

2009

Meadow Valley Contractors, Inc. v. Utah Department of Transportation : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MEADOW VALLEY CONTRACTORS,
INC.

Plaintiff, Appellee and Cross-
Appellant,

vs.

STATE OF UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant, Appellant and Cross-
Appellee.

Supreme Court No. 20090025-SC

District Court No. 0509009139

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JURISDICTION

This Court has jurisdiction pursuant to section 78A-3-102 of the Utah Code Ann.

STATEMENT OF ISSUES PRESENTED FOR REVIEW RELATED TO UDOT'S APPEAL

1. Whether the trial court correctly determined that Meadow Valley Contractors, Inc. ("MVC") is entitled to damages resulting from UDOT's refusal to allow ribbon paving on significant portions of the I-215 Project.
2. Whether the trial court correctly determined that the State of Utah Department of Transportation ("UDOT") breached the contract by interfering with and changing the means and methods by which MVC/Southwest Asphalt Paving ("Southwest") should have been allowed to pave the subject project and failing to pay for extra costs associated with said interference and change.
3. Whether the trial court correctly determined that MVC/Southwest's numerous verbal notices to UDOT throughout the course of the project, which verbal notices consisted of MVC/Southwest informing UDOT that prohibiting MVC/Southwest from using the ribbon paving method would result in increased costs, production inefficiencies, downtime, scheduling problems and other negative impacts to MVC/Southwest, constituted sufficient notice, thereby excusing MVC/Southwest from complying with the strict notice provisions of the contract.
4. Whether the trial court correctly determined that UDOT modified, waived and

is estopped from relying on the strict written notice provisions of the contract due to UDOT's course of conduct before, during and after the subject project.

MVC/Southwest concurs with the standard of appellate review cited by UDOT as it relates to the above issues.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW RELATED TO
MEADOW VALLEY'S CROSS-APPEAL**

1. Whether the trial court erred in finding that the contract does not allow MVC/Southwest a 3/8 of an inch thickness deficiency on each of the two separate layers (lifts) of asphalt pavement installed by MVC/Southwest.

Standard of Review: The interpretation of the terms of a contract is a question of law and a trial court's legal conclusions regarding a contract are afforded no deference and will be reviewed for correctness. Alpha Partners, Inc. v. Transamerica Investment Management, L.L.C., 2006 UT App 331, ¶ 14; 153 P.3d 714.

Preservation for Appeal: This issue was preserved at R. 1425: 950-953, 1043-1046.

2. Whether the trial court erred in determining that November 1, 2004, is the operative date for prejudgment interest to begin accruing on damages awarded to MVC/Southwest.

Standard of Review: A trial court's decision to grant or deny prejudgment interest presents a question of law which is reviewed for correctness. Iron Head Construction, Inc. v. Gurney, 2008 UT App 1, ¶ 5; 176 P.3d 453 (Utah Ct. App. 2008).

Preservation for Appeal: This issue was preserved at R. 1425: 968-969, 1048.

STATEMENT OF THE CASE

I. Nature of the Case: MVC entered into a contract with UDOT for the construction of a multiple lane highway project on I-215 from Redwood Road to 300 East (“I-215 Project”). MVC subcontracted all paving work for the I-215 Project to Southwest. The I-215 Project Specifications contained no restrictions as to the means and methods of paving to be used on the I-215 Project. Accordingly, Southwest based its bid on the premise that it would be allowed to utilize the ribbon style method of paving throughout the entire I-215 Project. Ribbon paving is the most cost effective and common form of paving used in highway and interstate construction improvement projects.

At a pre-pave meeting in June of 2003, UDOT informed MVC/Southwest for the first time that MVC/Southwest would not be allowed to utilize ribbon paving on a significant portion of the Project, claiming that the I-215 Project Specifications did not allow ribbon paving in areas where it would result in a greater than two inch vertical separation grade between traffic lanes. Southwest personnel immediately informed UDOT at that meeting and several times thereafter during the course of the I-215 Project that not allowing MVC/Southwest to ribbon pave would result in increased paving costs, production inefficiencies, scheduling problems and other negative impacts. In response, UDOT re-iterated its position that the I-215 Project Specifications did not allow ribbon paving on the majority of the project and directed MVC/Southwest to continue work. As a result, MVC/Southwest had to utilize block paving, a different and more expensive and

inefficient method of paving, which resulted in substantial added costs to MVC/Southwest.

As it relates to asphalt thickness issues, according to the contract, the total thickness of the asphalt on the I-215 Project was to be five inches thick. However, the contract allowed for a $\frac{3}{8}$ of an inch deficiency in thickness on each individual lift (layer) paved by MVC/Southwest. Prior to paving, UDOT and MVC/Southwest agreed that the five inches of asphalt would be laid in two separate lifts on separate days.

MVC/Southwest's position is that it was entitled to a $\frac{3}{8}$ of an inch deficiency on each individual lift, for a total of $\frac{3}{4}$ of an inch deficiency on the total five inches of thickness. UDOT disagreed, claiming that MVC/Southwest was only entitled to a $\frac{3}{8}$ of an inch deficiency on the total five inches of thickness. After a majority of the paving work was completed, UDOT informed MVC/Southwest that several areas of the paving were deficient in thickness and assessed penalties against MVC/Southwest in the amount of \$166,416.00. MVC/Southwest disputed such because the asphalt measurements were within the thickness deficiency allowances under the contract.

UDOT refused to pay for MVC/Southwest's increased costs and deducted \$166,416.00 for its thickness deficiency claim. As a result, MVC and Fisher Industries, Southwest's parent company, entered into a Claims Prosecution and Tolling Agreement wherein MVC assigned and granted Southwest the right to prosecute MVC/Southwest's claims in the name of MVC.

II. Course of Proceedings & Disposition Below: On September 24, 2004, MVC/Southwest filed a Formal Claim against UDOT for MVC/Southwest's increased costs and for unwarranted thickness penalties assessed by UDOT against MVC/Southwest. UDOT's Claims Board of Review considered MVC/Southwest's claims on the merits and recommended they be denied. UDOT's Deputy Director, Carlos Braceras, adopted the recommendations of UDOT's Claims Review Board and denied MVC/Southwest's claims.

In response, MVC/Southwest filed suit against UDOT in the Third District Court. At trial, the court found that the contract did not restrict paving methods and clearly and unambiguously allowed MVC/Southwest to utilize ribbon style paving on the entire I-215 Project. The trial court found that UDOT breached the contract by not allowing MVC/Southwest to ribbon pave and by refusing to pay for increased costs suffered by MVC/Southwest as a result of not being able to ribbon pave. The trial court found that MVC/Southwest incurred significant increased costs as a result of UDOT's breach, and found that UDOT received actual notice of the increased costs and negative impacts on several occasions during the course of the I-215 Project, but directed MVC/Southwest to proceed with the work. The trial court awarded MVC damages in the amount of \$548,832.52 and found that MVC was entitled to 10% per annum interest on its awarded damages of \$548,832.52. However, the trial court ruled that prejudgment interest did not begin to accrue until November 1, 2004, which was approximately one year after

MVC/Southwest had completed the I-215 Project and determined its increased costs.

The prejudgment interest awarded by the trial Court totaled \$225,247.06.

The trial court denied MVC's thickness penalty claim of \$166,416.00. In doing so, the trial court found that the contract specifications relating to allowable thickness deviations were less than clear, but agreed with UDOT's position that MVC/Southwest was not entitled to more than a 3/8 of an inch deficiency on the total five inches of thickness.

III. Statement of Facts

A. Contractual Relationship Between the Parties

1. In the fall of 2002, MVC entered into a written contract with UDOT for the construction of a multiple lane highway (with exits, entries and shoulders) on I-215 from Redwood Road to 300 East ("I-215 Project"). (R. 2, 457, 1496).

2. MVC entered into two subcontracts (one entitled "Purchase Agreement Meadow Valley Contractors, Inc." and the other entitled "Meadow Valley Subcontractors, Inc. Subcontract Agreement") with Fisher Sand and Gravel Company d/b/a Fisher Industries ("Fisher"), wherein Fisher agreed to perform all paving operations on the I-215 Project. (R. 1424: 494, 503; R. 1496; Trial Ex. 8 & 9).

