

Case No. 16868

-oOo-

RESPONDENT'S BRIEF

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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, Defendants/ Appellants.	Case No. 16868

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RESPONDENT'S BRIEF

NATURE OF THE CASE

Plaintiff brought action in the Circuit Court for a recovery of an open account. The defendants original attorney counterclaimed and since the counterclaim was in excess of the jurisdictional amount of the Circuit Court, it was transferred to the Fourth District Court for trial.

DISPOSITION OF LOWER COURT

The Court granted the plaintiff's claim upon an open account and ruled that the defendants had failed to prove both that the product that was delivered was

not that which was ordered and further that the damages claimed were as a direct and proximate result of inferior materials delivered upon the part of the plaintiff.

RESULT SOUGHT ON APPEAL

Plaintiff seeks to have the Court sustain the ruling of the lower Court.

STATEMENT OF FACTS

The "proposal" dated June 28, 1978, was submitted to the defendants and was introduced as Exhibit "1". This proposal was delivered personally by Don Alger, a witness for the plaintiff, (see Tr. p. 61, line 28). The specifications were for thirty percent (30%) cement per eighty (80) pound bag and regular sand. After the delivery of this special mix on July 17, 1978, the defendants complained that it was not working in their equipment being used on Kennecott contract. That on the 18th day of July, 1978, the plaintiff, through their agents Charles Booth and Don Alger, retrieved a bag of the cement which was shipped on July 17th for purpose of testing as to the cement content. (See Tr. p. 32, line 16)

This bag was taken to the plaintiff's plant in American Fork, Utah. A test was conducted showing thirty percent (30%) cement, seventy percent (70%) sand as indicated on page 33, line 14 of the Transcript.

As to the other two (2) deliveries, the delivery of $451.39 and $89.04, the defendants admit that there is no dispute as to those items and that they have not been paid.

The defendants did not controvert the testing conducted by the plaintiff although there was a representative, Mr. Shepherd, from the American Testing Laboratories, who testified as to procedures which he could have used but the defendants admitted that they had not had any tests conducted upon the cement mix which they claim caused them to be damaged.

Defendants then attempted to prove that the delivery had caused a delay in their contract with Kennecott which resulted in sizeable damages. The defendants did not introduce the underlying contract with Kennecott nor did they have any representative from Kennecott to verify that the adjustment made in their contract, which incidentally was on a time cost basis, was as a direct result of delays.

ARGUMENT I

THE DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROOF OF SHOWING THAT THERE WAS A BREACH OF CONTRACT IN THAT THE MATERIAL DELIVERED BY PLAINTIFF DID NOT MEET THE STANDARDS AND SPECIFICATIONS IN THE "PROPOSAL" EXHIBIT "1".

The defendants' argue in their brief that the plaintiff did not meet their burden of proof of showing that the product delivered met the standards required by the order invoice. However, the very opposite is true and the record shows that the plaintiff's plant manager retrieved a bag of cement from the delivered batch and ran tests showing it to have thirty percent (30%) cement and seventy percent (70%) sand, which was the precise mix to be delivered in their proposal.

If such a mixture did not perform, plaintiff had no liability in that this was not an action for breach of warranty but for breach of contract. Therefore, in order for the defendants to prevail they would have to prove that the specifications of the mix were not as indicated in the proposal.

ARGUMENT II

EVEN IF THE LOWER COURT HAD FOUND PLAINTIFF BREACHED ITS CONTRACT, AS TO QUALITY OF THE PRODUCT, NO DAMAGES WERE PROVED THAT WERE NOT TOO SPECULATIVE AND UNCERTAIN TO BE ALLOWED.

The law is clear that the Court cannot speculate as to damages and this principle applies both to the fact of damages and to their cause. Thus, no recovery is allowed when speculation or conjecture is necessary to determine whether the damage resulted from the breach of contract of which the complaint is made or from some other source. See 22 AmJur 2d Sec. 24 p. 43 and 44.

Such principle was properly stated in the opinion of the Court on page 173 of the Transcript in which Judge Bullock said:

> Addressing myself to the Counterclaim, it is the Court's opinion that the evidence is insufficient to show that the special mix delivered was not that which was ordered. The supplier in this case, the plaintiff, were not and could not be an insurer of the optimum efficiency of the Defendants' equipment. Their responsibility under the contract entered into was only to deliver the special mix which was ordered, and the Court finds that that special mix was a mixture of dry sand, regular sand and 30 percent cement. The Court cannot presume as a matter of fact or law that because the defendants' equipment failed to pump the wet concrete using plaintiff's dry mix, that it was therefore the mix or that therefore the mix was not that which was ordered."

ARGUMENT III

THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND THEREFORE THE JUDGMENT ENTERED BELOW SHOULD NOT BE REVERSED.

It is a well established rule that the Supreme Court will not reverse a trial court's judgment unless there has been an error of law or abuse of discretion in interpreting the facts. Since in this case, the defendants in their brief do not quote any case or refer to any citation, it is apparent that the only premise upon the trial court could be reversed would be that it had, in fact, abused its discretion in interpreting the facts.

It is respectfully submitted that this is not the case and that the trial court had a justifiable basis to rule as did.

The term "'abuse of discretion' means no more than that the decision below fell outside the permissible limits as viewed by the appellate court or that the court on appeal is of the opinion that the trial court should have decided otherwise. There is clearly no hard and fast rule by which an abuse of discretion may be determined, since the matter greatly depends on the circumstances of the particular case. However, it has frequently been held that a decision as to a matter falling within the area of judicial discretion will not be lightly upset, ..." See 5 AmJur2d Sec. 774 p. 216-217.

See also the extensive annotations contained under Rule 72A of the Rules of Civil Procedure, more particularly pages 405 and 406.

CONCLUSIONS

Since the defendants admitted the deliveries, and the fair value thereof was proven without any evidence to the contrary, the only remaining issue is whether the quality of the product was as agreed. As indicated previously, the plaintiff made tests to support the quality of their product and the defendants had no evidence in

contradiction. In view of this proof the claimed damage becomes academic in view of the defendants having failed to prove any breach of contract. Therefore, the trial court's decision should not be disturbed.

Respectfully submitted this 23rd day of April, 1980.

HEBER GRANT IVINS
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MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing to William B. Parsons, III, Attorney for Defendants/Appellants, 515 South 700 East, Suite 3R, Salt Lake City, Utah 84102, postage prepaid, this 23rd day of April, 1980.

Secretary