Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1980

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Ray G. Martineau; Martineau, Rooker, Larsen & Kimball; Attorneys for Appellant;
Roger P. Christensen; Attorneys for Respondent;

Recommended Citation
Brief of Respondent, *Highland Construction Co. v. Stevenson*, No. 17099 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2386

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME 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, Defendants-Respondents,	)	Case No. 17099
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.	)	

BRIEF OF RESPONDENT SHELL OIL COMPANY

Appeal from the Judgment of the Fourth District
Court for Duchesne County,
Hon. Allen B. Sorenson, Judge

J. RAND HIRSCHI
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Attorneys for Respondent
Shell Oil Company
Suite 1600, 50 South Main Street
Salt Lake City, Utah 84144

[Appearances continued on inside cover]

FI[illegible]

NOV [illegible] 1980

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

RAY G. MARTINEAU
MARTINEAU, ROOKER, LARSEN
& KIMBALL
Attorneys for Appellant
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

ROGER P. CHRISTENSEN
CHRISTENSEN, JENSEN, KENNEDY & POWELL
Attorneys for Respondent
LaMar D. Stevenson
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

LELAND D. FORD
Assistant Utah Attorney General
Attorney for Respondent
Utah Department of Transportation
115 State Capitol
Salt Lake City, Utah 84114

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME 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,

Defendants-Respondents,

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. 1709

BRIEF OF RESPONDENT SHELL OIL COMPANY

Appeal from the Judgment of the Fourth District Court for Duchesne County, Hon. Allen B. Sorenson, Judge

J. RAND HIRSCHI
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Attorneys for Respondent
Shell Oil Company
Suite 1600, 50 South Main Street
Salt Lake City, Utah 84144

[Appearances continued on inside cover]

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

RAY G. MARTINEAU
MARTINEAU, ROOKER, LARSEN
& KIMBALL
Attorneys for Appellant
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

ROGER P. CHRISTENSEN
CHRISTENSEN, JENSEN, KENNEDY & POWELL
Attorneys for Respondent
LaMar D. Stevenson
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

LELAND D. FORD
Assistant Utah Attorney General
Attorney for Respondent
Utah Department of Transportation
115 State Capitol
Salt Lake City, Utah 84114

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	9
I. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF HAD FAILED TO PROVE PROMISSORY ESTOPPEL AGAINST SHELL	9
A. Mr. Nash's Statements At The Preconstruction Conference Did Not Constitute A Promise	11
B. Mr. Nash Had No Reason To Expect That His Statement Would Induce Action Or Forbearance Of A Definite And Substantial Character On The Part Of Highland Construction	15
C. Mr. Nash's Statements Did Not Induce Action Or Forbearance Of A Definite And Substantial Character On The Part Of Plaintiff	16
D. The Trial Court Found Correctly That It Would Be Unjust To Enforce Mr. Nash's Statements As A Promise	18
II. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF HAD FAILED TO PROVE THAT SHELL WAS NEGLIGENT	20
III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS NO REASONABLE BASIS OF CALCULATION FOR PLAINTIFF'S CLAIM OF DAMAGES AGAINST SHELL	23
SUMMARY	25
CONCLUSION	27

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

CASES CITED

Page

Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956) 10

Granfield v. Catholic University of America, 530 F.2d 1035 (D.C. Cir. 1976) 13

Lawrence v. Bamberger Railroad Company, 3 Utah 2d 247, 282 P.2d 335 (1955) 25

Petty v. Gindy Manufacturing Corp., 17 Utah 2d 32, 404 P.2d 30 (1965) 10, 14, 25

Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975) 10

Security Development Company v. Fedco, Inc., 23 Utah 2d 306, 462 P.2d 706 (1969) 23

Union Tank Car Company v. Wheat Brothers, 15 Utah 2d 101, 387 P.2d 1000 (1965) 11, 16

STATUTES CITED

Utah Rules of Civil Procedure, Rule 41(b) 25

OTHER AUTHORITIES

Restatement of Contracts

Section 90 10

Restatement (Second) of Contracts (Tentative Drafts 1-7 (1973))

Section 2 12

Section 76 12

Section 90 12

Restatement (Second) of Torts

Section 323 20

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME 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, Defendants-Respondents.	Case No. 17099
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.	

