1980

Highland Construction Co. v. LaMar D. Stevenson et al : Brief of Appellant

Utah Supreme Court

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Roger P. Christensen; Attorneys for Respondent;

HIGHLAND CONSTRUCTION COMPANY, a Utah corporation,

Plaintiff-Appellant,

vs.

LaMAR D. STEVENSON d/b/a LaMAR D. CONSTRUCTION COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation; and SHELL OIL COMPANY, a Delaware corporation,

Defendant-Respondent,

LaMAR D. STEVENSON d/b/a LaMAR D. CONSTRUCTION COMPANY,

Third-Party Plaintiff,

vs.

THE STATE OF UTAH and THE UTAH STATE DEPARTMENT OF TRANSPORTATION,

Third-Party Defendant.

Case No. 17099

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court
for Weber County, Honorable Allen B. Sorenson, Judge

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REME COURT OF THE STATE OF UTAH

HIGHLAND CONSTRUCTION COMPANY, a Utah corporation, Plaintiff-Appellant, vs. LaMAR D. STEVENSON d/b/a LaMAR D. CONSTRUCTION COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation; and SHELL OIL COMPANY, a Delaware corporation, Defendant-Respondent,	
LaMAR D. STEVENSON d/b/a LaMAR D. CONSTRUCTION COMPANY, Third-Party Plaintiff, vs. THE STATE OF UTAH and THE UTAH STATE DEPARTMENT OF TRANSPORTATION, Third-Party Defendant.	Case No. 17099

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BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is an action by Highland Construction Company ("Highland"), the earthwork subcontractor on a state highway

project ("Project"), against LaMar D. Stevenson dba LaMar D. Construction Company ("Stevenson"), the prime contractor, United States Fidelity and Guaranty Company ("USF&G"), Stevenson's bonding company, and Shell Oil Company ("Shell"), the owner of, and the party engaged by the Utah Department of Transportation ("UDOT") to relocate and encase, certain gas and water lines located within the portion of the highway right of way included within the Project, for the recovery of damages and additional compensation resulting from defective plans and specifications, unreasonable delays and breach of contract.

DISPOSITION IN DISTRICT COURT

The trial court, the Honorable Allen B. Sorenson sitting without a jury presiding, found no cause of action on all claims of Highland's Complaint, entered its declaratory judgment that Stevenson had rightfully back charged Highland for certain claimed sums and awarded Stevenson judgment for attorneys fees and costs.

RELIEF SOUGHT ON APPEAL

Highland seeks (a) to have the trial court's Findings of Fact and Conclusions of Law set aside insofar as they relate to Highland's claims, (b) a reversal of the trial court's judgments dismissing all of Highland's claims and awarding Stevenson attorneys fees and costs, (c) the entry of

a judgment in favor of Highland and against Stevenson for the sum of $46,403.83 for damages and additional compensation to which Highland is entitled by reason of the defective plans and specifications which failed to disclose the very substantial unstable subgrade conditions encountered by Highland in the performance of its work, by reason of unreasonable and unnecessary delays caused and created by Stevenson as a result of his failure to perform preparatory work as agreed or within a reasonable time so as to enable Highland to perform its work timely and without interference or interruption, and by reason of breaches of contract on the part of Stevenson in failing to perform his work and to make payments to Highland as provided in the subcontract, (d) the entry of a judgment in favor of Highland and against Shell in the amount of $6,604.97 for damages suffered by Highland as a result of Shell's failure to relocate and encase its gas and water lines within the time promised or within a reasonable time, (e) the entry of a judgment in favor of Highland and against Stevenson pursuant to Section 14-1-8, Utah Code Annotated 1953, as amended and supplemented, for reasonable attorneys fees and costs, and (f) the entry of a judgment in favor of Highland and against USF&G for all sums for which Stevenson is finally adjudicated to be liable to Highland herein.

STATEMENT OF FACTS

Some time prior to June 15, 1976, UDOT determined to upgrade a 1.827 mile section of State Road 35, located some five miles north of Duchesne, Utah. (R.663, Ex.P-6). Detailed plans and specifications were prepared by UDOT for the Project which provided, among other items of work, for the excavation of 55,100 cubic yards of material ("Roadway Excavation") from the existing roadway. (Ex.P-7). The Roadway Excavation item of work is the only one involved in this appeal.

At the time the plans and specifications were prepared, Myron Taylor, UDOT's maintenance engineer for UDOT's District 6 wherein the Project was located, was aware of the following unusual and abnormal conditions relating to the portion of State Road 35 underlying the Project:

1. Soft subgrade conditions (R.1046) were causing abnormal rutting and boggyness in a 75 to 100 foot section of the roadway which became extremely wet and saturated each spring and summer. (R.1047-1048, Ex.P-49).

2. A French drain, a major water gathering and drainage device, had been installed in the 75 to 100 foot section of the roadway to collect and drain the water from under the travelled portion of the roadway at that point. The water thus collected was discharged through a two- or three-inch pipe, not visible to someone not acquainted with its location, into a field adjoining the roadway. (R.1050-1051).

Myron Taylor first became acquainted with the roadway underlying the Project in 1945 and was the state official directly responsible for its maintenance at all times after November, 1970. (R.1042-1043).