3. Southwest, a division of Fisher, was delegated the task of performing the paving operations. (R. 1422: 319, 362, 381, 460; R. 1497; Trial Ex. 8 & 9).

B. Project Specifications, Paving Methods & Bid History

4. Prior to entering into the two subcontracts with MVC, Mike Moehn,

Vice-President of Southwest, reviewed the I-215 Project Specifications. (R. 515; R. 1421: 22-23; R. 1497).

5. The Project Specifications contained no restrictions as to the method or means of asphalt paving to be used on the I-215 Project. (R. 515; R. 1421:26; R. 1422: 324-325; R. 1424: 697, 777; R. 1497).

6. As there were no restrictions on paving, Southwest, in preparing its bid to MVC, planned on utilizing a ribbon style method of paving and based its bid on the premise that ribbon paving would be allowed for the entire I-215 Project. (R. 515-516; R. 1421: 15; R. 1497).

7. Ribbon paving is the most common form of paving used in highway and interstate construction improvement projects and is the most cost effective method of paving because it results in the fewest amount of stops, downtime, and resets of the paving equipment and asphalt plant. (R. 517; R. 1421: 10; R. 1424: 776-777; R. 1497).

8. Ribbon paving also results in higher productivity of the paving equipment, paving crew, truckers and asphalt plant than other methods of paving. (R. 517; R. 1421: 10; R. 1498).

9. In the vast majority of its highway and interstate construction improvement projects, UDOT has allowed the ribbon style paving method to be utilized. (R. 1424: 709, 805; R. 1499).

10. UDOT allowed Staker & Parsons, another paving contractor, to utilize

the ribbon style paving method in a similar interstate project along the I-15 interstate corridor near the Point of the Mountain in Salt Lake and Utah Counties, which took place during and after the I-215 Project. (R. 517; 523-525; R. 1421: 77-87; R. 1422: 331-333; R. 1424: 796, 803-805, 810; R. 1499, Trial Ex. 20).

11. The I-15 Point of the Mountain Project included similar specifications as were used in the I-215 Project where ribbon paving was not allowed. (R. 1421: 87; R. 1424: 803-804; R. 1499).

C. Pre-Pave Meetings re: UDOT Restrictions on Method of Paving and Notice by MVC/Southwest of Impacts Due to Restrictions

12. The paving portion of the I-215 Project began in late June or early July 2003. (R. 1421: 49-50; R. 1422: 325; R. 1499).

13. Prior to paving beginning, from the fall of 2002 to June 12, 2003, UDOT never notified MVC or Southwest that ribbon paving would not be allowed on portions of the I-215 Project where there would be a greater than two inch vertical grade separation between traffic lanes. (R. 1422: 325-328; R. 1424: 777; R. 1500).

14. On June 12, 2003, at a pre-pave meeting, Brandon Squire, UDOT's young and relatively inexperienced Project Engineer, notified MVC and Southwest personnel for the first time that MVC/Southwest would not be allowed to ribbon pave a significant portion of the I-215 Project. (R. 1421: 51; R. 1422: 325-328, 364-366, 425-428; R. 1424: 506; R. 1500-1501).

15. In support of his position directing MVC/Southwest not to use the ribbon

paving method, Brandon Squire relied on his interpretation of the TC-2A Hazard Mitigation Flowchart (“TC-2A Flowchart”), which is a Standard Specification included in all UDOT highway and construction improvement projects. (R. 1421: 51; R. 1422: 325-328, 358-359, 364-366, 427-428; R. 1424: 619-620, 695, 829, 847-848; R. 1500-1501).

16. Specifically, Brandon Squire represented to MVC/Southwest at the meeting that ribbon paving would not be allowed in areas of the I-215 Project where it would result in a greater than two inch vertical grade separation between traffic lanes because he claimed that the TC-2A Flowchart did not allow for traffic to traverse a vertical grade separation greater than two inches. (R. 1421: 51; R. 1422: 325-328, 425-428; R. 1424: 619-620; R. 1501).

17. Southwest’s Project Manager, David Olson, responded by informing Brandon Squire that Southwest had planned on ribbon paving the entire I-215 Project and could mitigate the greater than two inch vertical grade separation by providing a 6:1 or flatter taper on the vertical edges between traffic edges, which was allowed by the TC-2A Flowchart and which practice had been used successfully by Southwest on all of its prior projects, including Southwest’s prior projects with UDOT. (R. 1422: 328-329, 429; R. 1499, 1501).

18. Brandon Squire denied Southwest’s request to use the ribbon paving method to pave the I-215 Project using a 5:1 or flatter taper to mitigate the vertical grade separation. (R. 1422: 329, 429; 1424: 623-624, 701-702; R. 1501).

19. In response, David Olson told Brandon Squire that not allowing MVC/Southwest to ribbon pave the entire I-215 Project would result in increased costs, production inefficiencies and scheduling problems. (R. 1422: 329, 341-342, 366; R. 1502).

20. Despite being notified of the increased costs, production inefficiencies and scheduling problems, Brandon Squire re-iterated his position that MVC/Southwest would not be able to ribbon pave where a greater than two inch vertical grade separation between traffic lanes would result. (R. 1422: 329-330, 341-342, 429; R. 1502).

21. Thereafter, on July 31, 2003, at another pre-pave meeting, the issue of ribbon paving came up again between MVC, Southwest and UDOT. (R. 1422: 367, 429-431; R. 1424: 778; R. 1502).

22. Ken Schmidt, Southwest's Project Superintendent, was present at the meeting together with Brandon Squire and other Southwest employees. (R. 1422: 367-368, 429-431).

23. Brandon Squire told Ken Schmidt, Tim Sisneros and Ben Lujan that ribbon paving would not be allowed where it would result in a greater than two inch vertical grade separation. (R. 1422: 368; R. 1424: 778; R. 1502).

24. Ken Schmidt expressed to Brandon Squire the same concerns that had been raised by MVC/Southwest in the June 12, 2003, pre-pave meeting, including negative impacts on Southwest's production output and scheduling. (R. 1422: 368; R. 1424: 778; R. 1503).

25. Brandon Squire responded by re-iterating his position that MVC/Southwest could not use ribbon paving where it would result in a greater than two inch vertical grade separation. (R. 1422: 368; R. 1424: 778; R. 1503).

D. Commencement of Paving and Continued Notice from MVC/Southwest to UDOT of Impacts Due to Paving Restrictions

26. From early August 2003 until the I-215 Project was completed in late September 2003, Ken Schmidt, Tim Sisneros, Ben Lujan and Shawn Hammer (all Southwest employees) had several conversations at the project site with UDOT personnel (at least twice per week), including Brandon Squire and a UDOT Inspector, Ronnie Bair, where Southwest personnel told Brandon Squire and Ronnie Bair that not being allowed to ribbon pave was affecting Southwest's production output, costs, quality of product and scheduling of work. (R. 1422: 368-370, 383-388, 432-435, 461-462; R. 1503).

27. Richard Jessop, MVC's Project Superintendent, witnessed some of these conversations. (R. 1424: 778-779; R. 1503).

28. Brandon Squire and Ronnie Bair responded by directing the work to continue and directed MVC/Southwest to supply more work crews. (R. 1422: 369-370, 379, 383-388, 461; R. 1503).

29. As a result of UDOT's directive that ribbon style paving could not be used in areas in which there was a greater than two inch vertical grade separation, MVC/Southwest had to utilize block paving, which is significantly more expensive and time consuming than ribbon paving because it requires multiple start-ups and shut downs

of the asphalt plant, multiple movements of paving equipment and downtime of the paving equipment, trucks and paving crews. (R. 517; R. 1421: 10, 96; R. 1498, 1504).

30. UDOT's requirement that MVC/Southwest not utilize ribbon paving for a substantial portion of the I-215 Project resulted in increased production costs, operating costs, increased wastage and down time for paving crews, trucks, paving equipment and the asphalt plant. (R. 1421: 96-150, 104-107; R. 1504; Trial Ex. 24).

31. Throughout the I-215 Project and at trial, UDOT never argued that its continuous directives to MVC/Southwest that ribbon paving not be used where it would result in a greater than two inch vertical grade separation constituted an alteration in the contract. Rather, UDOT maintained throughout the I-215 Project and at trial that the contract did not allow ribbon paving in areas where it would result in a greater than two inch vertical grade separation. (R. 1495-1526).