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiff Highland Construction Company ("Highland") first asserted a claim against Shell Oil Company ("Shell") in an Amended Complaint filed 6 months after this action was initiated. Plaintiff sought to recover against Shell on two theories: promissory estoppel and negligence. Specifically, Highland alleged that Shell

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

breached a promise to it to relocate a gas line within three days and that Shell's failure to complete the relocation within three days constituted negligence.

DISPOSITION IN LOWER COURT

The bench trial of this action began on September 10, 1979. Plaintiff completed the presentation of its evidence on September 13, 1979, at which time defendant Shell moved for a dismissal of plaintiff's claims against it on the ground that plaintiff had shown no right to relief. The trial court took this motion under advisement, and adjourned the trial until November 13, 1979. On that day the court heard further argument on the motion and granted it. Findings of Fact and Conclusions of Law and a Judgment dismissing the Amended Complaint as against Shell were entered. Trial continued with respect to the remaining claims and counterclaims.

RELIEF SOUGHT ON APPEAL

Defendant Shell seeks an order of this Court affirming the Judgment dismissing plaintiff's claims against it.

STATEMENT OF FACTS

As plaintiff's statement of facts suggests, the evidence on which it bases its claim against Shell

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

is minimal. Defendant Shell owns a natural gas line that crosses the roadway that the Department of Transportation was improving. (Ex. 18, R. 724). On July 24, 1976 Shell entered into a contract with the Department to perform all work and provide all materials necessary to relocate and encase the gas line beneath the roadway (Ex. 15, R. 645). Shell had no contract nor any agreement or understanding with defendant LaMar D. Stevenson, the prime contractor, or with plaintiff Highland, which had a subcontract to do the earthwork on the project.

On August 3, 1976, at the invitation of the Department of Transportation's project engineer, Larry Buss, all parties interested in the project met at Duchesne, Utah for a preconstruction conference (R. 724-25). Shell was represented by Harry Nash, its plant foreman, and Highland was represented by Bryan Bergener, its president (Ex. 56, R. 1150-51). Plaintiff and Shell had never communicated before this conference, nor were there any communications after it (R. 1151-53).

Plaintiff bases its claim against Shell solely on a comment that Mr. Nash made at the preconstruction conference. It contends that Nash's statement

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

that the gas line would be relocated in four days constituted an enforceable promise.

Larry Buss made a tape recording of the conference, and a transcript of the parts of it relevant to plaintiff's claim against Shell was admitted in evidence pursuant to stipulation. (Ex. 56). Because plaintiff's claims against Shell, and the propriety of the trial court's dismissal of them, turn almost entirely on what was said at the meeting, this transcript is set forth in full, with Mr. Nash's alleged "promise" underlined:

> LARRY BUSS: I believe we'll go ahead and start. It's 10:30. We are missing the telephone and power people and if we have any problems, we'll get in touch with these particular utilities. I guess we ought to start with introductions. I'm Larry Buss, the project engineer on the project and my secretary here, Carrie Hall, and let's go right around and introduce each one and tell what you -- who you represent and your title.
>
> I'm Mrs. LaMar Stevenson. I'm his secretary.
>
> I'm LaMar D. Stevenson, the contractor.
>
> I'm Myron Taylor, District 6 Maintenance Engineer.
>
> . . . District 6 Supervisor.
>
> Paul Traynor (?), District 6 Materials Engineer:

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Leo Brady, I'm with the Pioneer Canal Company;

Melvin White, Pioneer Canal Company.

Leland Wright, Pioneer Canal.

Curtis Wilson (?), District Construction Engineer.

Harry Nash, Shell Plant Foreman . . . Chevron Pipe.

Connie (?) Cowans, Safety, District 6.

BUSS: Come on in, just in time. The rest of the people have been introduced. Would you men like to introduce yourselves and tell who you represent?

[BERGENER]: My name is Bryan Bergener and I represent Highland Construction Company. This is Wayne Davies, Highland Construction.