Notwithstanding Myron Taylor's long familiarity with the roadway and his personal knowledge of the unusual and abnormal conditions that prevailed, he was never contacted by or communicated with UDOT's personnel who prepared the soils reports (Ex.D-20) and the plans and specifications for the Project. (R.1053). Myron Taylor's knowledge was likewise never communicated to Larry Buss, UDOT's Project engineer, until three weeks after work on the Project commenced. (R.680).

Before the Project was bid, it became evident to Larry Buss, UDOT's project engineer for the Project, that a 2700 foot section of the roadway at the western end of the Project would have serious water and soil stability problems. (R.671-672). The knowledge of Larry Buss was likewise never communicated to UDOT's personnel who prepared the soils reports and the plans and specifications.

More significantly, no effort was made by UDOT to disclose or communicate its knowledge of these unusual and abnormal conditions to the contractors who bid on the Project prior to the opening of their bids. (R.681-682).

The plans and specifications reflected no particularly unusual or difficult conditions to be encountered in the general performance of the work, nor did they reflect any such conditions relating to the Roadway Excavation item. (Ex.P-6). UDOT's engineer's estimate of the unit cost for Roadway Excavation item likewise reflected no such conditions. (Ex.P-7). The contractors who submitted bids on the Project were obviously not aware and were not made aware of these unusual and difficult subgrade conditions that were then known to exist by UDOT, as shown by the fact that of the eight bids which were ultimately submitted and opened, one included a unit price for the Roadway Excavation item of $1.00 per cubic yard, one was for $1.10, two were for $1.40, one was for $1.75, one was for $1.90 and two were for $2.00. In the case of the $1.90 and $2.00 unit prices the bids which included them were also the highest overall bids that were submitted. (Ex.P-7, Ex.P-8).

Notwithstanding UDOT's knowledge, the plans and specifications and other bidding materials failed to make any reference to the 75 to 100 foot section of unstable roadway, the existence of the French drain, the existence of the drain pipe carrying the flow of water into the adjoining field or the 2700 foot section of roadway known by Larry Buss to have serious water and soil stability problems. The plans and specifications and bidding materials merely contained a

provision buried in the Special Provisions (Ex.P-6, Section 102) which notified bidders of a materials report, soil survey plans and profiles, and test data which was available for inspection at UDOT's offices in Salt Lake City, or at its District office. A document entitled "Soil Survey and Materials Report" was prepared by UDOT for the Project which merely indicated that the Project's soils ranged from a very plastic to a non-plastic silty sandy gravel, that natural surface drainage varied from good to poor, and that some water was accumulating in marshy and saturated zones that occurred where irrigation water seeped from irrigation ditches and canals. (Ex.D-20). Attached to the Soil Survey and Materials Report were ten individual laboratory soil reports indicating that test hole conditions actually encountered by UDOT were "silty sandy bouldery gravel", "red silty fine sand", "red gravelly sandy silt", "sandy silty clay", "gray silty clay", "red silty fine sand" and "red sandy silt with minor clay". (Ex.P-10, Ex.D-20).

Before submitting their bids on the Project, Bryan Bergener, Highland's president, and John W. Lloyd, the owner of John W. Lloyd Const. Co., one of the other bidders on the Project, inspected the Project site by walking and driving over it. They each observed some evidence of moisture coming from the existing canal, such as marsh grass, alkali and surface water. (R.801-806, 930-934, 939, 941-942). Although

they each had had over twenty years experience in bidding construction work similar to the Project and were both very familiar with the roadway in question after having travelled over it, and after having worked on other construction projects in the area, for a number of years, neither Bryan Bergener nor John W. Lloyd believed that any significant water or unstable subgrade conditions existed and they prepared and submitted their bids accordingly. (R.842-843, 930-934).

Bids for the Project were solicited to be opened on June 15, 1976. The bidding materials included UDOT's engineer's estimate for the Roadway Excavation item of $1.00 per cubic yard. (EX.P-7). Three bids, submitted by Highland, J. M. Sumsion & Sons and LeGrand Johnson Construction Co., were opened at the bid opening. (Ex.P-7). Although Highland was the low bidder, all bids were rejected by UDOT and the Project, with certain revisions, was readvertised for bids to be opened on July 27, 1976. (Ex.P-6). The bidding materials for the second bidding included UDOT's engineer's estimate for the Roadway Excavation item of $1.50 per cubic yard. (Ex.P-8). Five bids, submitted by Stevenson, John W. Lloyd Const. Co., L. C. Stevenson Construction Co., Highland and James Reed & Co., were opened at the second bid opening. (Ex.P-8). The prime contract ("General Contract") for the Project was thereafter awarded to Stevenson as the low bidder. (Ex.P-1, P-2).