32. Moreover, the contract only allowed UDOT to alter the I-215 Project if it provided written notice of the alterations, which it failed to do. Specifically, the contract provides that the UDOT Engineer "reserves the right at any time during the work to make written changes in quantities and alterations in the work that are necessary to satisfactorily complete the project." (Trial Ex. 103 at 54). (Emphasis added).

33. If the UDOT Engineer made any such alterations, UDOT agreed that it would pay for any increased costs due to the alterations. (Trial Ex. 103 at 54-56).

E. Other UDOT Project Involving Same Paving Specifications Where Ribbon Paving Was Allowed by UDOT.

34. On the I-15 Point of the Mountain Project, described above, UDOT

allowed its paving contractor, Staker and Parsons, to pave the entire project in ribbon style, and allowed traffic to travel across lanes where there was a greater than two inch vertical grade separation. (R. 517, 523-525; R. 1421: 77-87; R. 1422: 331-333; 1424: 796, 803-807, 810-811; R. 1499, 1506; Trial Ex. 20).

35. The I-15 Point of the Mountain Project Specifications included the same specifications UDOT and Brandon Squire relied on in the I-215 Project for not allowing MVC/Southwest to ribbon pave, including the TC-2A Flowchart. (R. 1421:87; R. 1424: 803-804; R. 1499, 1506).

36. The I-15 Point of the Mountain Project was discovered by MVC/Southwest immediately following a meeting on October 7, 2003 between UDOT and Southwest, where a UDOT representative told Mike Moehn of Southwest that the paving specifications, including the TC-2A Flowchart, were uniformly used, interpreted and applied on all UDOT highway and interstate projects in the same manner that they were being used, interpreted, and applied on the I-215 Project. (R. 1422: 308-310; R. 1424: 910; R. 1507). Brandon Squire was present at the meeting and did not say anything that would contradict this representation, which representation was consistent with similar prior statements made by Brandon Squire during the course of the I-215 Project. (R. 1421: 90, 1422: 340, 1507-1508).

F. UDOT's Denial of MVC/Southwest's Claim and Claims Prosecution and Tolling Agreement Between MVC and Southwest.

37. On September 24, 2004, MVC/Southwest filed a Formal Claim against

UDOT for MVC/Southwest's increased costs and for unwarranted thickness penalties accessed by UDOT against MVC/Southwest. (R. 1421: 95; 1424: 514-515; Trial Ex. 25 & 26).

38. UDOT's Claims Board of Review considered MVC/Southwest's claims on the merits and recommended they be denied, which UDOT did. (R. 1421: 146-147; 1424: 514-516; Trial Ex. 29 & 112).

39. MVC then brought suit against UDOT. Pursuant to a Claims Prosecution and Tolling Agreement entered into between MVC and Fisher Industries, Southwest's parent company, MVC assigned and granted Southwest the right to prosecute MVC/Southwest's claims in MVC's name since there was no direct contractual relationship between UDOT and Southwest. (R. 1182-1187; R. 1497).

40. The claims are not only Southwest's claims, they are MVC's claims as well, **as all work performed by Southwest on the I-215 Project was part of MVC's scope of work under MVC's contract with UDOT.** (Trial Ex. 6 & 103). (Emphasis added).

41. The Claims Prosecution and Tolling Agreement reflects that the claims were MVC's claims as well as Southwest's in that MVC stated that it "hereby assigns and conveys to Fisher [Southwest] the right to prosecute, negotiate, settle, and otherwise pursue the Block Paving Claim against UDOT in the name of MVCI under the terms of the Prime Contract with UDOT." (R. 1183).

42. MVC and Fisher [Southwest] agreed that "absent this Agreement, the

parties [MVC and Fisher] would further assert and prosecute the Block Paving Claim and the Other Claims against one another. . . “ (R. 1183).

43. As part of the Claims Prosecution and Tolling Agreement, Fisher [Southwest] agreed to seek the recovery of MVC’s profit, overhead, bond markups and taxes as it related to the Block Paving Claim. (R. 1184).

44. MVC and Fisher [Southwest] also agreed that Fisher would be entitled to deduct from MVC’s recovery 15% of Fisher’s claim preparation and prosecution costs, including travel, discovery, attorney’s fees, fact, expert and consulting fees and litigation costs. (R. 1184).

45. Fisher [Southwest] agreed to be bound to MVC to the same extent that MVC is shown to be bound to UDOT as it related to the claim for extra costs, which clearly shows this was MVC’s claim. (R. 1184).

46. Finally, the Claims Prosecution and Tolling Agreement specifically states that it was “intended to resolve all aspects of the Block Paving Claim as between Fisher [Southwest] and MVCI . . . In the event Fisher recovers any amounts or does not actually recover any amounts from UDOT on the Block Paving Claim . . . MVCI and Liberty [MVC’s Surety] will have no liability to Fisher with respect to the Block Paving Claim.” (R. 1184).

G. Facts Relating to Thickness Deficiency Claim

47. The total thickness of asphalt laid by MVC/Southwest on the TLA

(Trinidad Lake Asphalt) portion of the I-215 Project was to be five inches thick. (R. 1421: 33).

48. However, the contract specifications state that UDOT would accept a paving lot when “No individual subplot shows a deficient thickness of more than 3/8 of an inch.” (Trial Ex. 3 at 346; Trial Ex. 103 at 346).

49. Paragraph 1.4(A) of the contract specifications state that “A lot equals the number of tons of HMA [hot mix asphalt] placed during each production day.” (Trial Ex. 3 at 345; Trial Ex. 103 at 345). (Emphasis added).

50. Paragraph 1.4(A) provides that a “subplot” makes up part of a “lot”. (Trial Ex. 3 at 345; Trial Ex. 103 at 345).

51. On the I-215 Project, UDOT and MVC/Southwest agreed that the total five inches of asphalt to be laid would be performed in two separate lifts on separate days; the first a three inch lift and the second a two inch lift. (R. 1421: 43-44; R. 1424: 639, 898; R. 1515).

52. Therefore, a three inch lift performed within a day’s production constituted a “lot” and the two inch lift performed on a different day constituted a separate second “lot.” (R. 1421: 38-39, 43-44, 69, 71, 75; R. 1424: 926-927).

53. Thickness and density were measured each day during the course of the I-215 Project and the same measurement cores were used to measure both thickness and density, as allowed for by the contract specifications. (R. 1421: 34, 36-37, 42; R. 1515; Trial Ex. 3 at 346; Trial Ex. 103 at 346).

54. After a majority of the paving work had been completed by MVC/Southwest, UDOT informed MVC/Southwest for the first time that some areas of the asphalt were deficient in thickness. (R. 1421: 38, 64-65; R. 1422: 465-466).

55. In coming to this conclusion, UDOT only allowed for a 3/8 of an inch deficiency on the total five inches of asphalt laid by MVC/Southwest instead of a 3/8 of an inch deficiency on each subplot as allowed for by the contract . (R. 1421: 43-44, 69, 71, 75, 103;; R. 1425: 952-953; R. 1515; Trial Ex. 3 at 346; Trial Ex. 103 at 346).

56. UDOT specifically relied on paragraph 1.4(E)(3)(b) of the contract specifications in determining that MVC/Southwest was only entitled to a total of 3/8 of an inch deficiency in thickness on both sublots. (R. 1424: 882-883, 917-918, 923-924).

57. UDOT assessed thickness deficiency penalties against MVC/Southwest in the amount of \$166,416.00. (R. 1425: 953).

58. On September 24, 2004, MVC/Southwest filed a Formal Claim against UDOT for unwarranted thickness penalties assessed by UDOT against MVC/Southwest, which claim was denied. (R. 1421: 95, 146-147; 1424: 514-515; Trial Ex. 25, 26, 29 and 112).

H. Trial Court's Findings of Fact and Conclusions of Law

59. At the conclusion of the trial, the trial court ruled that the I-215 Project Specifications allowed for ribbon style paving for the entire project and that UDOT's directive that ribbon style paving not be used was not consistent with the contractual requirements. (R. 1518).