BUSS: Very fine. Carrie, will you start that list around, if you would, please. Okay, the first part we'd like to discuss any utilities problems that may come up; and then we'll excuse the utilities people and continue on hashing out a few other items. Would you like to -- those utility people -- would you like to tell what your schedule is for completing your utilities relocations so that you might -- the contractor might have an idea when to expect those items to be moved or completed?

CHEVRON REPRESENTATIVE: Our casing's almost complete; it'll be, oh, Thursday or Friday.

BUSS: That's with Chevron.

CHEVRON REPRESENTATIVE: Chevron.

BUSS: Very good.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

NASH: Yeah, we haven't done anything. We're ready to start. Depends (actually?) on what your timing is, when you want it done. We're looking at about four days, I imagine.

BERGENER (?): Within four days you can have it done?

STEVENSON: That'll be fine. The quicker the better. We'd like to start on the lower end first. We won't be able to start there, but we'd like to start there. Just as soon as the concrete lined ditch is out of our hair and the utilities and fencing. We'd like to start there and start with our oiling operation there, but meanwhile, we'll work right outside of it.

NASH: (Inaudible.)

BUSS: We have got that slope-staked in the area so that you could go with the stakes that are there and determine what you need.

NASH: All right (?), we'll get started on it.

[BUSS]: Okay. Very fine, now we go to the Pioneer Canal.

(Ex. 56).

Question marks on this Exhibit indicate the parts of the tape recording that were not entirely clear when the transcript was made. However, in his testimony Mr. Bergener, Highland's president, confirmed that it was he who asked, "Within four days you can have it done?", immediately after Mr. Nash made his statement (R. 1151). Also, Mr. Bergener testified that

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

he had never seen Mr. Nash before this meeting and that the contents of the transcript (Ex. 56) are all of the communications of any kind that he ever had with Shell Oil Company (R. 1152-53). The record also shows that Mr. Nash and other utility representatives were excused from the meeting shortly after Mr. Nash made his statement (R. 1151), and, except for the general comments made by Mr. Stevenson (Ex. 56), Shell never had any information about the plans for moving earth on the project.

On August 10, Shell began its work on the gas line relocation (R. 651). Mr. Nash's estimate of the time it would take to complete the work was inaccurate because in excavating the trench through which the gas line and its casing were laid Shell ran into a great deal of water and was substantially slowed (R. 651, 1188). Shell worked at least 12 hours a day every day, including Saturdays and Sundays, from August 10 to August 25 (R. 1160-61). Although Mr. Bergener testified that he could have completed the work more quickly, he never testified that he had any first-hand knowledge of the actual conditions under which Shell was working, or of the details of the work Shell was doing (R. 830-31, 1188). There is certainly no evidence of

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

any kind in the record to indicate that Shell was negligent in the performance of its work.

Plaintiff contended that its large earth moving vehicles ("scrapers") were slowed by Shell's activities on the project, and that it was damaged thereby (R. 894-906). On certain days Shell was working close to the roadway the scrapers traveled. Highland, however, had substantial problems proving the time it allegedly lost. Bryan Bergener admitted that each point of his calculations was based on assumptions and estimates and that the delay caused by other problems on the project could not reasonably be separated from the delay caused by Shell's work (R. 872-74).

Highland failed not only to prove any basis for Shell's liability, but also failed to prove a reasonable basis for calculating damages. The trial judge correctly found that Mr. Nash's statement is exactly what it appears to be: an estimate or a statement of intentions, not a promise (R. 538, Findings 15 & 16). It also found that each other element of promissory estoppel had not been proved (R. 538-39, Findings 17, 18 & 20), and that the evidence of damages was too uncertain and speculative to allow recovery (R. 540, Finding 24). There is substantial competent evidence

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

in the record, most of it undisputed, to support the Findings and Conclusions on which the trial court's dismissal of Highland's claim against Shell was based.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF HAD FAILED TO PROVE PROMISSORY ESTOPPEL AGAINST SHELL.

In this action, Shell's only contract was with the Utah Department of Transportation (Ex. 15). Its activities on the project site were completely independent of any contractual arrangement with either plaintiff Highland or the prime contractor, defendant Stevenson.