Upon learning that he was the low bidder, Stevenson entered into negotiations with Highland, who was then in the process of completing the construction of another similar highway project approximately 20 miles northwest of the Project and who therefore had a full spread of new earth-moving equipment and men available to perform the earthwork, for the performance by Highland of that portion of the General Contract. (R.813-815). These negotiations resulted in an oral agreement being arrived at on August 3, 1976 for Highland to perform the earthwork, including the Roadway Excavation, under certain specified terms and conditions. (R.815-821, 1327). On August 6, 1976 Highland commenced its work on the Project, pursuant to the agreement thus arrived at. (R.823-824). The agreed upon terms and conditions were thereafter incorporated into a written sub-contract agreement ("Sub-Contract") dated August 9, 1976. (Ex.P-2). The Sub-Contract evidenced the complete understanding of the parties both at the time the agreement was arrived at on August 3, 1976 and at the time the Sub-Contract was executed by the parties on August 19, 1976. (R.823, 1327-1329). Although Highland's two bids on the Project had included a unit price of $1.40 per cubic yard for the Roadway Excavation item, Highland agreed to perform the Roadway Excavation for Stevenson at the lower unit price of $1.20 per cubic yard (Ex.P-2), following detailed negotiations which resulted in Stevenson's

considered and voluntary agreement that Highland would be able to conduct a "Highball" operation with no delay or interference and that Highland would have the benefit of the following provisions which were expressly included in the Sub-Contract for the purpose of reducing Highland's cost and burden of performing its work. (R.817, 821, 823, 992-993, 1327-1329):

1. Paragraphs 1 and 10 incorporated by reference the provisions of the "Contract Documents," which included the General Contract and the plans and specifications, and provided that Stevenson would assume toward Highland all of the obligations and responsibilities which UDOT, under the Contract Documents, assumed toward Stevenson.

2. Paragraph 2 obligated Highland to perform the Roadway Excavation item for the $1.20 unit price and obligated Stevenson to pay Highland progress payments, less the standard 10% retainage, within five days after the receipt by Stevenson of his progress payments from UDOT, and further obligated Stevenson to pay Highland in full for all sums owed under the Sub-Contract, including any unpaid retention, within thirty days following the completion of Highland's work.

3. Paragraph 3 obligated Stevenson to install or cause to be installed or modified any utilities, drainage

pipes, fences, oil pipelines or other items of work in advance of Highland's operation so as not to cause any hindrance or delay to Highland's operation.

4. Paragraph 11 prohibited Stevenson from giving instructions or orders to Highland's workmen.

In the negotiations leading to the Sub-Contract, Stevenson expressly agreed to work double shifts, overtime, weekends, Saturdays, Sundays and holidays if necessary to keep out of Highland's way so that Highland would have absolutely no delay by reason of Stevenson's operations. (R.818, 992-993, 1238, 1327).

At the time Highland entered into the Sub-Contract, it had the benefit of all bidding information, including the engineer's estimates relating to the Roadway Excavation item which reflected low and medium bids as low as $1.00 and $1.10 to as high as $1.50 and $1.75. In addition Highland was then aware, as were Myron Taylor and the other bidders, of the high volume traffic by heavy oil field rigs that were then and for some time prior thereto had been using the roadway without any apparent evidence of subgrade instability. (R.930-934, 963-966, 1049-1055). Bryan Bergener, John Lloyd and Myron Taylor all had been acquainted with the roadway for a number of years prior to the bidding. Based upon their familiarity and inspection they were all three surprised by the conditions that were actually encountered by Highland

when it subsequently commenced its work. (R.930-934, 963-966, 1049-1055).

Consistent with industry practice, on August 9, 1976 Larry Buss convened and conducted a preconstruction conference attended by various representatives of parties having an interest in the Project, including Ernest J. Wilson, UDOT's District 6 construction engineer, Myron Taylor, Paul Traynor, UDOT's District 6 materials engineer, Stevenson, Harry Nash, Shell's plant foreman, and Bryan Bergener, Highland' president. (R.826, Ex.D-56). At the preconstruction conference Larry Buss invited the representatives for the utilities, including Shell, to state what their schedules would be for completing their utility relocations so that the contractors would know when such relocations would be completed. Harry Nash, speaking for Shell, stated that Shell's relocation would be completed in about four days. Shell's four-day schedule was then reaffirmed by Harry Nash upon being questioned further by Bryan Bergener at the conference. (R.828-829, Ex.D-56).

Shell's statement that the relocation would be completed in four days was relied upon by Highland in planning, scheduling and performing its work. (R.829, 831). Shell's relocation was not in fact completed until August 24, 1976. (R.467, 538, 598). Shell could reasonably have completed the

pipeline relocation within the promised four-day period. (R.830, 1350). By reason of Shell's failure to complete its pipeline relocation within the time stated by Harry Nash, Highland's earthmoving operations were interfered with and delayed to its damage from this cause alone in the amount of $6,604.97. (R.894-906).

There was a discussion at the preconstruction conference between Bryan Bergener, Myron Taylor and Ernest J. Wilson concerning possible soil stability problems that might effect Highland's work. (R.965-966, 1049-1050). In that discussion Myron Taylor and Ernest J. Wilson both expressed the belief that water and associated soil stability problems, if any were encountered at all, would be isolated and not extensive. (R.966). Larry Buss did not express any disagreement with the beliefs expressed by Myron Taylor or Ernest J. Wilson, although he held the belief at that time that it was evident serious subgrade stability problems did exist throughout the western end of the Project. Larry Buss wholly failed to make Highland aware of the very serious subgrade stability problems Larry Buss was then aware of. (R.671-672).