60. The trial court found that UDOT breached the contract because it failed to compensate MVC/Southwest for increased costs incurred as a result of UDOT's erroneous directive that ribbon paving not be used on portions of the I-215 Project where it would result in a greater than two inch vertical separation grade. (R. 1519-1520).

61. Specifically, the trial court found that UDOT's decision to prohibit ribbon paving where it would result in a greater than two inch vertical separation grade interfered with the method and means by which the asphalt paving should have been allowed to be performed by MVC/Southwest and constituted a material breach of the contract by UDOT. (R. 1519).

62. The trial court also found that UDOT breached the contract by misinterpreting and misapplying the asphalt paving specifications and misrepresented the manner in which the asphalt paving specifications were interpreted, used and applied on other UDOT highway and interstate projects. (R. 1519).

63. The trial court found that, as a result of the changes in paving methods made by UDOT, MVC/Southwest incurred substantial added costs for materials, labor, downtime, equipment, testing, grinding, trucking, traffic control, plant operations and other miscellaneous costs. (R. 1520).

64. The trial court found that Brandon Squire was neither a knowledgeable, nor credible, witness on matters dealing with methods and means of asphalt paving, compaction, and contract interpretation issues relating thereto. (R. 1507).

65. The trial court found that Lance Harris and Richard Jessop, both of

MVC, were not knowledgeable witnesses as it relates to paving issues, compaction issues, and contract interpretation issues pertaining to the placement of asphalt paving. (R. 1508).

66. The trial court found that Mike Moehn, Dave Olson, Tim Sisneros, Ken Schmidt, Ben Lujan and Shawn Hammer, all of Southwest, were the more credible witnesses and more knowledgeable in the area of paving and plant operations than Brandon Squire, Lance Harris and Richard Jessop. (R. 1508).

67. The trial court found that as of June 12, 2003, UDOT was on notice that prohibiting MVC/Southwest from ribbon paving the entire I-215 Project would result in increased costs, production inefficiencies, downtime, scheduling problems, and other impacts to MVC/Southwest. (R. 1422: 994-996; R. 1510, 1520).

68. The trial court found that the legal principles Thorn Construction Co., Inc. v. Utah Department of Transportation, 598 P.2d 365, 369-370 (Utah 1979), are applicable in this matter, i.e. where the project engineer orally furnishes a work directive to the contractor in the midst of construction for work not contemplated in the contractor's original bid, and where the project engineer is given notice of the adverse impacts of the directive in the form of the need for additional compensation, formal notice under the terms of the contract are not required because the project engineer is obviously on notice that extra compensation will be required. (R. 1521).

69. The trial court found that, as in Thorn, because MVC/Southwest gave

oral notice to UDOT on several occasions of the adverse impacts of UDOT's directive that MVC/Southwest not ribbon pave portions of the I-215 Project, and UDOT orally directed MVC/Southwest to proceed with the work and not use ribbon paving, MVC/Southwest was not required to give formal written notice as required by the contract. (R. 1521-1522).

70. The trial court found that the trial testimony of Brandon Squire established that any formal written or further notice of adverse impacts to MVC/Southwest would not have changed his mind in not allowing ribbon paving in areas where it would result in a greater than two inch vertical grade separation. (R. 1510).

71. The trial court additionally found that UDOT, by its conduct, impliedly waived strict compliance with the contractual notice provisions because it acted in a manner inconsistent with its contractual rights by orally responding to MVC/Southwest's complaints regarding paving methods and by dealing informally and directly with Southwest personnel on paving issues (i.e. verbally directing Southwest to continue block paving when notified of the impacts instead of requiring that a written claim be made). (R. 1511, 1522).

72. The trial court further found that UDOT and MVC modified the contract as it relates to the contract's written notice provisions in that any written notice requirements were orally modified and waived when UDOT verbally directed MVC/Southwest to proceed with block paving despite MVC/Southwest's requests that they be allowed to ribbon pave. (R. 1513).

73. In so finding, the trial court found that the legal principles of R.T. Nielson Co. v. Cook, 2002 UT 11 ¶ 13; 40 P.3d 1119, 1124 (Utah 2002), were applicable, i.e., UDOT and MVC/Southwest orally modified their written agreement as it relates to the written contract's notice provisions when UDOT verbally directed MVC/Southwest to proceed with the block paving in areas where it would result in a greater than two inch vertical grade separation despite being notified on several occasions that such would significantly and adversely impact MVC/Southwest's costs, production and efficiency. (R. 1524).

74. The trial court also found that UDOT waived and is estopped from asserting that MVC/Southwest should have strictly complied with contractual notice provisions because UDOT failed to follow the same asphalt paving specifications on both the I-215 Project and the I-15 Point of the Mountain Project and misrepresented to Southwest that the use and application of the I-215 contract specifications by UDOT was uniform on other UDOT highway and interstate projects with similar specifications and requirements. (R. 1522-1523).

75. The trial court found that, because UDOT reached and addressed the merits of MVC/Southwest's claim regarding paving methods and costs in the Claims Board of Review, UDOT waived and was estopped from asserting that MVC/Southwest must strictly comply with the contractual notice provisions. (R. 1524).

76. In so finding the trial court found that the legal principles of Procon

Corp. v. Utah Department of Transportation, 876 P.2d 890 (Utah Ct. App. 1994) applied, i.e., that review of the merits of a claim arguably waives a party's obligation to comply with a contract's strict notice provisions. (R. 1523).

77. The trial court found that MVC/Southwest's methods in determining its damages resulting from UDOT's directives that ribbon paving not be utilized on portions of the I-215 Project were reliable, credible, accurate, and reasonable. (R. 1513).

78. The trial court awarded damages to MVC in the amount of \$548,832.52, which did not include interest. (R. 1516, 1525).

79. As it relates to MVC/Southwest's claim for recovery of the \$166,416.00 in thickness penalties, the trial court found that the contract specifications relating to allowable thickness deviations were "**less than clear.**" (R. 1515). (Emphasis added).

80. However, the trial court adopted UDOT's interpretation of the allowable thickness deviation, finding that an allowable thickness deficiency of 3/8 of an inch applied to the total thickness of the asphalt pavement (five inches) and not to each individual lift (three inch lift and 2 inch lift). (R. 1515-1516).

81. Accordingly, the trial court denied MVC/Southwest's thickness claim of \$166,416.00. (R. 1525).

82. The trial court found that, pursuant to Utah Code Ann. § 15-1-1, MVC was entitled to 10% per annum interest on its awarded damages of \$548,832.52 starting from 11/1/2004 (when MVC submitted its formal claim to UDOT's Claims Review

Board, approximately one year after the I-215 Project was completed) to the date Judgment was entered, which was December 8, 2008. (R. 1516, 1525, 1528).

83. Final Judgment in favor of MVC and against UDOT was entered on December 8, 2008, in the amount of \$774,079.58 (\$219,533.00 of which was interest). (R. 1528-1529).

SUMMARY OF THE ARGUMENTS RELATED TO UDOT'S APPEAL

The trial court correctly determined that UDOT breached its contract with MVC by not allowing MVC/Southwest to ribbon pave the majority of the I-215 Project and refusing to pay for increased costs incurred by MVC/Southwest as a result of having to use a more expensive paving method. Contrary to UDOT's position otherwise, MVC is entitled to damages resulting from UDOT's directive that ribbon paving not be used. MVC was responsible for performing all paving operations on the I-215 Project and the damages resulting from UDOT's directive that ribbon paving not be used were directly related to MVC's scope of work under its contract with UDOT. MVC was legally entitled to pursue the damages directly from UDOT. However, rather than pursuing the damages from UDOT, MVC passed the costs down through assignment to its paving subcontractor, Southwest. Southwest could have brought suit directly against MVC for the damages. If it had, MVC would then have sued UDOT in the same proceeding seeking those damages. Rather than taking that course of action, MVC and Southwest entered into a Claims Prosecution and Tolling Agreement, wherein MVC assigned and granted Southwest the right to prosecute the claim for extra costs in MVC's name.

Additionally, this Court should not even consider UDOT's position on this matter because UDOT failed to raise this argument below at trial and therefore it is waived.