It is a fundamental principle of contract law that, with certain exceptions, a promise will not be enforced against the promisor unless the promisee gives some consideration for it. In its Amended Complaint (in contrast to its brief on appeal), plaintiff recognized that it had given no consideration for the "promise" allegedly received from Shell, and, to circumvent this problem, carefully pled each element of promissory estoppel (R. 175-77). However, at the conclusion of its evidence, plaintiff had failed to prove even one of these elements.

The doctrine of promissory estoppel, which

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

may be invoked in proper circumstances to enforce a promise without consideration, is set out in Section 90, Restatement of Contracts:

> §90. PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL ACTION.
>
> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

The validity of Section 90 had been acknowledged by this Court in several cases, e.g., Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956); Petty v. Gindy Manufacturing Corp., 17 Utah 2d 32, 404 P.2d 30 (1965); Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975). The showing that a proponent of promissory estoppel must make is clearly set out in Section 90. This Court has repeatedly ruled that the doctrine should not be applied lightly. For example, in Petty v. Gindy Manufacturing, supra, the Court said:

> In approaching the question as to the applicability of promissory estoppel . . . there are some precepts which should be kept in mind. The first is that it would be somewhat at variance with traditional rules of contract law. . . . This [application] would impose liability in the nature of a contractual obligation in the absence of the classic essentials: a promise and a consideration.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> For this reason it is resorted to only where circumstances are such that equity and good conscience render its application imperative in order to avoid an obvious unfairness and injustice. Further prerequisites . . . are that the promise or representation relied on must be sufficiently definite and certain that the plaintiff acting as a reasonable and prudent person under the circumstances would be justified in placing reliance upon it and in case of uncertainty or doubt the responsibility is upon the plaintiff to ascertain the facts before acting upon it.

17 Utah 2d at 35 (emphasis added). In Union Tank Car Company v. Wheat Brothers, 15 Utah 2d 101, 387 P.2d 1000 (1965), the Court emphasized that defendants must be "aware of all the material facts [and] in such awareness [make] the promise knowing that the plaintiff [is] acting in reliance on it"' 15 Utah 2d at 104.

A. Mr. Nash's Statements At The Preconstruction Conference Did Not Constitute A Promise.

Plaintiff's claim against Shell in promissory estoppel is premised entirely on Mr. Nash's statement at the preconstruction conference. In reply to a request from the project engineer to explain Shell's expected schedule for completing the relocation, Nash replied, "Yeah, we haven't done anything. We're ready to start. Depends actually on what your timing is when you want it done. We're looking at about four days I

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

imagine." (Ex. 56). This does not sound like a promise; Mr. Nash had no reason to think he was making a promise; and Mr. Bergener never considered it a promise.

A promise is defined in Section 2, Restatement (Second) of Contracts (Tentative Drafts 1-7 (1973)) as " . . . a manifestation of intention to act or refrain from acting in a specified way, <u>so as to justify a promisee in understanding that a commitment has been made</u>." (Emphasis added.) Whether a purported promise will be enforced turns in part "on the formality with which the promise is made [and] on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise. . . ." Comment b. to Section 90, Restatement (Second) of Contracts (Tentative Drafts 1-7 (1973)). The functions of form, or formality, are set out in Comment c. to Section 76, Restatement (Second) of Contracts (Tentative Drafts 1-7 (1973)) as follows:

> Four principal functions have been identified which legal formalities in general may serve: the <u>evidentiary</u> function, to provide evidence of the existence and terms of the contract; the <u>cautionary</u> function, to guard the promisor against ill-considered action; the <u>deterrent</u> function, to discourage transactions of doubtful utility; and the <u>channeling</u> or signalizing function, to distinguish a

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> particular type of transaction from other types and from tentative or exploratory expressions of intention and the way the coinage distinguishes money from other metal. . . ." (Emphasis in original).

See, also, Granfield v. Catholic University of America, 530 F.2d 1035 (D.C. Cir. 1976), in which the mode or manner of communication of the purported promise is discussed as a factor to be considered in assessing a claim based on promissory estoppel.