Highland commenced its excavation operations at the western end of the Project on August 11, 1976 (R.825) and immediately encountered unstable subgrade conditions that were so severe that the speed and efficiency of its heavy

earthmoving scrapers being utilized in the excavation operation was seriously impaired. The scrapers were repeatedly stuck and mired down in the boggy, yielding soil and had to be repeatedly extricated from the mud by Highland's other equipment. (R.758-761, 836-837). When the excavation operations reached the area of the French drain a flowing spring in the middle of the highway right of way was encountered. (R.836-840). These adverse conditions prevailed throughout the westernmost 3200 foot section, or approximately one-third, of the Project and resulted in Highland being required to subexcavate the unstable material, in some areas two and three times. (R.840, 845-846). Highland was required to spend 67.6% of its total time on the Project performing 32.7% of its work. (Ex.P-58). The result was a very time-consuming, inefficient and very expensive excavation operation which ultimately resulted in cost overruns to Highland from this cause alone in the amount of $32,486.18. (Ex.P-30, Ex.P-32 and R.969).

Highland's operations were also delayed and its costs significantly increased by Stevenson's failure, notwithstanding his express agreement and Highland's repeated demands to the contrary, to perform his work (utilities, drainage pipes, fences, oil pipeline and other items of work) or to cause the same to be performed (Ex.P-2, Par.3) in advance of Highland's operations so as not to cause any hindrance or

delay to Highland's operations. The Shell relocation, for which Stevenson was responsible insofar as Highland was concerned, was not timely completed (R.830), the 120 CMP structure was not completed until October 4, 1976 even though it could and should reasonably have been completed within ten days from August 25, 1976 (R.847, 1335-1337), the Pioneer Canal was diverted down the middle of the roadway, rather than down the borrow pit along one side of the roadway as was agreed by Stevenson and as was reasonable, throughout the period commencing August 27, 1976 to September 23, 1976 (R.853-860). In addition Stevenson, in violation of the terms of the Sub-Contract, repeatedly directed Highland's workmen to perform work for Stevenson's sole convenience thereby causing disruption to and inefficiencies in Highland's operations. (R.869-871). Stevenson's failure to perform or cause to be performed his part of the work in a manner so as not to cause any hindrance or delay to Highland resulted in damages to Highland from this cause alone in the amount of $9,280.76. Stevenson was given repeated notices of these breaches on his part under the Sub-Contract (R.855-859, Ex.P-58).

Highland completed its work and moved its equipment off the Project on October 6, 1976 (R.1279, 1337, Ex.P-58, Pg.8). Stevenson thereafter, without notice to or the consent of Highland (R.1351-1354, 1364-1365, 1383-1384), back

charged Highland for $3,497.79 for work he claimed he finished for Highland, the last item of which was claimed by him to have been completed on October 29, 1976.

Stevenson received his progress payments from UDOT regularly on a monthly basis within ten days or so of the same day each month (R.1393). Stevenson's payments to Highland, however, were not made monthly or within thirty days following the completion of Highland's work, as provided in the Sub-Contract. Highland received payments on the following dates in the amounts indicated. (R.960, 1389-1390, Ex.P-32).

9/24/76	Estimate No. 1	$39,900.00
11/6/76	Estimate No. 2	18,338.01
11/16/76	Final Partial	9,290.21
5/13/77	Equipment	2,762.90
12/19/77	Final Partial	10,300.78

Highland had the right, in any event, to receive payment in full for all sums owing to it under the Sub-Contract not later than November 28, 1976, or 30 days following the completion by Stevenson of his claimed work on Highland's behalf on October 29, 1976. A formal Claim (Ex.P-58) was submitted by Highland to Stevenson on January 12, 1977 and when payment in full was not forthcoming Highland initiated this action on July 8, 1977. (R.1). Stevenson's last payment to Highland in the amount of $10,300.78 was made as indicated above on

December 19, 1977, over six months after this litigation was initiated. (Ex.P-32).

Highland's cost for performing the Roadway Excavation would have been something less than $1.12 per cubic yard, or $61,712.00, had its excavation operation not been delayed and interferred with. (R.893, 1007, Ex.D-35). However, as a result of such delays and interference, Highland ultimately incurred costs, including a 15% overhead factor, in the amount of $126,995.73. (R.913, 926, Ex.P-30). Highland received payments totalling only $80,591.90 (Ex.P-32), which included $6,600.00 for sub-excavation of the unstable subgrade materials as an adjustment for its fixed costs as calculated in its original bid. (R.1374, 1400-1401). In computing the additional compensation for Highland's work relating to the Roadway Excavation item, no consideration whatsoever was given by Larry Buss, acting in his capacity as the Project engineer, to Highland's actual per unit or "total costs," or to any "consequential," "ripple effect," or "indirect" damages suffered by Highland. (R.1519-1520, 1523-1524). Highland's unreimbursed costs amount to $46,403.83. (Ex.P-32).