UDOT argues that it could not have breached the contract by interfering with MVC/Southwest's paving means and methods because the contract permitted UDOT to do so. In reality, the trial court correctly determined that UDOT did breach the contract because of its interference and its failure to pay for increased costs resulting from UDOT's interference. While the contract may have allowed UDOT to alter the contract, the contract required that UDOT give MVC written notice of any such alteration, which it failed to do. The contract also obligated UDOT to pay for increased costs due to its alteration, which it failed to do.

In addition, the Court should not even consider UDOT's alteration argument because UDOT never took the position at trial that it had altered the contract by prohibiting ribbon paving. Rather, UDOT's only position at trial was that the contract specifications prohibited MVC/Southwest from using ribbon paving.

As to UDOT's argument that MVC/Southwest did not comply with the contract's strict written notice provisions relating to requests for additional compensation for extra work, the trial court correctly interpreted Thorn Construction Co. Inc. v. Utah Department of Transportation, 598 P.2d 365 (Utah 1979) and determined that MVC/Southwest was excused from strictly complying with said provisions because UDOT directed the extra work and MVC/Southwest provided UDOT with repeated verbal notice that not being allowed to ribbon pave would result in increased costs and

other negative impacts. UDOT acknowledged the multiple verbal notices and directed MVC/Southwest to proceed with work even though UDOT knew of the increased costs and negative impacts.

Lastly, the trial court correctly found that UDOT modified, waived and is estopped from relying on the contract's strict written notice provisions due to UDOT's course of conduct before, during and after the subject project. First, UDOT impliedly waived any right to rely on the contract's written notice provisions because UDOT orally responded to MVC/Southwest's complaints regarding paving methods without requiring strict compliance with contractual notice provisions relating to compensation for extra work, and dealt informally and directly with Southwest personnel on paving method issues instead of dealing directly with MVC. This also resulted in a modification of the contract's notice provisions to excuse MVC/Southwest from the necessity of providing written notice to UDOT.

Second, UDOT waived and is estopped from relying on the strict notice provisions of the contract because UDOT misrepresented to Southwest the correct use and application of the I-215 Project Specifications. On other UDOT highway and interstate projects with similar specifications and requirements, paving contractors were allowed to utilize ribbon paving even where it resulted in a greater than two inch vertical separation grade. UDOT misrepresented this fact to MVC/Southwest.

Third, UDOT waived and is estopped from relying on the strict written notice provisions because, prior to the filing of the lawsuit, UDOT's Claims Review Board

considered the merits of MVC/Southwest's claims and recommended they be denied.

UDOT's Deputy Director adopted the recommendations of the Claims Review Board and denied MVC/Southwest's claims.

SUMMARY OF THE ARGUMENTS RELATED TO MEADOW VALLEY'S CROSS-APPEAL

First, the trial court incorrectly found that MVC/Southwest was only entitled to a 3/8 of an inch thickness deficiency on the total thickness of the asphalt installed by MVC/Southwest. The contract allows for a 3/8 of an inch thickness deficiency on each lot installed. The Court did not apply this contract standard. It agreed with the UDOT assessment that applied the 3/8 of an inch deficiency to the two lots (total thickness) of asphalt laid by MVC/Southwest. The contract specifications relating to allowable thickness deviations in the asphalt installed by MVC/Southwest on the I-215 Project are ambiguous and capable of more than one reasonable interpretation. MVC/Southwest's interpretation that it was entitled to a 3/8 of an inch deficiency allowance on each of the two separate lots of asphalt installed by MVC/Southwest, for a total of 3/4 of an inch deficiency on the total asphalt thickness, is a reasonable interpretation of the contract specifications.

Second, the trial court incorrectly determined that pre-judgment interest on MVC/Southwest's damages did not begin to accrue until November 1, 2004, approximately one year after the I-215 Project had been completed. Pre-judgment interest on the damages should have begun to accrue on November 11, 2003 because that

is the date that MVC/Southwest's damages had been determined with reasonable mathematical certainty.

ARGUMENT

I. The Trial Court Correctly Determined that MVC Is Entitled to Damages Resulting From UDOT's Directive that Ribbon Paving Not be Used.

a. The Damages Awarded by the Trial Court are MVC's Damages.

Contrary to UDOT's claims otherwise, the trial court correctly determined that MVC is entitled to damages resulting from UDOT's directive that MVC/Southwest not ribbon pave the I-215 Project where it would result in a greater than two inch vertical grade separation between traffic lanes. Pursuant to the contract between UDOT and MVC, MVC was responsible for performing all paving operations on the I-215 Project, including furnishing all materials, labor and equipment necessary to perform the paving. (R. 1496; Trial Ex. 6 & 103 at 52). While MVC subcontracted the paving work to Southwest, MVC, as the general contractor, remained responsible to UDOT for the paving operations. (R. 1496-1497; Trial Ex. 6, 8, 9 and 103). Because MVC remained responsible to UDOT for the paving operations, MVC was entitled to make a claim for any extra costs incurred as a result of changes made to the work by UDOT. (Trial Ex. 103 at 54, 56; Trial Ex. 9 at 5.4).

In this case, as a result of UDOT's directive that MVC/Southwest not utilize ribbon paving on a large portion of the I-215 Project, MVC/Southwest incurred significant cost increases. (R. 1421: 96-100, 104-107; R. 1504; Trial Ex. 24-26). MVC is contractually entitled to the increased costs because the costs include labor, materials

and equipment directly within MVC's scope of work under its contract with UDOT. (R. 1496, Trial Ex. 6 & 103).

Prior to this litigation, MVC pursued the extra costs from UDOT and UDOT rejected the same. (R. 1421: 146-147; R. 1424: 514-516; Trial Ex. 29 & 112). Instead of commencing litigation against UDOT to try and recapture the costs, which it was legally entitled to do, MVC passed, by assignment, the losses down to Southwest, who did not have a direct contractual relationship with UDOT and, therefore, could not sue UDOT directly. (R. 1424: 521-522). Specifically, Lance Harris, MVC's Project Manager, testified at the trial as follows:

Q. And as a matter of fact Meadow Valley reduced the cost of the price of the subcontract [with Southwest] by the amount it [MVC] was reduced in payment by UDOT; is that right?

A. Yes.

Q. Basically passed along the loss to Southwest?

A. Yes.

(R. 1424: 521-522).

While Southwest initially absorbed the increased costs, MVC still had standing to bring a claim for the costs against UDOT because all Southwest had to do was file suit against MVC for the extra costs. MVC, in turn, would have had to sue UDOT in the same proceeding to recover the costs from UDOT or pay Southwest the increased costs directly. However, rather than Southwest suing MVC and MVC, in turn, suing UDOT, MVC and Southwest decided to enter into a Claims Prosecution and Tolling Agreement,

wherein MVC assigned and granted Southwest the right to prosecute the claim for extra costs in MVC's name. (R. 1182-1187; R. 1424: 533; R. 1497).

A close reading of the Claims Prosecution and Tolling Agreement clearly reflects that the claim for extra costs was MVC's claim. Specifically, in the agreement, MVC stated that it "hereby assigns and conveys to Fisher [Southwest] the right to prosecute, negotiate, settle, and otherwise pursue the Block Paving Claim against UDOT in the name of MVCI under the terms of the Prime Contract with UDOT." (R. 1183). MVC and Southwest agreed that **absent the agreement, they "would further assert and prosecute the Block Paving Claim and Other Claims against one another. . . "** (R. 1183). (Emphasis added). This language clearly reflects that, absent the agreement, MVC and Southwest would have litigated the issue of extra costs between each other. Had that occurred MVC would have sued UDOT and asserted a claim for the extra costs.

The agreement also states that it was "intended to resolve all aspects of the Block Paving Claim as between Fisher [Southwest] and MVCI in connection with the Project. In the event Fisher [Southwest] recovers any amounts or does not actually recover any amounts from UDOT on the Block Paving Claim after a disposition on the merits, MVCI and Liberty [MVC's Surety] will have no liability to Fisher [Southwest] with respect to the Block Paving Claim." (R. 1184). This provision clearly shows that the claim for extra costs belonged to MVC in that it acknowledges a dispute between MVC and UDOT relating to the extra costs suffered by MVC and passed down to Southwest.

