

1955

Walter W. Sprague and United States Fidelity & Guaranty Company v. Boyles Bros. Drilling Company : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

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WALTER W. SPRAGUE and UNITED
STATES FIDELITY & GUARANTY
COMPANY, a corporation,

Respondents,

v.

BOYLES BROS. DRILLING COMPANY,
a corporation,

Appellant.

Case No.
8351

RESPONDENTS' BRIEF

FILED
AUG 13 1955

Supreme Court, Utah

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for EVANS, NESLEN & ELGGREN

Attorneys for Respondents.

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In the Supreme Court of the State of Utah

WALTER W. SPRAGUE and UNITED
STATES FIDELITY & GUARANTY
COMPANY, a corporation,

Respondents,

v.

BOYLES BROS. DRILLING COMPANY,
a corporation,

Appellant.

Case No.
8351

RESPONDENTS' BRIEF

STATEMENT OF FACTS

The respondents agree generally with the Statement of Facts in the Appellant's Brief. Certain inconsistencies are noted and additional facts are called to the Court's attention.

One of the important provisions of the agreement between Sprague and appellant is that the appellant, the subcontractor, was to proceed with the work by breaking the rock in a workmanlike manner and complete the same without unreasonable delay (R. 8, Par. 2).

On page 2 of appellant's brief it is stated that the subcontract provided for the production of the rock by the joint efforts of appellant and Sprague. This is probably the appellant's interpretation of the subcontract. The contract speaks for itself. It is true that Sprague was to do certain things such as procure a license from the owner of the rock to enter upon the premises to mine and remove the rock and to furnish Boyles with sufficient compressed air to efficiently operate its drill (R. 8, Par. 3). But said subcontract did not provide for the production of rock by the joint efforts of appellant and Sprague.

On page 2 of appellant's brief it is stated that Sprague agreed - - - "to remove the rock from the quarry as it was broken into sizes specified 'so as not to cause delay' ". No such provision is contained in the agreement.

The agreement does contain the following provision in paragraph 10 pertaining to what the subcontractor was to do, "all secondary breaking of rock shall coincide with hauling operations so as not to cause delay" (R. 10).

On page 4 of appellant's brief the last sentence of the first paragraph is not a correct statement. The pleading of appellant is entirely different as it appears in paragraph 6, page 4 of defendant's Answer and Counterclaim (R. 14 & 15).

Respondents dispute the statement on page 5 of appellant's brief that there was no determination made by the Court of the controlling issues in the case.

Although appellant's employees had some difficulties with the air compressor furnished by Sprague in that it was difficult to start in the morning and that there was clutch trouble and battery trouble during the latter part of December, 1949, and the month of January 1950, apparently the trouble was not important to the appellant because the actual written contract was not executed until the 25th day of January, 1950 (R. 8). Appellant's witness, Lowery, testified that there was ample air to operate the drill which they wanted to drill with (R. 336).

The blast of February 3, 1950, did not produce sufficient rock of the size specified for use on the project. As late as July 31, 1950, a great preponderance of the rock in the quarry was too large to meet the specifications and had to be reduced before it could be hauled (R. 89). A very small portion of the rock in the quarry after the blast of February 3, 1950, could be placed on the revetment (R. 90). At that time at least eighty percent of the rock was considerably over the weight of 350 pounds, that being the largest size which could be used, and running up to about three tons (R. 90).

Because the rock was not broken to the specified size, it was necessary for Sprague's employees to sort the rock in the pile and push the oversize rock aside to get

to the rock which was broken to size (R. 306 & 168). This caused delay and increased costs in loading and hauling the rock.

Mr. Karlsten, the man in charge of the project of breaking rock for appellant, had never before personally supervised or done any rock blasting where rock of the size of 50 to 350 pounds had to be produced (R. 303). He had never broken any rock in this particular quarry before (R. 301). He did not put any test holes and made no tests concerning the method of breaking this rock before the coyote hole was put in by him (R. 301).

It was respondents' theory that appellant did not use a proper method to break rock in this quarry to produce rock of size from 50 to 350 pounds. That the coyote hole method used by appellant was not a workmanlike manner of proceeding with the work (R. 164 and 165). Testimony of qualified experts was offered and, upon objection of the appellant that this testimony was immaterial, the Court sustained the objection and appellant was prevented from introducing the evidence (R. 164, 173, 189).