The trial court, following a seven-day trial, entered judgment dismissing all of Highland's claims and awarding Stevenson $18,597.00 attorneys fees and $877.00 costs, the full amount claimed for these items (R.535-606).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PLANS AND SPECIFICATIONS WERE DEFECTIVE

Highland recognizes that in reviewing a trial court's findings and judgment on appeal, this Court indulges them with a presumption of validity and correctness, it reviews the record in the light most favorable to them, it does not disturb them if they find substantial support in the evidence, and it requires an appellant to sustain the burden of showing error. R. C. Tolman Construction Company, Inc. v. Myton Water Association, 563 P.2d 780 (Utah 1977); Nielsen v. Chin-Hsien Wang, 613 P.2d 512 (Utah 1980). However, when the trial court has based its rulings upon a misunderstanding and misapplication of the law, where a correct one would have produced a different result, the party adversely effected is entitled to have the error rectified in a proper adjudication under correct principles of law. Reed v. Alvey, 610 P.2d 1374 (Utah 1980). And this Court does not uphold the findings and judgment of a trial court where there is no reasonable basis in the evidence to support them. Nielsen v. Chin-Hsien Wang, 613 P.2d 512 (Utah 1980).

In this case UDOT, for whose actions Stevenson is responsible to Highland under the Sub-Contract, prepared plans and specifications for the Project and provided such

plans and specifications together with other bidding materials to parties interested in submitting bids. (Ex.P-6). At the time the Project was advertised for bid UDOT was aware, through Myron Taylor, its district maintenance engineer, and Larry Buss, its Project manager, that the 75 to 100 foot section became "extremely wet and saturated" each spring and summer, that a French drain had been installed under the travelled surface of the roadway in that area which continually discharged water from under the roadway into an adjoining field, that significant rutting of the roadway had been experienced by UDOT in maintaining this section of the roadway, and that the western 2700 foot section of the roadway would have serious water and soil stability problems. (R.1046-1048, 1050-1051). Notwithstanding this knowledge, no positive steps were taken by UDOT to communicate the same to the bidders or to otherwise make the bidders aware of it. (R.681-682). No reference was made to this information in the plans and specifications, the Contract Documents, or the other bidding materials (Ex.P-6). None of these documents disclosed any unusual, abnormal or particularly difficult conditions to be encountered insofar as the Roadway Excavation was concerned.

The unit prices included in the bids for the Roadway Excavation item reflect clearly the lack of any notice having been given to those submitting bids on the Project, and the engineers estimates prepared and published by UDOT likewise

failed to disclose or give any notice of the existence of any such conditions. (Ex.P-7, Ex.P-8).

No reasonable conclusion can be drawn from the facts established by the evidence in this record other than that UDOT failed reasonably to disclose the facts known to it to prospective bidders notwithstanding the critical importance of those facts to those who prepared and submitted bids. As a result all bidders, including Highland, were misled into submitting lower bids for the Roadway Excavation item than they would otherwise have submitted. The legal principle which applies to these facts has been stated by this Court as follows:

> A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as a basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented.

Thorn Construction Company, Inc. v. Utah Department of Transportation, 598 P.2d 365 (Utah 1979); L. A. Young Sons Construction Company v. County of Tooele, 575 P.2d 1034 (Utah 1978).

Thus, the trial court erred in not finding that UDOT, and by reason of the Sub-Contract provisions Stevenson also, failed to disclose or give any notice to Highland of the

water and associated subgrade conditions that were then known by UDOT to exist in the roadway. In so failing, UDOT, and Stevenson, breached the obligation they each then had to fully disclose to Highland all material facts then known concerning the then existing subgrade conditions. As a result, Highland's unit price of $1.20 for the Roadway Excavation item was significantly lower than it would otherwise have been and Highland, by reason thereof is entitled under Thorn to recover for the extra work and expense, in the amount of $32,486.18, necessitated by the conditions being other than as represented.

POINT II

THE TRIAL COURT ERRED IN FAILING TO FIND THAT STEVENSON BREACHED HIS SUB-CONTRACT OBLIGATIONS TO HIGHLAND AND SUBJECTED HIGHLAND TO UNREASONABLE DELAYS

A. STEVENSON BREACHED HIS SUB-CONTRACT OBLIGATIONS.

The evidence is uncontroverted that in negotiating the Sub-Contract Highland agreed to complete the Roadway Excavation item at a unit price of $1.20 only after Highland was assured that it could conduct a "Highball" operation entirely free from delays or interference from other on-going work on the Project (R.818, 992-993, 1327), and that Stevenson would do whatever was necessary to stay out of Highland's way, including working "double shifts", "overtime", "weekends", "Saturdays", "Sundays" and "holidays" if necessary.

(R.818, 992-993). This understanding was incorporated into paragraph 3 of the Sub-Contract (Ex.P-2) which provides:

> The Contractor agrees to install or cause to be installed or modified any utilities, drainage pipes, fences, oil pipelines or other items of work in advance of Sub-Contractor's operations so as not to cause any hindrance or delay to Sub-Contractor's operation. (emphasis added)

This provision was included knowingly and deliberately following serious negotiations, in lieu of and in contrast with the standard sub-contract provision which obligates the sub-contractor to schedule his work to fit with and accommodate the prime contractor's overall schedule.