While plaintiff claims it was "formal", the preconstruction conference cannot be considered a "commercial setting". When it was called, all bargains had already been struck. The prime contractor, Stevenson, had made its agreement with the State and with its subcontractors, including plaintiff; and the State had made its arrangements with the various canal companies, utilities, and oil companies that had an interest in the relocation of their property on the project. The purpose of the preconstruction meeting was, as Mr. Buss stated, to give the contractor an "idea" as to when the relocation of the various utilities would be completed. To impose contractual commitments based on statements made at a preconstruction conference might substantially impair these various contractual arrangements, and could substantially defeat the purpose of the conference.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

The trial court so found (R. 539, Finding 21).

The "formalities" of Mr. Nash's statement and Mr. Bergener's response to it do not indicate that it was a promise. Mr. Nash's statement itself is obviously a tentative and and exploratory expression of intention and would not "signalize" to any reasonable person that Nash himself thought he was making a promise. In the context of a preconstruction conference, the form of the expression itself and Mr. Bergener's response to it were not designed to guard Mr. Nash against ill-considered action. Clearly, Mr. Nash's statement was not "sufficiently definite and certain that the plaintiff [Highland], acting as a reasonable and prudent person under the circumstances [could] be justified in placing reliance on it." Petty v. Gindy Manufacturing Corp., 17 Utah 2d at 35.

Indeed, it is quite clear from the record that Mr. Bergener never considered Mr. Nash's statement a promise until much later, when his attorneys had had time to reflect on it. In its Amended Complaint and throughout the discovery documents, plaintiff remembered that Mr. Nash said three days, not four days. When Mr. Bergener heard the tape recording shortly before the trial, he conceded that four days was

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

correct (R. 1153-54). Although this difference would not be important in most contexts, Mr. Bergener could be expected to remember accurately a "promise" which he claims was so important to his work and profits.

Until plaintiff served the Amended Complaint, it had never even suggested to Shell that it thought a promise had been made and broken. Almost anyone, and certainly Mr. Bergener, would have brought such a promise and its breach to Shell's attention immediately. Mr. Bergener was aware of his problems and the possibility of a financial loss on the project even before Highland's work was completed. He wasted no time in making claims of varying formality against both Stevenson and the Department of Transportation. One of these, a written claim made in January, 1977, after the completion of Highland's work, was obviously prepared with much thought and care (R. 1152, 1171). Yet, despite his attention to plaintiff's problems on the project, and his careful itemization of its claims, Mr. Bergener never once let Shell know of the purported breach of promise.

B. <u>Mr. Nash Had No Reason To Expect That His Statement Would Induce Action Or Forbearance Of A Definite And Substantial Character On The Part Of Highland</u>

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Construction.

As this Court emphasized in Union Tank Car Company v. Wheat Brothers, supra, before an enforceable promise will be imposed, a defendant must be aware of all material facts and make the promise in the context of such awareness. 15 Utah 2d at 104. The Restatement requires that a promisor should "reasonably expect [his promise] to induce action or forbearance of a definite and substantial character."

There is no dispute that the few casual remarks made by Mr. Nash and Mr. Bergener at the preconstruction conference are the sum of all communications between plaintiff and defendant Shell. Mr. Nash was never made aware of any material facts. When he made the statement at the conference he knew only that Mr. Bergener represented Highland. There is no evidence that Nash knew even that Highland had a contract to move earth on the project. The only comments made at the conference that could be construed as an explanation of contemplated action were Mr. Stevenson's generalized statement of what he, not Highland, wanted to do. Mr. Bergener never once explained his plans while Shell was in attendance at the conference.

C. Mr. Nash's Statements Did Not Induce Action

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Or Forbearance Of A Definite And Substantial Character On The Part of Plaintiff.