On page 6 of appellant's brief appears the statement that Sprague made no attempt to remove any of the contract rock from the quarry, referring to the latter part of February, 1950. This is not the fact. Rock could not be moved because of restrictions on the use of the roads (R. 169).

On page 8 of appellant's brief there appears a statement which indicates there was no compressor in the quarry from September 21 until October 5. This is not the fact. There was a 105 compressor in the quarry during that period (R. 299 & 413).

There is no conflict between the two respondents. So as to eliminate any question as to the right of recovery between the principal and the surety and any question of who was the real party in interest, both were made plaintiffs and two separate causes of action were alleged in the complaint. The first cause of action was on behalf of Sprague and the second cause of action was on behalf of United States Fidelity and Guaranty Company (R. 1 to 10). At the trial both plaintiffs, by their counsel, agreed that any judgment that might be obtained might be taken jointly in the name of both plaintiffs, and that the plaintiffs were not concerned with prorating any recovery (R. 76).

The contract between the parties was prepared by the appellant (R. 405).

ARGUMENT

POINT I

THE JUDGMENT APPEALED FROM IS PROPER AND THERE IS EVIDENCE TO SUPPORT IT.

The respondents have no quarrel with appellant's authorities cited under Point I of appellant's brief, but

respondents do not agree with the appellant's interpretation of the agreement between Sprague and Boyles (R. 8-10).

Appellant contends that it performed its part of the contract by putting in a coyote hole tunnel 75 feet into the face of the quarry and two wings at the end 30 feet on each side of the tunnel and setting off a large blast of powder and loosening the cliff of the quarry, knocking down into the quarry a large tonnage of oversize rock and then secondarily blasting the large rock on the surface of the pile and waiting until Sprague, with the shovel in the quarry, sorted rock which could be used and set aside or uncovered large rocks which could not be used when appellant would then secondarily blast the large rock to the specified size of 50 to 350 pounds. Respondents contend that such performance did not constitute the breaking of rock into sizes between 50 pounds and 350 pounds in a workmanlike manner without unreasonable delay.

Appellant contends that the evidence establishes that the only breach of the subcontract was that committed by the plaintiffs. This is not the fact.

Boyles started on the job in the quarry on December 18, 1949 (R. 287). The initial blast to produce rock was not set off until February 3, 1950. Eighty percent of the rock knocked down was oversize (R. 90). Sprague's difficulty on the job was his inability to get sufficient

rock of proper size to put on the dike in the revetment area (R. 98). Boyles had no equipment in the quarry to segregate the rock of proper size from that of improper size. They brought to the quarry in December, 1949, a Leyner, a bar, a water pump, the water tank, four pick-ups, and hoses and steel and bits (R. 333). A jackhammer was in the quarry after the blast from February 3 to February 11, 1950 (R. 339). When Lowery, an employee of Boyles, left the quarry on February 11, 1950, there were between 400 and 600 tons of rock of acceptable size visible in the quarry (R. 339). On April 24, 1950, when Lowery returned to the quarry, he brought to the quarry a light plant, hoses, connections, three jackhammers, and approximately two dozen pieces of steel (R. 341). While there, he shot 60 holes (R. 342). Boyles had no equipment to drag down rock from the sides of the quarry (R. 345). They had no caterpillar tractor in the quarry for the purpose of separating the large rock from the rock which had been reduced to size (R. 346). Nothing was done by Boyles to get the large rocks that were up on the side of the quarry down into the quarry and, from April 24 until May 1, 1950, the only rock which was reduced to size was that which was convenient to start hauling (R. 347).

Hauling of rock started in May, 1950, for only a few days and was discontinued when all the acceptable rock was taken from the quarry (R. 116).

After the May hauling, Sprague brought to the quarry a Traxcavator to sort the rock in the quarry (R. 117). Employees of Sprague attempted to break rock by plastering and shooting (R. 117). This was done by Sprague because sufficient rock was not available to keep the trucks operating (R. 118). These things were part of the breaking of the rock which should have been done by Boyles. Mrs. Fern Sprague, the wife of Walter Sprague, kept the records on the job (R. 135). She testified in detail concerning the expenses incurred by Sprague in the production of rock which was the obligation of Boyles. She made summaries of the various items of expense and fully explained all the facts and circumstances to the Court (R. 136-158).