Highland's agreement to the $1.20 unit price was also agreed to after Stevenson had agreed expressly committed to promptly pay all progress payments and the final payment. Paragraph 2 of the Sub-Contract provides:

> The sums payable by Contractor to Sub-Contractor hereunder shall be paid out of estimates received by the Contractor from the Owner and shall be paid within five (5) days after the receipt of each estimate by Contractor, to the extent of the Work covered by said estimate which has been completed by the Sub-Contractor; provided, however, that Contractor shall have the right in any event to withhold the percentage, up to ten percent (10%), of all amounts due the Sub-Contractor in accordance with the established and prevailing practice of Owner... Contractor agrees to pay Sub-Contractor in full for all sums owing under and in connection with this Sub-Contract, including any unpaid retention, within thirty (30) days following completion of the Work covered by this Sub-Contract. (emphasis added)

The Sub-Contract provided, in addition, as follows:

> Contractor shall not give instructions or orders directly to employees or workmen of Sub-Contractor...

Notwithstanding these very specific and unambiguous provisions deliberately arrived at, which had as their sole purpose the freeing up of Highland's operation so it could be conducted at a substantially reduced cost at a significantly reduced burden to Highland, it is uncontroverted in the evidence that Stevenson made no special or particular efforts to avoid delays and interference to Highland's operation. Highland's operations were continuously interfered with throughout the period during which Highland was on the Project. The utilities, including Shell's pipelines, remained in the way after they could and reasonably should have been relocated, (R.467, 538, 598, 830, 846-847), the drainage pipes were a continuing hindrance (R.846-847, 850-851), the 120 CMP was not timely completed (R.847, 853), the Pioneer Canal relocation was diverted down the travelled portion of the roadway instead of down the borrow pit on one side of the roadway (R.853, 856-857) thereby causing Highland unnecessary delays and interference throughout most of the time Highland was on the Project (R.860), Stevenson directed Highland's men to perform work for Stevenson's sole convenience without regard to the inefficiency caused thereby to Highland's operations

(R.870-871), the fence removal was delayed (R.871), and Highland was not paid promptly as agreed (Ex.P-32, R.1393).

Stevenson had a duty to Highland both under the Sub-Contract and independent of his obligations under the Sub-Contract, to take, or to avoid taking, any action which would unreasonably delay Highland in its work. Lester N. Johnson Co., Inc. v. City of Spokane, 22 Wash. App. 265, 588 P.2d 1214 (1979); 16 ALR 3rd 1252, 12541256. The evidence reflects an almost total failure on the part of Stevenson to satisfy that duty.

The trial court's failure to find that Stevenson breached his Sub-Contract obligations to Highland finds no support in the evidence and was clearly in error. The trial court disregarded the variousexpress provisions of the Sub-Contract to the contrary and found that "Stevenson performed his work in accordance with accepted practices in projects of this nature" and in accordance with the requirement of performance in the best and workmanlike manner. (R.526). The trial court erred in wholly disregarding these express provision of the Sub-Contract which as a matter of law clearly and unambiguously imposed a much higher duty upon Stevenson than those established by "accepted practices in project of this nature" and "the best and workmanlike manner." The trial court simply failed to apply the proper standard. Highland is entitled to have said error rectified on this appeal.

B. STEVENSON SUBJECTED HIGHLAND TO UNREASONABLE DELAYS.

This Court has previously ruled that damages for delays are not recoverable in construction cases where the written contract between the parties contains an unambiguous "no damages for delay" provision. Allen-Howe Specialties v. U.S. Const., Inc., 611 P.2d 705 (Utah 1980); Western Engineers, Inc. v. State Road Commission, 20 Utah 2d 294, 437 P.2d 216 (1968). Although this Court has not spoken as to the responsibility of a prime contractor to his sub-contractor for damages resulting from unreasonable delays, it is "fairly well settled" in most of the jurisdictions that have considered the question that a prime contractor is under an implied obligation not to hinder or delay performance by his sub-contractor and may incur liability for the latter's damages if he does not take all reasonable steps to insure that the job site is ready and that work proceeds without delay. Lester N. Johnson Co., Inc. v. City of Spokane, supra, 16 ALR 3rd 1252, 1254-1256. This rule is particularly applicable in cases, such as this one, where the parties have included express provisions obligating the prime contractor to perform the work which is preparatory to the sub-contractor's performance "in advance of Sub-Contractor's operations so as not to cause any hindrance or delay to Sub-Contractor's operation." (Ex.P-2, Par.3). 16 ALR 3d 1252, 1260.

By reason of these unreasonable and unnecessary delays and Stevenson's breach of his Sub-Contract obligations, Highland suffered damages from this cause alone, in the amount of $9,280.77. (Ex.P-30, Ex.P-32, R.969).

The facts on this record compel the finding that Stevenson breached his Sub-Contract obligations to Highland and unreasonably and unnecessarily delayed Highland all to Highland's damage in the amount of $9,280.77.