It is clear that the trial court correctly awarded damages to MVC in this matter. The extra costs relate directly to MVC's scope of work under its contract with UDOT. While MVC passed the costs down to Southwest, the extra costs still belonged to MVC because had Southwest sued MVC directly, MVC would have asserted the same claim against UDOT for the costs.

Conversely, if UDOT's theory on this point was adopted, it would have the effect of nullifying virtually all liquidating agreements entered into between general contractors and subcontractors, and prevent subcontractors from bringing actions on behalf of general contractors against owners. Instead, it would require subcontractors to rely upon general contractors to litigate claims against owners relating to damages affecting both general contractors and the subcontractors. This would affect subcontractor prices, increase risk and would result in greater construction costs to all involved in a construction project, including owners, general contractors, subcontractors, suppliers, vendors and, in cases of public projects, the taxpayer.

b. The Court Should Not Even Consider UDOT's Assignment Argument Because it Was Not Raised at Trial.

By UDOT's own admission, this issue was never raised at trial by UDOT. Pursuant to Utah law, "a defendant who fails to bring an issue before the trial court is barred from asserting it initially on appeal." State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994). The trial court is considered "the proper forum in which to commence thoughtful and probing analysis" of issues and "failing to argue an issue and present pertinent evidence in that forum denies the trial court the opportunity to make any findings of fact

or conclusions of law pertinent to the claimed error.” State v. Brown, 856 P.2d 358, 360 (Utah Ct. App. 1993).

The exception to this rule is that an appellate court may address an issue not raised at trial if the trial court committed plain error or there are exceptional circumstances. State V. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1992). In order to establish plain error, an appellant must establish that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.” Id. at 8. An exceptional circumstance exists only in truly unusual cases involving rare procedural anomalies. Id. at 11. Utah courts very rarely find either plain error or exceptional circumstances and, in fact, have stated that even issues involving liberty or constitutional rights do not necessarily constitute exceptional circumstances. Id. at 9; See also, State v. Archambeau, 820 P.2d 920, 925 (Utah Ct. App. 1991).

Clearly, the trial court did not commit plain error as it relates to the issue of whether MVC incurred damages and there are no exceptional circumstances that exist for even considering this issue for the first time on appeal. Rather, for the reasons set forth in Subsection a. above, the trial court correctly determined that MVC was entitled to damages.

In addition, if UDOT felt that the trial court awarding damages to MVC was so clearly and plainly in error, it should have raised the issue with the trial court, which it failed to do. The trial court was the proper forum for this issue and the trial court could have handled the matter expeditiously and effectively.

II. The Trial Court Correctly Determined That UDOT Breached the Contract by Interfering With and Changing MVC/Southwest's Means and Methods of Performing the Paving Work and Failing to Pay for Extra Costs Resulting From UDOT's Interference.

In Point II of its Argument section, UDOT claims that MVC's breach of contract action fails as a matter of law, arguing that UDOT could not have breached the contract by altering the I-215 Project because the contract allowed UDOT to alter the I-215 Project. UDOT's argument is flawed for several reasons, including: (1) UDOT did not raise this issue during trial and, therefore, it is waived. Specifically, UDOT did not view its directives as an alteration of the contract and never took the position at trial that it was an alteration. Rather, UDOT's only position at trial was that it was correctly interpreting the I-215 Project Specifications when it gave the directive to MVC/Southwest on several occasions that they could not ribbon pave; (2) Even if UDOT considered the directive an alteration, it did not comply with contractual notice and payment requirements relating to changes/alterations in the work; and (3) Even if the contract permits UDOT to alter the I-215 Project, it was legally obligated to pay for increased costs resulting from the alteration, which it failed to do.

a. UDOT's Argument that it Could Not Have Breached the Contract by Altering the Project Because the Contract Provides that UDOT Can Alter the Project Was Not Raised at Trial.

As already stated above, "a defendant who fails to bring an issue before the trial court is barred from asserting it initially on appeal." State v. Lopez, 886 P.2d at 1113. In order to preserve an issue for appeal, "Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to

correct the errors if appropriate.” State v. Brown, 856 P.2d at 361. Also, for an issue to be sufficiently raised, “it must at least be raised to a level of consciousness such that the trial judge can consider it.” Id.

In the instant case, UDOT never raised the issue at trial that it could not have breached the contract by altering the I-215 Project because the contract allowed it to do so. Rather, UDOT’s only position at trial was that it was correctly interpreting the I-215 Project Specifications when it directed MVC/Southwest to not ribbon pave in areas where it would result in a greater than two inch vertical grade separation. (R. 1421: 51; R. 1422: 325-328, 425-428; R. 1424: 619-620; R. 1501). UDOT simply never viewed its directives as an alteration of the contract and is only making this argument now in an attempt to confuse the issues and to draw the Court’s attention away from the trial court’s conclusions relating to UDOT’s wrongful interpretation of their own contract specifications and MVC/Southwest’s damages resulting from such.

In support of its position that it raised the issue at trial, UDOT cites to pages 1274-1277 of the Record. These pages make up a portion of UDOT’s Trial Brief. In reviewing the pages, UDOT never takes the position or raises the issue that UDOT could not have breached the contract by altering the I-215 Project because the contract provides that UDOT can alter the same. (R. 1274-1277). Rather, the only issues raised by UDOT relate to UDOT’s position that MVC waived all claims because it did not comply with the notice and dispute resolution requirements of the contract and that UDOT was

correctly interpreting the contract, not altering or changing the contract, when it prohibited MVC/Southwest from ribbon paving. (R. 1274-1277).

In sum, UDOT never raised the issue that it could not have breached by contract by altering the I-215 Project because the contract permitted UDOT to do so. UDOT's position has always been that there was no alteration. Accordingly, this issue has been waived and the Court should not even consider the same.

b. UDOT Did Not Comply With Contractual Notice and Payment Requirements Relating to Alterations in the Work.

Even if UDOT now considers its directive prohibiting MVC/Southwest from ribbon paving to be an alteration of the I-215 Project, UDOT failed to comply with its own contractual notice and payment requirements relating to alterations in the work. While the contract does give UDOT's project engineer the right to make changes/alterations in the work, the contract specifically provides that any such changes/alterations be made in writing. Specifically, the contract provides: "The Engineer reserves the right at any time during the work to make written changes in quantities and alteration in the work that are necessary to satisfactorily complete the project." (Trial Ex. 103 at 54) (Emphasis added). In addition, if the engineer makes changes or alterations in the work, UDOT is required to pay for extra costs associated with the changes/alterations. Specifically the contract provides: "Department [UDOT] adjusts the Contract, excluding anticipated profits, if the alterations or changes in quantities significantly change the character of the work under the contract." (Trial Ex. 103 at 54).

In this case, prior to the paving work being performed by MVC/Southwest, UDOT never made any written changes to the contract relating to its multiple directives to MVC/Southwest that ribbon paving was not to be utilized where it resulted in a greater than two inch vertical separation grade. No such written changes exist because, as set forth more fully above, UDOT never considered its directives relating to paving methods a change/alteration to the contract. If it had, it would have issued a written change order or some other document stating that that it considered its directives a change to the contract.

Moreover, even if UDOT had made written changes as it relates to paving methods to be utilized on the I-215 Project, UDOT was still responsible to pay for MVC/Southwest for extra costs associated with changes/alterations, which it clearly did not do.

c. UDOT is Required to Pay For Increased Costs Resulting From Alterations.

As set forth above, even if UDOT had the ability to alter/change the I-215 Project, it was still responsible for paying extra costs associated with the alterations/changes, which it failed to do. (Trial Ex. 103 at 54). When the trial court's conclusions are read in their entirety, it is clear that the trial court ruled that UDOT breached the contract because UDOT interfered with and changed the means and methods by which MVC/Southwest should have been allowed to pave the subject project and failed to pay for extra costs associated with the interference and change.

Specifically, the trial court found that:

9. UDOT breached its contract with Meadow Valley in directing Meadow Valley/Southwest not to use the ribbon style method on portions of the Project.

10. UDOT breached its contract with Meadow Valley in misinterpreting and misapplying the asphalt paving specifications.

12. UDOT was aware, and it was foreseeable to UDOT, that UDOT's decision to disallow ribbon paving throughout the Project would prejudice Meadow Valley/Southwest by resulting in substantial additional costs for materials, labor, downtime, equipment, testing, grinding, trucking, traffic control, plant operations, and other miscellaneous costs to Meadow Valley/Southwest.