Mr. Nash's statement did not induce action or forbearance of any kind at all, let alone of a definite and substantial character. In his testimony at trial, Mr. Bergener said:

> Q. Now in response to a question of Mr. Martineau's yesterday you said when you heard Mr. Nash say four days, that it would take four days to do Shell's work, you thought in effect that is fine we can go ahead and do it like we planned. Does that summarize your testimony yesterday accurately?
>
> A. Yes.
>
> Q. And what was this plan that you thought you could then put into effect?
>
> A. We felt like that what we could do is start our excavation on the far west end of the job at station 8 plus 78 and work continuously through the job, through the east end of the job, and, of course, we had various reasons for that and one thing, but that was our plan.
>
> Q. Did you in fact begin to put this plan into effect?
>
> A. Yes.

Highland did exactly what it had always planned to do. Nash's statement changed nothing. Nothing in the record suggests that had Mr. Nash correctly

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

estimated the time it would take Shell to complete its work, Highland would have formulated a plan different from that stated by Mr. Bergener.

D. <u>The Trial Court Found Correctly That It Would Be Unjust To Enforce Mr. Nash's Statements As A Promise</u>.

The last condition of Restatement of Contracts, Section 90, requires that before a promise without return consideration may be enforced, the Court must find that "injustice can be avoided only by enforcement of the promise." In this action the trial court found it would be <u>unjust</u> to enforce Mr. Nash's statements as a promise (R. 539, Finding 21).

The trial court considered that Shell had worked at least 12 hours every day, including Saturdays and Sundays, from August 10 to August 25 to complete its work, and that the work went much more slowly than expected because of the subsurface water that seeped into the trench. Mr. Bergener thought that he could have done the work more quickly himself, but there was little foundation for his opinion. He admitted that Highland itself had been surprised, and its work was substantially slowed, because of unexpected subsurface water. A major part of Highland's claim against

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Stevenson is based on this fact.

The trial court also thought it significant that Highland had never communicated with Shell concerning the problems caused by Shell's operations on the project. Although it is doubtful that Shell could have expended much more effort than it did, some sort of cooperative effort might have been made to alleviate plaintiff's problems. As discussed above, this lack of communication is also relevant to whether Mr. Nash's statement was even a promise, and would tend, in general, to show there was nothing in the form of a contractual commitment between Shell and Highland.

The trial court found that it would be unjust to bind Mr. Nash to statements made at a preconstruction conference. Mr. Buss, in asking Mr. Nash to make his statement, had said that the purpose was to give the contractor an "idea" when to expect the relocation to be completed. The give and take that one would assume is necessary for a successful preconstruction conference, both in terms of scheduling and anticipation of problems, would be impaired if statements made were enforced as promises. And of course no one at the conference expected his statements to be construed as promises. Finally, the trial court found that the delay

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

caused Highland's scrapers as they moved through the area in which Shell was working could not easily be distinguished from the delays caused by other factors.

In summary, plaintiff was required to clear several hurdles before its claim of promissory estoppel was established. It failed to clear any of them. Considering the nature of Mr. Nash's expression and the context in which it was made, no reasonable person could have thought it was a promise. Mr. Bergener obviously did not think it was, or he would have taken some action long before be did. Even if Mr. Nash's statements were construed as a promise, there is no basis at all for finding that he reasonably should have known that it would induce action or forbearance of a definite and substantial character on the part of Highland, and it is clear that it did not induce such action or forbearance.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF HAD FAILED TO PROVE THAT SHELL WAS NEGLIGENT.

The language of plaintiff's negligence count against Shell suggests that plaintiff is relying on the rule stated in Restatement (Second) of Torts, Section 323, which provides:

> §323. Negligent Performance of Undertaking to Render Services.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

This reliance is clearly misplaced. Shell did not "undertake to render services" to plaintiff. It undertook to render services only to the State Department of Transportation. Plaintiff is not claiming damages to its "person or things," it is claiming economic damages. Had Shell entered an undertaking to provide services to plaintiff, economic damages for failure to perform properly would be recoverable as a breach of the contract, not as a tort. If the rule were otherwise, every breach of contract to perform services would also be a tort. The trial court concluded correctly that when plaintiff failed to prove the contractual duty asserted in its estoppel claim, plaintiff had failed to establish any duty or standard of care owed plaintiff by Shell (R. 540, Conclusion 4).