The appellant complains of the failure of Sprague to make the progress payment provided in the subcontract of 75% of the contract price of 48c per ton by April 20, 1950. This payment was not made until July 26, 1950, and was paid by check from United States Fidelity and Guaranty Company (R. 211). The payment was 75% of 48c per ton for 12,200 tons of rock (R. 211). Mr. Murray calculated the payment as if the contract had been performed (R. 211). The respondent did not complain of the failure to make this payment on April 20, 1950 as provided in the contract. The only reasonable conclusion that can be reached is that, on that date, Boyles knew that not sufficient rock had been broken to justify the payment. It will be remembered that no rock was hauled from the quarry by April 20, 1950, the

first rock being hauled in May. Boyles did not quit the job because of the failure to make this progress payment. They stayed on the job until October 5, 1950, more than two months after receiving the payment.

There was some difficulty about compressed air. Appellant complains that their employees had to handle the compressor. Mr. Lowery, the man in charge of the breaking of rock in the quarry, testified that it would be foolish to have Sprague furnish a man to start the compressor, and put in gasoline and oil (R. 348). No request was made of Sprague to furnish a man to do those things (R. 348). On no occasion, when repairs to the compressor were needed, did Sprague refuse to take steps to have it repaired (R. 350).

On this subject of determining the materiality of a failure to perform, the following from Section 275, Restatement of the Law of Contracts, is enlightening:

“In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

(d) The greater or less hardship on the party failing to perform in terminating the contract;

(e) The wilful, negligent or innocent behavior of the party failing to perform;

(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.”

Under this section appears the following comment:

“a. It is impossible to lay down a rule that can be applied with mathematical exactness to answer the problem—when does a failure to perform a promise discharge the duty to perform the return promise for an agreed exchange. Only such general principles based on inherent justice of the matter as are stated in this Section can be asserted. Where the failure is at the outset, a very slight failure is often sufficient to discharge the injured party. But even in that case, and more obviously if the failure of a promisor occurs after part performance by him, the question becomes one of degree. Both the amount he has done and the benefit that the injured party has received are considered. The question then to be answered is: Will it be more conformable to justice in the particular case to free the injured party, or, on the other hand, to require him to perform his promise, in both cases giving him a right of action if the failure to perform was wrongful. In the one case damages are based on breach of the whole contract; in the other on the loss caused by the partial breach. While the wilfulness of the breach, except in contracts for personal service, may not enhance the injury, yet it does so far

increase the dement of the wrongdoer that the law is less inclined if a breach is wilfull to require the injured party to perform."

The trial Court found that Sprague performed his part of the contract and there is ample evidence in the record to sustain that finding.

POINT II

THERE IS EVIDENCE TO SUPPORT A FINDING THAT DEFENDANT DID NOT BREAK THE ROCK INTO CONTRACT SIZE IN A WORKMANLIKE MANNER.

Although appellant objected, and objection was sustained, to testimony offered to be given by two experts concerning the proper method to produce rock in this quarry (R. 164, 173 and 189), there is sufficient evidence from which the Court could find that the rock was not broken in a workmanlike manner.

After Boyles worked under the subcontract for more than five weeks, or until February 3, 1950, the initial blast was set off. A picture of the quarry after the blast was set off was introduced in evidence (R. 85, Ex. 25). This picture itself shows the condition of the rock. After this much valuable time had been consumed, rock could not be hauled to the project because of the large size of the rock and the fact that large and proper size rock were all mixed together in the pile. Eighty percent of the rock was oversize (R. 90). After this blast in the

quarry of February 3, 1950, a shovel could not start loading to haul rock out to the project in sizes called for by the contract specifications (R. 166 and 167).

No attempt is here made to detail all the evidence given at the trial on the manner in which the rock was broken. The record is full of similar testimony. There is ample evidence to support the finding of the Court that the appellant did not break the rock into contract size in a workmanlike manner.

Several places in appellant's brief statements are made that, after respondents started to break rock, they did so in the same manner as did the appellant. This is not true. Boyles put in a "coyote" hole in an attempt to produce the rock. When Sprague took over, he went up on top of the shelf above the quarry and used a wagon drill to drill holes down into the rock and then blasted using these holes (R. 133 and 250).

POINT III

THE EVIDENCE IS SUFFICIENT TO PROVE THAT THE COST TO PLAINTIFF OF PRODUCING THE ADDITIONAL ROCK EXCEEDED WHAT HE AGREED TO PAY DEFENDANT.