13. UDOT's breach of the contract resulted in substantial added costs for materials, labor, downtime, equipment, testing, grinding, trucking, traffic control, plan operations, and other miscellaneous costs to Meadow Valley/Southwest.

(R. 1519-1520).

When reading these conclusions in their true context, it is clear that the trial court ruled that UDOT breached the contract not only because UDOT interfered with MVC/Southwest's means and methods, but also because UDOT failed to pay for extra costs resulting from UDOT's interference. Had the trial court concluded that UDOT was entitled to change the I-215 Project, UDOT still would have been in breach of contract because it did not pay for extra costs incurred by MVC/Southwest resulting from UDOT's changes as UDOT was clearly required to do under the contract. (Trial Ex. 103 at 54).

If the Court were to accept UDOT's logic that UDOT could not breach the contract because the contract allows UDOT to alter/change the Project, then UDOT would be able to make changes/alterations in its all of its projects (involving the same

contract language UDOT cites) and be under no obligation to pay for any increased costs due to the changes/alterations. This, of course, would be an absurd result.

III. The Trial Court Correctly Determined That MVC/Southwest Was Excused From Strictly Complying With the Contract's Written Notice Provisions Because UDOT Directed MVC/Southwest to Not Ribbon Pave and UDOT Was Given Repeated Verbal Notice That Not Being Allowed to Ribbon Pave Would Have a Significant Impact on Costs, Production And Operating Schedules.

The trial court correctly determined that MVC/Southwest's numerous verbal notices to UDOT informing UDOT that prohibiting MVC/Southwest from using the ribbon paving method would result in increased costs, production inefficiencies, downtime, scheduling problems and other negative impacts to MVC/Southwest, constituted sufficient notice, thereby excusing MVC/Southwest from complying with the strict notice provisions of the contract.

This Court has conclusively held that if a party entitled to receive notice of a change was already aware, or should have been aware of the change, then there is no need to comply with strict written notice provisions of a contract. Specifically, in Thorn Construction Co. Inc. v. Utah Department of Transportation, 598 P.2d 365 (Utah 1979), the plaintiff construction company claimed it was entitled to additional compensation for extra work performed at the request of UDOT's project engineer. Id. at 367. UDOT argued that the plaintiff was not entitled to additional compensation because it had not submitted a written request for payment as required by the contract, and had waived its claim as a result. Id.

In support of its argument, UDOT cited the following contract provision:

If, in any case, where the contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered by the engineer as extra work as defined herein, **the contractor shall notify the engineer in writing of his intention to make a claim for such additional compensation before he begins the work on which he bases the claim.**

Id. at 369. (Emphasis added).

Despite the fact that the contract contained a strict notice provision that required the contractor to provide written notice of its claim and refrain from commencing work until providing written notice, this Court unanimously held that **no written notice** was required because UDOT's project engineer, not the contractor, **orally directed the extra work to be performed** and, therefore, UDOT clearly had **actual notice** that additional compensation would be required. Id. at 370. (Emphasis added).

In addition to Thorn, courts outside of Utah have held that strict compliance with contractual notice provisions is unnecessary when the owner has actual notice. See, New Pueblo Constructors, Inc. v. State of Arizona, 696 P.2d 185, 191 (Ariz. 1985) (where the Arizona Supreme Court stated that "**Barring claims** for compensation by a **strict application of notice requirements is disapproved . . . where the government is aware of the changed conditions and of the claim for compensation** and where no prejudice is shown by the lack of formal notice.") (Emphasis added). See also, Chaney Bldg. Co., Inc. v. Sunnyside School District No. 12, 709 P.2d 904, 907 (Ariz. Ct. App. 1985) (where the Arizona Court of Appeals stated that "the evidence was sufficient for the trier of fact to infer that Sunnyside had **actual notice** of the delays . . . thereby making a 7-day written notice duplicitous and unnecessary . . ."). (Emphasis added). See

also, Roger J. Au & Sons, Inc. v. Northeast Ohio Regional Sewer District, 504 N.E.2d 1209, 1211 (Ohio Ct. App. 1986) (where the Ohio Court of Appeals found that when an owner has **constructive notice of a claim, the failure to provide written notice** or otherwise strictly comply with contractual notice provisions **is harmless**). (Emphasis added). See also, Nelson Bros. Constr. Co. (1977), 77-2 BCA, ¶ 12660, which states as follows:

Failure to give formal notice of changes claims did not bar the claims because responsible officials were aware of the facts giving rise to the claims. **A defense based upon lack of notice does not apply if such officials as a project inspector, COR, or project engineer had actual knowledge of the circumstances upon which the claim is based**, nor is notice required for extra expenses that result from a work order. Such circumstances give **actual knowledge** of the basis for the claim and no prejudice results from a failure to receive notice.

(Emphasis added).

In this case, consistent with Thorn and the other cases cited above, MVC/Southwest was not required to strictly comply with the contract notice provisions because UDOT clearly had **actual notice** of MVC/Southwest's claim for extra costs resulting from UDOT's directive that ribbon paving not be used.

Specifically, as set forth in more detail above in the "Facts" section, UDOT was informed by MVC/Southwest on several occasions before and during paving operations that UDOT's prohibition on ribbon paving would result in increased costs, production inefficiencies, scheduling problems and other negative impacts to MVC/Southwest. For example, UDOT was notified of such:

- At the June 12, 2003 pre-pave meeting. (R. 1422: 329, 341-342, 366; R. 1502).

- At the July 31, 2003 pre-pave meeting. (R. 1422: 367-368, 429-431; R. 1424: 778; R. 1502-1503).
- During several conversations in the field from early August 2003 until the end of the I-215 Project that occurred at least twice per week. (R. 1422: 368-370, 383-388, 432-435, 461-462; R. 1503).

Despite being notified of the increased costs and other negative impacts, UDOT repeatedly re-iterated its position that MVC/Southwest could not ribbon pave in areas where it would result in a greater than two inch vertical separation grade and directed MVC/Southwest to continue work and not ribbon pave in those areas. (R. 1422: 329-330, 341-342, 368-370, 379, 383-388, 429, 461; R. 1424: 778; R. 1502-1503).

The trial court correctly determined that, consistent with Thorn, while MVC/Southwest did not strictly comply with the written contractual notice provisions, **UDOT clearly had actual repeated verbal notice** of MVC/Southwest's claim of increased costs due to not being allowed to ribbon pave, which notice was sufficient. (R. 1510-1511, 1520-1522). Despite MVC/Southwest's ongoing complaints regarding production and scheduling issues, UDOT **orally directed** MVC/Southwest to proceed and perform **extra work** not contemplated by MVC/Southwest by restricting the manner and method of paving methods available to MVC/Southwest, which restriction required MVC/Southwest to utilize a method of paving that was more expensive and less efficient. (R. 1521).

UDOT cannot claim it was prejudiced by not receiving formal notice when the evidence clearly shows that it knew of MVC/Southwest's increased production costs and operating issues, but directed MVC/Southwest to proceed with the work anyway. Moreover, any formal written or further notice of adverse impacts to MVC/Southwest would not have changed Brandon Squire's mind in not allowing ribbon paving in areas where it would result in a greater than two inch vertical grade separation. Brandon Squire's position throughout trial was that the contract did not allow for ribbon paving in those areas. (R. 1424: 619-620; R. 1510).

As to UDOT's claim that MVC agreed with UDOT's position on paving methods allowed on the I-215 Project. MVC never indicated that it agreed with UDOT's position. Rather, Lance Harris, an MVC employee, who admitted he is not a paving expert and whom the trial court found was not a knowledgeable witness as it relates to paving issues and contract interpretation issues, indicated that he did not necessarily agree with UDOT's position on which paving methods were and were not allowed, but was just trying to pass on UDOT's position to Southwest. (R. 1424: 559, 578; 1508, Trial Ex. 16 at 1). MVC never agreed with UDOT's position. (R. 1424: 525).