POINT III

THE TRIAL COURT ERRED IN FAILING TO FIND THAT SHELL FAILED TO COMPLETE THE RELOCATION OF ITS LINES WITHIN THE TIME PROMISED OR WITHIN A REASONABLE TIME

Following the award by UDOT of the General Contract to Stevenson and before the work on the Project got fully underway, Larry Buss, the Project engineer, following the generally accepted practice in the industry, convened a pre-construction conference on August 9, 1976, which was attended by all interested parties, including Shell, for the purpose of insuring that all activities and functions to be carried out by the various parties would be performed in a coordinated and effective manner. (R.826, Ex.D-56). When asked at the conference to inform the other participants as to its schedule for completing the relocation of its gas and water lines, Shell's representative Harry Nash stated, "We're looking at about four days, I imagine." Bryan Bergener, Highland's

president then asked, "Within four days you can have it done?" to which Harry Nash responded in the affirmative. (Ex.D-56, R.828-829). Highland relied upon Shell's representation in planning, scheduling and performing its work. (R.829, 831). In fact the relocation was not completed until August 25, 1976 (R.467, 538, 598), although it could reasonably have been completed within the promised four-day period. (R.830, 1350).

The trial court found on these facts that Harry Nash's statement was an "opinion" and not a "promise," that Highland "could not have reasonably have expected "that Harry Nash's statement would induce action or forbearance of a definite, substantial character on the part of plaintiff."

The trial court's findings were clearly erroneous. Highland clearly and unquestionably had the right in planning organizing, scheduling and conducting its own operations to rely upon Shell's statement, made in the presence of Highland at a formal preconstruction conference, as to the time that would be required by it to relocate its gas and water lines so as to not delay or interfere with Highland's operations, particularly where the preconstruction conference was convened for the very purpose of coordinating such activities as between the various participants with the full expectation that any such statements would be relied upon.

Stevenson became obligated to Highland, regardless of Shell's performance, for the prompt relocation of said gas and water lines, and Stevenson failed to satisfy that obligation all to Highland's damage, from this cause only, in the amount of $6,604.97. (R.894-906).

POINT IV

THE TRIAL COURT ERRED IN FAILING TO APPLY THE "TOTAL COST" THEORY TO THE COMPUTATION OF HIGHLAND"S DAMAGES

Because of the unstable subgrade conditions and the delays and interference encountered by Highland on the Project, its costs overran and exceeded the costs which it would otherwise have incurred by the sum of $46,403.83. It was not reasonably possible for Highland, under the circumstances that existed, to reasonably or practically establish or prove the amount of its cost overrun attributable to each separate activity and function. (R.872). Under such circumstances Highland was entitled to prove and recover its damages based upon its "total costs." Thorn Construction Company, Inc. v. Utah Department of Transportation, supra; Winsness v. M. J. Conoco Distributors, Inc., 593 P.2d 1303 (Utah 1979); Industrial Construction, Inc. v. State, No. 15167 (Utah Oct. 11, 1978) (unpublished). In Thorn this Court adopted the "total cost" theory:

> We turn to defendants' next...assertion which is: the district court erred in allowing

plaintiff to present its damages according to a "force account," or total cost theory. The project actually required 15,305 cubic yards of borrow, whereas the original contemplated the use of 28,100 cubic yards. Because of the large underrun, defendant takes the position that plaintiff is therefore entitled to an adjustment for his fixed costs, according to §104.02 of the Standard Specifications, but is not entitled to alter the unit prices originally used in its bid.

The above provisions contemplate the creation of supplemental agreements before the alteration is made. Here, however, the fact of the underrun was not realized by either party until the final quantities were calculated at the conclusion of the project. Defendant contends that according to the above section, plaintiff is only entitled to an adjustment for its fixed costs as calculated in the original bid, because the underrun was admittedly greater than 25 percent. The district court allowed plaintiff to present figures showing its total costs on the theory that if plaintiff proved its case, its unit costs would be increased because of the representations by defendant as to the Utelite pit.

> ...Because the record reveals the extra costs were necessitated by the representations and requests of defendant as outlined above, plaintiff was properly allowed, under these factual circumstances, to calculate its damages under the "force account." (emphasis added)

Id. at 370.

In this case UDOT did not misrepresent existing facts to Highland. Rather, it failed to disclose to Highland and the other bidders facts and information known to UDOT which was of critical importance to contractors who submitted bids. There is no reason insofar as this Court's holding in Thorn is concerned, why it should not likewise apply to an

omission on the part of UDOT, to fully disclose all material facts and information known to it at the time it accepts bids.

As in Thorn, UDOT took the position in this case that Highland was only entitled to an adjustment for its fixed costs as calculated on the basis of the unit prices included in its original bid. The trial court erroneously failed to adopt and apply the "total cost" theory, notwithstanding the uncontroverted evidence showing that Highland's extra costs were necessitated in the most substantial part by the failure of UDOT to accurately and fully disclose all of the facts then known to it alone concerning the water and unstable soil conditions that existed in the roadway, in such a manner as to give bidders reasonable notice thereof. The balance of Highland's extra costs were the direct result of Stevenson's and Shell's joint failure to perform their work in advance of Highland's operations as agreed.

Highland's extra costs calculated on the "total cost" theory amount to $46,403.83. Stevenson is properly liable to Highland for the full amount of such damages by reason of its Sub-Contract obligations, and Shell is jointly liable with Stevenson to Highland for $6,604.97 of said amount.