If plaintiff was relying on general concepts

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

of negligence, rather than the specific rules of Section 323, it still failed entirely to establish any duty that Shell owed Highland, and failed to show any breach of duty. At trial there was simply no legal argument advanced nor evidence offered that, as a matter of trade practice or otherwise, a party relocating its property on a construction project such as this is accountable to the construction contractors for delay, particularly when the delay is caused in large part by unforeseen circumstances.

Mr. Bergener admitted that he never observed Shell's work on the project and knew of the problems Shell encountered only by hearsay. In fact he admitted that it was reported to him that Shell was "doing everything humanly possible to get the pipeline moved." (R. 1188). His opinion that Shell could have worked more quickly must be discounted because of the absence of any direct knowledge of Shell's work. In fact, as the trial judge implied, Mr. Bergener's opinion is impeached by Highland's own problems with subsurface water on the project, which he testified were unexpected and substantially slowed plaintiff's operations (R. 1188, 842-43, 930-34).

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS NO REASONABLE BASIS OF CALCULATION FOR PLAINTIFF'S CLAIM OF DAMAGES AGAINST SHELL.

A "reasonable basis of calculation" must be afforded before approximate damages of the sort claimed by plaintiff can be awarded. Security Development Company v. Fedco, Inc., 23 Utah 2d 306, 462 P.2d 706 (1969). Throughout his testimony, even on direct examination, Mr. Bergener stated that each point of plaintiff's damage calculations is based on assumptions or estimates (R. 873).

To arrive at the damage figure Mr. Bergener was required first to assume how many trips through Shell's construction area were made by Highland's scrapers, then to estimate on how many of these trips the scrapers were slowed (R. 848). He then had to assume the average speed the scrapers might have maintained through Shell's work area (R. 894) and the average speed in fact maintained (R. 894). In this connection, he assumed the distance from Shell's gas line crossing that the scrapers began to slow down and the distance it took them to regain normal speed (R. 894). Finally, he had to assume that for every minute one of the scrapers was delayed, all of his men and equipment on the job were delayed for an equal amount

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

of time (R. 898).

There was evidence at trial that many of these assumptions were based on extremely shaky premises. Bergener had no idea of how many days Shell was working near and outside the right-of-way lines and not slowing his scrapers at all (R. 1167-68). Plaintiff was apparently claiming that it was slowed simultaneously by Shell and by soft and yielding spots near Shell's operations (R. 1164-65). It was doubtful that the scrapers would have approached Shell's construction area at full speed, since flagmen were on duty in the area to govern the convergence of construction vehicles and the traveling public (R. 1164). Mr. Bergener testified that he estimated that the scrapers began slowing from 25 to 5 m.p.h. 400 feet from Shell's work area and did not resume full speed for another 400 feet after (R. 1165). His own employee, Mr. Gines, thought 100 feet on each side sounded reasonable (R. 777).

Bergener testified that all of Highland's problems -- with Shell, with large culverts that Stevenson did not complete quickly enough, and with soft and yielding spots -- were so interrelated that it would be "impractical" to try to isolate the time lost

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

because of any one of them (R. 872-74).

The trial court was justified in concluding that plaintiff had failed to provide a reasonable basis of calculation for its damages against Shell.

SUMMARY

The trial court granted defendant Shell's Motion to Dismiss after the presentation of plaintiff's evidence, and Findings were entered as required by Rule 41(b), U.R.C.P. "In such circumstances [this Court] review[s] the evidence in the light most favorable to the findings." Petty v. Gindy Manufacturing Company, 17 Utah 2d 32, 34, 404 P.2d 30 (1965), citing, Lawrence v. Bamberger Railroad Company, 3 Utah 2d 247, 282 P.2d 335 (1955). Since all of the evidence was presented in plaintiff's case in chief, there was little dispute about it. Plaintiff clearly failed to prove promissory estoppel or negligence.

Shell made no promise. There is no dispute about the statement which plaintiff contended was a promise. Mr. Nash, Shell's agent, said, "[It] depends on . . . when you want it [the gas line relocation] done. We're looking at about four days, I imagine." The trial court properly found from the form of the statement and its context that it was an estimate or an

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

expression of opinion, not a promise. Plaintiff's conduct in waiting almost a year and a half to assert the purported promise or make demands pursuant to it, supports this finding.