The point raised by appellant applies only to the rock produced by respondents after appellant walked off the job in October, 1950.

The Court did, in its written memorandum, refer to the cost to Sprague of breaking of rock as 45.5 cents per ton, or a savings of 2.5 cents per ton under the contract price (R. 23).

It is evident, from an examination of the evidence, that, when the trial Judge in his memorandum, figured the cost of breaking rock by Sprague, he did not consider all of the expenses of Sprague in the production of the rock during the period after Boyles quit the job.

This Court's attention is called to Exhibits 7-P and 8-P introduced in evidence upon the testimony of Fern Sprague who kept the books and records for Sprague (R. 137 and 156). The original figures on the first page of Exhibit 8 were the actual cost to Sprague of producing rock after Boyles left the quarry. The total originally amounted to \$6,770.45. On the second page of Exhibit 8 originally appeared a credit for 1,000 tons of rock sold to Mathews at 48 cents per ton or \$480 and the original statement figures showed as the amount owed to Sprague by Boyles the sum of \$5,790.39. Mrs. Sprague explained that it cost Sprague considerably more than 48 cents per ton to produce the rock and that she revised the figures so as to give Boyles credit for the 1,000 tons of rock sold to Mathews at the cost of producing it, or \$1,185.23 (R. 138). The figures then on the first page of Exhibit 8

were all reduced in proportion and the total reduced from \$6,770.45 to \$5,585.22, which corrected figure was carried over onto the first page of Exhibit 7-P and the corrected figures on the various detailed items as corrected on page 1 of Exhibit 8-P to page 3 of Exhibit 7. All the items of expenses of producing rock after Boyles left the quarry were testified to by Mrs. Sprague and supported by documentary evidence.

It is apparent that Hon. Martin M. Larson left out some part of his calculations in the first paragraph of page 5 of his memorandum decision. Multiplying 5485 tons by 45.5 cents does not bring a result of \$4,495.55, nor does multiplying said 5485 tons by 48 cents bring a result of \$4,632.80.

Attention of this Court is called to the closing paragraph of Judge Larson's Memorandum which is as follows:

"Without setting forth herein the detailed working of in figures, and items, which we have done from three different approaches, and working in each detail of expense and deduction with the variation between largest and smallest, we find the plaintiff has been damaged in the sum of \$8,334.80 for which they are entitled to judgment against defendant, together with \$2,000 attorney's fees and costs." (R. 25)

This shows a detailed and careful consideration of the matter by the trier of the facts.

The appellant complains on page 30 of its brief about the sale of 1,000 tons of rock. The subcontract provided that, if the breaking of the rock into sizes therein provided for resulted in the production of rock of any size which is saleable, Sprague agreed to pay Boyles for all such rock at the rate of forty-eight cents per ton (R. 9, Par. 7). Sprague, in his account, gave Boyles credit for this rock which was sold to Mathews in the sum of \$1,185.23, which was credit at the cost of Sprague in producing the rock (R. 138). This rock, which was sold to Mathews, was in sizes of 1,000 pounds or over (R. 251). It was not rock which was acceptable to be used on the revetment (R. 252). Mathews gave credit to Sprague for this rock in the sum of \$1,000 on a bill for the rental of equipment (R. 251). Certainly appellant has no just complaint about this.

This Court's attention is called to the exhibits, which appellant refers to as packages and bundles on page 33 of its brief, and which were testified to by Mrs. Sprague (R. 141-148). The first so-called package or bundle was Exhibit 16-P and was identified by Mrs. Sprague as the weekly payroll records to support the items on Exhibit 7-P. These were the records from which she made a recap of the charges for labor used in production of rock which recap was designated as Exhibit 16 P-A (R. 146 and 147). Exhibits 16-P and 16 P-A were for the period prior to Boyles leaving the job. Exhibits 23-P and 23 P-A were the payroll records and recap by Mrs. Sprague of that part of the payroll which was

charged against appellant for the period after Boyles left the job, from September 30 to November 18, 1950 (R. 151 and 152). Respondents believe that these exhibits and others of similar character were proper exhibits and properly received in evidence.

POINT IV

THE COURT PROPERLY AWARDED THE PLAINTIFFS THE SUM OF \$823.15 FOR INCREASED COSTS OF LOADING AND HAULING THE ROCK.