POINT V

THE TRIAL COURT ERRED IN AWARDING STEVENSON JUDGMENT FOR ATTORNEYS FEES AND COSTS, AND IN FAILING TO AWARD HIGHLAND SUCH A JUDGMENT

This action was filed on July 8, 1977 for the recovery of sums owed by Stevenson to Highland on the payment bond issued by USF&G and provided to UDOT as required by Section 14-1-5, Utah Code Annotated, 1953, as amended and supplemented, and by the General Contract and the bidding documents. (R.6, 47, Ex.P-1, Ex.P-3). As of that date, Highland had received payment from Stevenson of the total sum of $70,292.12 out of a total of $80,591.90 which Highland received. (Ex.P-32). Although even according to Stevenson's claims, the last of Highland's work was completed on October 29, 1976 and Highland was therefore entitled under the Sub-Contract provisions to receive final payment in any event on or before November 28, 1976, Highland was not paid the sum of $2,762.90 until May 13, 1977 and did not receive the final payment in the sum of $10,300.78 which even Stevenson himself admitted was owing, until December 19, 1977, some 164 days after this action was initiated. (Ex.P-32, R.960, 1389-1390).

Section 14-1-8, Utah Code Annotated, 1953, as amended and supplemented, provides:

> In any action brought upon either of the bonds provided herein....the prevailing party, upon each separate cause of action, shall recover a reasonable attorney's fee to be taxed as costs.

In the event Highland prevails on this appeal, as it feels on this record it is clearly entitled to, it will be entitled to have the findings and judgment of the trial

court set aside as to attorneys fees and costs and Highland will be entitled as the "prevailing party" to be awarded a judgment against Stevenson and USF&G for Highland's reasonable attorneys fees and costs, pursuant to Section 14-1-8, supra.

Even if Highland is for any reason not successful on this appeal, it is entitled to have the findings and judgment of the trial court for attorneys fees and costs reversed, for the reason that failure on the part of Stevenson to make payment of the sum of $2,762.90 until May 13, 1977 and his even more serious failure to pay the sum of $10,300.78 until December 19, 1977 must be taken into account in any determination of reasonable attorneys fees and costs. In recovering the sum of $10,300.78 after the initiation of this action, Highland could and properly should be deemed to be the "prevailing party" in this action.

In granting the judgment in favor of Stevenson for attorneys fees and costs in the full amount claimed by Stevenson, the Court obviously failed to give any consideration whatsoever to Stevenson's failure to abide by his Sub-Contract obligations to pay promptly, both as to the monthly progress payments and more importantly the final payment due Highland. The Court simply and obviously erred in its application of the proper principals applicable in this case.

CONCLUSION

The trial court's findings and judgments in this case are based upon a clear and obvious misunderstanding and misapplication of applicable law and equitable principals. A proper understanding and application would have resulted in findings and a judgment favorable to Highland. Most of the trial court's findings have no reasonable basis in the evidence for their support. Highland is therefore entitled to have the trial court's errors rectified by this Court through a proper adjudication under correct principles of law.

Respectfully submitted this
29 day of September, 1980.

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CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing Brief of Appellant to be hand-delivered to each of the following, this 29th day of September, 1980.

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February 2, 1981

The Honorable Justices
Utah Supreme Court
State Capitol
Salt Lake City, Utah 84114

Re: Highland Construction Co. v, LaMar D. Stevenson, d.b.a. LaMar D. Construction Company, et al., Civil No. 17099

Gentlemen:

The Utah Department of Transportation is not a party to the appeal in the above-cited matter since the Department's liability was only as a contingent party. In view of the Trial Court's ruling of "no cause of action," the Department is not before the Court but is obviously interested in the outcome of the appeal.

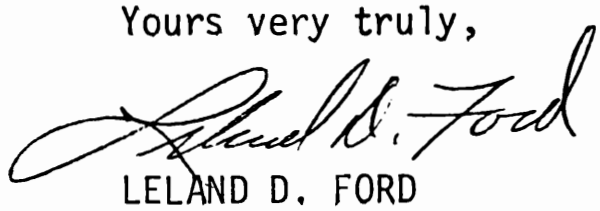
We have reviewed Respondent's Brief and believe that it adequately and accurately states what would be the position of the Department of Transportation were the Department before the Court. We do not wish to burden the Court with an additional brief, but recognize that if the case were reversed, some possible liability could attach to the Department. We desire to make one brief comment.

As pointed out in Respondent's Brief, the Appellant places considerable reliance on this Court's holding in Thorn Construction Co., Inc. v. Utah Department of Transportation, 598 P.2d (1979). Respondent has correctly analyzed why Thorn should not apply in our opinion. We would like to point out that in our view Thorn is one of those cases which has to be limited to the factual context in which it was decided. Those same facts do not exist in this case as pointed out by Respondent. We further believe that this Court has already recognized the limited scope of the holding in Thorn in its recent decision in the case of Schocker Construction Company v. State of Utah, 619 P.2d 1378, which was distinguished from Thorn on the basis of factual differences.

We respectfully submit that the decision of the Trial Court should be sustained as urged in Respondent's Brief.

Please advise us if we can provide any information or assistance to the Court in this matter.

Yours very truly,



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