

1955

Alvie Peterson v. Roydon K. McCullough et al : Additional citations to be inserted in Brief of Appellant

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Dwight L. King; Counsel for Appellant;

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

ALVIE PETERSON, :

Plaintiff and Respondent, :

v. :

ROYDON K. McCULLOUGH dba :

ROYDON K. McCULLOUGH CO., :

Defendant and Appellant, :

v. :

HENRY L. ASHTON, et al, :

Third-party Defendants :

and Respondents, :

FILED
1957
No. 8298

Additional citations to be inserted at page
16 of Defendant Roydon K. McCullough's
brief pursuant to Rule 75 (P) (2), Utah
Rules of Civil Procedure, as amended.

McCullough, Boyce & McCullough
Attorneys for Defendant Roydon
K. McCullough

Copy mailed March _____, 1957, to Clifford L.
Ashton, Attorney for Defendant Ashton, Harold
L. Boyer, Attorney for Defendants Earl, and
Glen S. Hatch, Attorney for Plaintiff Peterson.

Because of the large amount of testimony which was taken in this case, Defendant Roydon K. McCullough herewith submits to the court additional citations to the record in response to the argument that plaintiff has put forth in page 11 of his brief under Point I of his Argument. Plaintiff states:

"The plaintiff did not contract with the defendant for blocks which were not cured and which would shrink What reasonable person would contract for the construction of a theatre building to be made of blocks which might technically meet A.S.T.M. standards, but which were neither cured nor finished. Moreover, the defendant used three different blocks of different compositions with obviously three different coefficients of expansion and contraction, resulting in a lack of uniformity in wall composition and expansion and contraction. The defendant, therefore, has not met the requirements of the contract in the use of building blocks as agreed, and the finding of the trial court that he used blocks "different and defective" than those called for should be sustained."

The court's attention is directed to the following citations in the record: R. 395, 461, 473, 483, 484, 495, 496, 560, 505, 566 and

R. 395

"Q. Mr. Driggs, did you examine the building to see what kind of building blocks were used in the building?

A. I did.

Q. What did you find?

A. I found the regular standard masonry concrete block which is referred to in the specifications."

R. 461 (Mr. Driggs continuing)

"Q. Mr. Driggs, you stated there were three types of aggregates in the cement.

A. Yes.

Q. So far as you can ascertain all three of them met the A.S.T.M. specifications?

A. Yes, sir."

R. 484 (Mr. Driggs continuing)

"Q. Mr. Driggs, answer this question if you know. Does the A.S.T.M., the American Society of Testing Materials, do they set any specification for the period of time for drying, if you know?

A. If you care I can read from the pamphlet in answer to that.

Q. Is that an A.S.T.M. specification?

A. It has not reached the stages of a specification yet. It is still in the stage of research.

Q. ~~It is not~~ A.S.T.M. specification?

Q. Then there is no A.S.T.M. specification with reference to drying, is that correct?

A. To my knowledge, that is correct.

Q. And this drying is the thing we are talking about on this shrinkage, is it not?

A. That is the function of the aggregates."

R. 505 (Mr. Driggs continuing)

"Q. Now you made some mention about experimental work that is being done with shrinkage by the A.S.T.M.

A. Yes.

Q. But that experimental work has not been incorporated in the specifications?

A. No.

Q. And you know nothing in A.S.T.M. that refers to allowable shrinkage?

A. No, I don't think that has been established yet.

Q. So that this whole question of shrinkage is in the experimental stage, beyond that perhaps with you, but as far as specifications are concerned, it is not included in the A.S.T.M. specifications?

A. I would say yes.

Q. Then coming to this conclusions, as I understand your conclusion Mr. Driggs, you say the reason this wall has cracked in the manner you have described is because of shrinkage of the blocks?

A. Excessive shrinkage.

Q. Excessive shrinkage?"

The only defect which plaintiff's expert witness, Mr. Driggs, attributed to the blocks in this particular case was the question of shrinkage, and plaintiff's expert witness as well as defendant's, admitted that shrinkage was not an A.S.T.M. specification at the time the contract was entered into or even at the time of the trial. As such, the only defect which plaintiff can assert is one which the defendant was not required to provide against.