There is ample evidence in the record to support this finding of damage to the respondents. This damage occurred prior to the time when Boyles left the quarry and was caused by the manner of the breaking of the rock and the oversize condition of the rock which made it necessary for Sprague to sort the rock, set aside the oversize rock, which of necessity cost him added expense for loading the trucks, and the truck drivers were delayed because of the lack of rock of available size to be loaded on the trucks and this made it necessary to pay the truckers an increased amount per ton for hauling the rock.

Mrs. Sprague prepared Exhibit 31-P. She prepared this from the records of Sprague. This exhibit shows the average cost to Sprague of loading when Boyles was producing rock as compared with the average cost to Sprague of loading when Sprague was producing rock

(R. 157). It cost Sprague 12.9 cents per ton more to load while Boyles was in the quarry producing rock. This item alone amounts to \$823.15 for 6381 tons broken by Boyles after the trouble with the truckers. There is ample evidence that there were delays caused by Boyles not having rock ready to be hauled (R. 111, 167, 168). In addition to this, because the truckers had to wait to be loaded when rock was not available and while the operator of the shovel was sorting rock, the price paid to the truckers was increased from 70 cents per ton to 80 cents per ton (R. 268).

POINT V

THE COURT DID NOT ERR IN AWARDING PLAINTIFFS \$850 ON ACCOUNT OF SPRAGUE'S FAILURE TO COMPLETE HIS PRIME CONTRACT ON TIME.

There is no dispute on the law pertaining to the right of a contractor to abandon his contract under certain circumstances for failure to be paid for his work, as it progresses, as provided in the contract. However, in this case there is no evidence that appellant abandoned its contract because of the failure to pay. It is true that the payment of \$4,392.00 became due by the terms of the contract on April 20, 1950 and that it was not paid until July 26, 1950. Under the evidence and reasonable interpretation of the contract, there may be some question of the right to have and receive the payment on April 20, 1950, on which date much less than 12,200 tons of rock had been broken by appellant. The payment was

75% of the contract price for breaking 12,200 tons of rock. Since that amount of rock was not broken even on July 26, 1950, perhaps the payment made was premature. This, however, is beside the point because there is absolutely no evidence that there was an abandonment of the contract by appellant because of the late payment and appellant continued to work on the project for more than two months after the payment was received by it.

As hereinbefore pointed out, Sprague was delayed by failure of Boyles to perform its contract of breaking rock in sufficient time to give Sprague the necessary time to deliver and place the rock on the levee within the time limit of the principal contract. This was required by the subcontract (R. 8 and 10, Par. 2 and 10). There is no dispute about the penalty of \$1050 being invoked by the government against Sprague for delay. Extensions were granted by the government for delays which were reasonable. The Court found that Boyles was responsible for a portion of the penalty and gave damages for the amount which Sprague was penalized for the delay caused by Boyles (R. 24 and 27). Elsewhere in this brief references are made to the record which show that rock was not readily available in sizes to be hauled to the levee because of the condition of the rock in the quarry after the blast of February 3, 1950, that the operator of the shovel in the quarry had to sort rock and cast aside the oversize rock and that trucks had to wait for rock because it was not available. Further reference appears to be unnecessary.

POINT VI

UNITED STATES FIDELITY & GUARANTY COMPANY IS NOT LIABLE TO DEFENDANT.

As surety on the performance and payment bonds of Sprague, the United States Fidelity & Guaranty Company would have been liable if the principal, Sprague, was liable. These bonds were furnished as required by Section 270, Title 40, United States Code. The provision of the United States Code is as follows:

“Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement by such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.”

It is obvious that in this action no recovery can be had against the United States Fidelity & Guaranty Company. Appropriate defenses were set up in the reply calling the attention of the Court to the above provision of the Code (R. 17 and 18).

In an apparent attempt to get around the above provisions of the Code, appellant contended that United States Fidelity & Guaranty Company made a new agreement with Boyles. Neither the testimony of Mr. Douglas

(R. 95 to 97), nor the Exhibits 27-P and 28-D, establish anything other than the fact that United States Fidelity & Guaranty Company, as the surety on the bonds of Sprague, was responsible for the performance of Sprague on his contract with the government and the payment of his obligations.

The trial Court found that there was no failure to furnish compressed air and, of course, if that finding is sustained by this Court, this point will be disposed of.