Shell could not have expected its statement to induce action or forbearance by plaintiff. Mr. Nash, Shell's agent who made the alleged "promise", did not know Mr. Bergener, plaintiff's representative, and plaintiff's plans were never communicated to Shell at any time.

Shell's statement did not induce action or forbearance of a substantial character. Mr. Bergener testified that when he heard Shell's statement that it would take four days to relocate the gas line, he thought, in effect, "Good, we can go ahead and do our work as we planned." Nothing was changed by the statement.

It would be unjust to impose a contract on Shell. Mr. Nash's statement was made at a preconstruction conference to give the construction contractor's an "idea" of when the gas line would be relocated. Nothing in the context suggested a contractual commitment. Shell worked as expeditiously as possible to complete its work. Until its Amended Complaint was

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

filed, plaintiff never gave any notice that it thought a promise had been made and broken.

Plaintiff failed to prove negligence. Plaintiff offered no evidence that Shell had a duty to Highland, or that Shell breached any duty. Mr. Bergener testified that he was informed that Shell was doing everything "humanly possible" to complete its work as quickly as possible. He had no direct knowledge of the problems Shell encountered or of the details of its work.

Plaintiff failed to establish a reasonable basis for its damage calculations. Although Plaintiff's damage calculations were elaborate, each point in them was based on assumptions that had little or no direct support. Mr. Bergener, Highland's president, testified that he did not think it practical to isolate the alleged damages caused by Shell from the damages caused by other problems on the project.

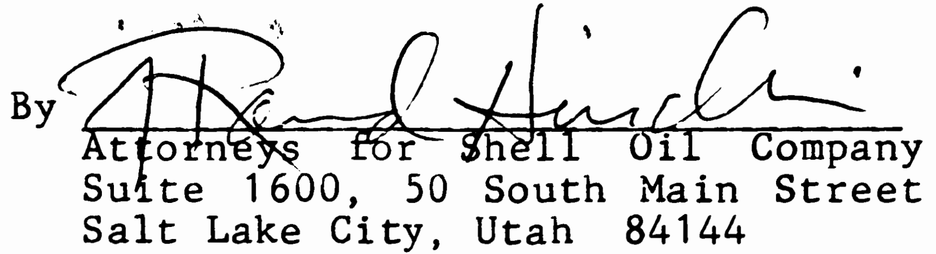
CONCLUSION

For the foregoing reasons, the trial court's Judgment dismissing plaintiff's claims against defendant Shell Oil Company should be affirmed.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

RESPECTFULLY SUBMITTED this 5th day of November, 1980.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
J. Rand Hirschi



By

Attorneys for Shell Oil Company
Suite 1600, 50 South Main Street
Salt Lake City, Utah 84144

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that two copies of the foregoing Brief of Respondent Shell Oil Company were hand delivered this 5th day of November, 1980, to:

Ray G. Martineau, Esq.
MARTINEAU, ROOKER, LARSEN & KIMBALL
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Attorneys for Highland Construction Company

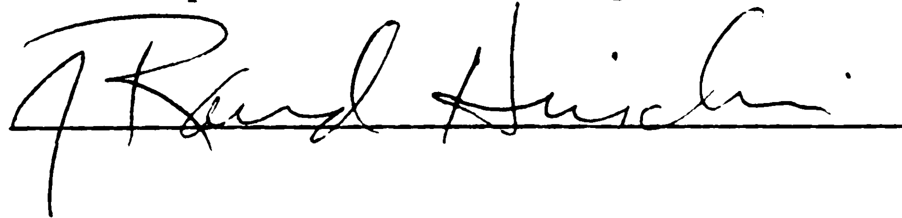
Roger P. Christensen, Esq.
CHRISTENSEN, JENSEN, KENNEDY & POWELL
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Attorneys for LaMar D. Stevenson d/b/a LaMar D. Construction Company

Leland D. Ford, Esq.
Assistant Utah Attorney General
115 State Capitol
Salt Lake City, Utah 84114

Attorneys for State of Utah and Utah

State Department of Transportation



Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.