On page 42 of appellant's brief, reference is made to the original complaint filed in the first action. This was a separate case, No. 96365 in the same Court, the District Court of Salt Lake County. Respondents' counsel is embarrassed about the mistake made when preparing and filing that complaint. It was filed September 2, 1952 (R. 44). The new action, which is the case which has been tried and is now before the Court, was filed August 6, 1953 (R. 10, back of page). A short explanation appears necessary concerning the mistake made by respondents' counsel in the filing of the complaint in Case No. 96365. At the time of filing this complaint, I thought that the United States Fidelity & Guaranty Company had issued a bond for Boyles Bros. Drilling Company, covering the performance of Boyles Bros. Drilling Company on its contract with Sprague for the production of the rock to be used by Sprague in the performance of his contract with the government and I so alleged in paragraph 2 of said complaint (R. 43 and 44).

This was not true as I later discovered. No bond had been issued by United States Fidelity & Guaranty Company for Boyles but bonds had been issued for Sprague. This mistake was not discovered by me until several months had passed possibly because the defendant, Boyles, in its answer (R. 45, Par. 2) admitted the issuance of the bond which had not been issued. This admission was not true; it likewise was a mistake. Two wrongs did not make a right and when I discovered my error, I attempted to obtain leave of Court to file an amended complaint in that action, No. 96365, in which at that time I did not attempt to state a cause of action on behalf of United States Fidelity & Guaranty Company, but believed that recovery could be had in the name of Walter W. Sprague, who was the real party in interest, and that the amount paid out by surety could be recovered on the theory of subrogation. The trial Court denied my motion to file the amended complaint (R. 57). It then became necessary to file this action. Appellant has raised objection to it, which objection has been decided against it by the lower Court. It continues its objection under point X of its brief. The so-called positive allegation of liability referred to on page 42 of appellant's brief is found in paragraph 2 of the original complaint (R. 43 and 44). This allegation was made by mistake. I have been embarrassed many times on various motions and arguments about it. I am embarrassed now to be under the necessity of again explaining it. Explanation of this mistake was made under oath at the trial of the case (R. 379).

POINT VII**THE COURT DID NOT ERR IN AWARDING PLAINTIFF \$292.80 FOR ROCK PURCHASED.**

Although the Court sustained objection to the offer of the exhibits on the purchase of rock (R. 81), testimony was allowed to be received on the number of tons purchased (R. 82). The amount purchased was 116 tons for which was paid \$3.00 per ton. The rock was necessary after the quarry was finally closed to complete the last of the contract.

The Court required a reduction from the cost of the rock at \$3 per ton, or \$348 the contract price of 48 cents per ton, or \$55.20, and allowed as damages the difference, \$292.80. I cannot find in the record any place where anyone testified about the cost of the rock at \$3.00 per ton or that it was reasonable that the rock be purchased rather than reopen the quarry to produce such a small amount. It may be that the trial Judge considered the Exhibit 24-P to which objection to its admission he had sustained (R. 81). If this be error, it is on a very small item and there should be no reversal or new trial granted but only an order to reduce the judgment by the amount of this item, \$292.80.

POINT VIII**THE JUDGMENT IS SUPPORTED BY THE FINDINGS OF FACT.**

The Court found that plaintiff, Walter W. Sprague, performed his part of the contract dated January 25, 1950, between the plaintiff and defendant (R. 27).

That was the ultimate fact for the Court to find. Would anything have been added to say in the finding "Plaintiff furnished defendant with compressed air to operate its drills efficiently"? When it came to the breaches of the contract on the part of defendant, the Court specified exactly what those breaches were. From the memorandum decision given by the Court, it is clear that, while there were times that Boyles was temporarily hampered by lack of air, they were such as would be reasonably expected to occur and not sufficient in time or effect to constitute a rescission or cancellation of the contract (R. 22). The finding and the written decision should be considered together and it appears that there can be no doubt but what the Court found that Sprague furnished adequate compressed air to Boyles.

POINT IX

THE JUDGMENT SHOULD BE AFFIRMED. THE COURT DID FIND ON THE MATERIAL ISSUES RAISED BY THE PLEADINGS.

This point in answer to appellant's Point IX is very similar to Point VIII. Respondents have no quarrel with the rule of law that the failure of the trial Court to make findings of fact on all material

issues is reversible error where it is prejudicial. Respondents contend that such findings were made. In the case cited by appellant, the Court made no finding on an issue of abandonment raised by defendant's answer. The defense in the present case was that the plaintiff had not performed his part of the contract. The Court found that the plaintiff had performed. If this finding is not specific enough and the failure to find specifically as to furnishing of air, making payment, and removing broken rock from the quarry by Sprague is prejudicial, then the most that should be required, as was done in the case of *Gaddis Investment Company v. Morrison*, 3 Utah 2d 43, 278 P. 2d 284, is that the judgment be set aside and the cause remanded to the District Court with directions to make proper findings and enter judgment in harmony therewith. Where a written memorandum was filed by the trial judge in which he stated that there was no failure to furnish air and the finding of the Court that the plaintiff performed his part of the contract, the defendant was not prejudiced in any way by not having a detailed finding that each thing, which was to be done by the plaintiff in the performance of the contract, was done by him.

POINT X

THE PRESENT ACTION SHOULD NOT HAVE BEEN ABATED BECAUSE OF THE PENDENCY OF ANOTHER SUIT.

The facts concerning the filing of the original action No. 96365 have been discussed under Point VI of this brief and will not again be discussed here.

Certainly plaintiffs were entitled to have their case against Boyles tried in a case where the complaint properly alleged the true facts and the plaintiffs' theory of their right to recover. Respondents' counsel thought that the trial Court, in its discretion, should have permitted the amendment to the original complaint. The proposed amended complaint did state a cause of action on a new and different theory and this was urged upon the trial Court by appellant as ground for denying the motion to amend.

After the commencement of the original action No. 96365, when it was discovered that plaintiffs' counsel was mistaken about the alleged issuance of a bond for Boyles and the Court refused to permit the filing of an amended complaint, there was only one thing which could be done and that was the filing of a new action. This mistake cost the plaintiffs the expense of paying another fee for filing another action and paying for the service of another summons. The first action, No. 96365, has never been tried and when the present case now before the Court is concluded, the first action can be dismissed.

The appellant has not been injured. It has not been required to go through two trials and all the rights of the parties will be finally determined in the case now before

the Court. The plaintiffs should not be deprived of their day in Court by an error of counsel in making a mistaken allegation in the original complaint which allegation was also mistakenly admitted by defendant.

The case of *State v. California Packing Corporation*, 105 Utah 191, 145 P. 2d 784, does not support the appellant's position. In that case a demurrer was sustained to plaintiffs' amended complaint by the trial Court; plaintiffs refused to plead further; the case was dismissed with prejudice and the Supreme Court affirmed the judgment in an earlier decision. The State, in the case before the Court on rehearing, contended that the dismissal of the action should not be a bar to its maintaining another action based on the facts alleged in its original complaint and asked the Supreme Court to so hold. The following statement from the case appearing on page 785 of 145 P. 2d indicates that a litigant is entitled to his day in Court even though one action has been dismissed with prejudice when new and additional facts might be alleged in a new complaint.

“The dismissal of plaintiff's action, although with prejudice, does not bar plaintiff from maintaining another action against the defendant based on the same facts alleged in the original complaint providing the new complaint supplies new and additional facts, so that the new complaint alleges different facts and states a cause of action. The dismissal of the action is with prejudice only to the extent that it determined once and for all that the complaint attacked by demurrer did not state facts sufficient to consti-

tute a cause of action and bars the maintenance of a new action on the same facts which were alleged in the complaint which was dismissed."

The Court, in the same case on page 786 of 145 P. 2d, quotes from the case of *Gould v. Evansville & C.R. Co.*, 91 U.S. 526, 534, 23 L. Ed. 416, 419:

"* * * but it is equally well settled, that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action."

SUMMARY

Appellant has raised many points upon which it relies for a reversal of the judgment. Respondents have answered all the objections raised. Some trivial errors or mistakes may have been made in this rather involved litigation. The record is rather long. It consists of more than 400 pages. No attempt has been made by respondents to point out all of the evidence on each point raised where the sufficiency of the evidence is challenged, but only sufficient to show to this Court that each finding is supported by substantial competent evidence.

As held by this Court in the cases of *Startin v. Mad-
sen*, 237 P. 2d 834, and *Hillyard v. Utah By-Products
Co.*, 1 U. 2d 143, 263 P. 2d 287, errors should be dis-
regarded unless they are so substantial as to affect the
rights of the parties or the likely outcome of the case.
Rule 61 Utah Rules of Civil Procedure.

The Judgment should be affirmed.

Respectfully submitted,

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