As to case law cited by UDOT regarding written notice, UDOT cites one Utah case, Geisdorf v. Doughty, 972 P.2d 67 (Utah 1998), for the proposition that where a contract requires written notice, strict compliance with the notice provision is required in order to bring an action for breach of contract. However, Geisdorf clearly does not apply to the facts of this case as that case involved an option contract, not a bilateral contract.

This Court's holding in Geisdorf is clearly limited to situations where an option contract requires written notice to exercise an option. Id. at 71.

Although UDOT does not specifically ask this Court to reverse Thorn, it is essentially asking the Court to do so. While the facts of Thorn and the instant case are not identical (they are close, however), the basic legal principle that this Court set forth in Thorn is that where a contract requires written notice for claims for additional compensation for work not covered in the contract, no written notice is required where the project engineer orally directs extra work to be performed because the project engineer clearly already has actual notice that additional compensation will be required. See, Thorn, 598 P.2d at 370. In the instant case, as set forth above in more detail, Brandon Squire orally directed MVC/Southwest to perform extra work not contemplated by MVC/Southwest by restricting the manner and method of paving methods allowed for under the contract, which restriction required MVC/Southwest to utilize a method of paving that was more expensive and less efficient. (R. 1521). Brandon Squire and other UDOT representatives were orally informed on several occasions of the adverse impacts to MVC/Southwest, including increased costs, production inefficiencies and scheduling problems, as a result of UDOT's directive, but UDOT, on several occasions, directed MVC/Southwest to proceed with the work anyway. (R. 1422: 329-330, 341-342, 366, 368-370, 379, 383-388, 429, 432-435, 461-462; R. 1424: 778).

The legal principles of Thorn clearly apply to the facts of this case and this Court should uphold those legal principles and find that MVC/Southwest's numerous verbal

notices to UDOT relating to increased costs and other impacts due to UDOT's directive that ribbon paving not be utilized in certain areas constituted sufficient notice, thereby excusing MVC/Southwest from complying with the strict notice provisions of the contract.

IV. The Trial Court Correctly Determined that UDOT Modified, Waived and is Estopped From Relying on the Contract's Written Notice Provisions.

The trial court correctly determined that UDOT modified, waived and is estopped from relying on the strict written notice provisions of the contract due to UDOT's course of conduct before, during and after the subject project.

a. UDOT's Waiver of Reliance on Strict Written Notice Provisions.

Pursuant to Utah law, "Waiver is an intentional relinquishment of a known right. It must be distinctly made, although it may be expressed or implied." Interwest Construction v. Palmer et al., 886 P.2d 82, 98 (Utah Ct. App. 1995). See also, Soter's, Inc. v. Deseret Federal Savings & Loan Assoc., 857 P.2d 935, 942 (Utah 1993); Continental Ins. Co. v. Kingston, 2005 UT App 233 ¶¶10-11; 114 P.3d 1158, 1161 (Utah Ct. App. 2005) ("intent to relinquish a right need not be express and may be implied from action or inaction"). "Waiver of a contractual right occurs when a party to a contract intentionally acts in a manner inconsistent with contractual rights, and, as a result, prejudice accrues to the opposing party or parties to the contract." Interwest Construction v. Palmer et al., 886 P.2d at 98. A distinct intent to waive "must only be shown by a preponderance of the evidence." Soter's, Inc. v. Deseret Federal Savings & Loan Assoc., 857 P.2d at 942.

In this case, the trial court concluded that UDOT impliedly waived any right to rely on the contract's written notice provisions for several reasons. First, the trial court correctly found that UDOT impliedly waived strict compliance with the contractual notice provisions because UDOT acted in a manner inconsistent with its contractual rights by orally responding to MVC/Southwest's complaints regarding paving methods and by dealing informally and directly with Southwest personnel on paving method issues instead of dealing directly with MVC. (R. 1502-1503, 1511-1512). Rather than handling paving disputes directly with MVC, which would have been proper given UDOT's direct contractual relationship with MVC, UDOT handled paving disputes directly with Southwest personnel, including Dave Olsen, Ken Schmidt, Tim Sisneros, Ben Lujan and Shawn Hammer and directed Southwest personnel to proceed with block paving in areas where it would result in a greater than two inch vertical grade separation even though UDOT was aware that such direction would result in cost increases and negative impacts. (R. 1422: 329-330, 341-342, 366, 368-370, 379, 383-388, 429, 432-435, 461-462; R. 1424: 778; R. 1502-1503, 1511-1512).

Contrary to UDOT's assertions otherwise, beginning on June 12, 2003, and continuing throughout the I-215 Project, there was clearly a dispute as to what methods of paving the contract allowed for and, by dealing directly with Southwest personnel on this dispute and verbally directing Southwest to block pave instead of ribbon pave, UDOT created an informal non-threatening atmosphere where it attempted to informally resolve paving disputes directly with Southwest without requiring strict compliance with

contractual notice provisions relating to extra compensation for altered work (i.e., **verbally directing** Southwest to proceed with work as directed when notified of impacts instead of requiring that MVC/Southwest make a written claim for UDOT to consider). (R. 1422: 329-330, 341-342, 366, 368-370, 379, 383-388, 429, 432-435, 461-462; R. 1424: 778; R. 1502-1503, 1511-1512). By verbally denying MVC/Southwest's request to ribbon pave throughout the I-215 Project without requiring MVC/Southwest to submit a written claim for UDOT to consider, UDOT clearly led MVC/Southwest to reasonably believe that UDOT had waived strict compliance with the contractual notice provisions. Providing written notice in that situation would have been pointless as UDOT already denied MVC/Southwest's request to ribbon pave on several occasions. (R. 1421: 51; R. 1422: 325-330, 341-342; 364-366, 368, 425-428; R. 1424: 506, 619-620, 623-624, 778).

Second, the trial court correctly found that UDOT waived and is estopped from relying on the strict notice provisions of the contract because UDOT misrepresented to Southwest the correct use and application of the I-215 Project Specifications, including the TC-2A Hazard Mitigation Flowchart, on other UDOT highway and interstate projects with similar specifications and requirements. During the I-215 Project, Brandon Squire represented to MVC/Southwest that ribbon paving was not allowed in areas of the I-215 Project where it would result in a greater than two inch vertical grade separation between traffic lanes, claiming that the TC-2A Flowchart did not allow for traffic to traverse a vertical grade separation greater than two inches. (R. 1421: 51; R. 1422: 325-330 364-366, 368, 425-428; R. 1424: 506, 619-620, 778). In addition, at a meeting that occurred

on October 7, 2003, a representative of UDOT told Southwest that the TC-2A Flowchart was uniformly used, interpreted, and applied on all UDOT highway and interstate projects in the same manner that it was being used, interpreted, and applied on the I-215 Project (i.e., no ribbon paving where it would result in a greater than two inch vertical grade separation. (R. 1422: 308-310; R. 1424: 910; 1507-1508). Brandon Squire was present at the meeting and did not say anything that contradicted the representation, which representation was consistent with Brandon Squire's position during the course of the I-215 Project as it relates to his interpretation of the I-215 Project Specifications. (R. 1421: 51, 90; R. 1422: 325-328, 340, 364-366, 368, 425-428; R. 1424: 619-620, 778; R. 1501-1503, 1507-1508).

The trial court concluded that UDOT's statements that ribbon paving was not allowed were misrepresentations because the evidence clearly reflected that UDOT had allowed other paving contractors on other highway and interstate projects to utilize ribbon paving even though it resulted in a greater than two inch vertical grade separation between traffic lanes. (R. 1523). Specifically, UDOT allowed Staker & Parsons to utilize ribbon paving on a project along the I-15 interstate corridor near the Point of the Mountain in Salt Lake and Utah Counties occurring around the same time as the I-215 Project even though doing so resulted in a much greater than two inch vertical separation grade, which traffic was allowed to traverse. (R. 517, 523-525; R. 1421: 77-87; R. 1422: 331-333; R. 1424: 796, 803-805, 810; R. 1499, 1506; Trial Ex. 20). The Point of the Mountain project included the same specifications UDOT relied on in the I-215 Project

for not allowing ribbon paving, including the TC-2A Hazard Mitigation Flowchart and the 3.5 Surface Placement provision. (R. 1421: 87; R. 1424: 803-804; R. 1499, 1506).

Representatives of Southwest discovered the Point of the Mountain project right after they left the October 7, 2003 meeting. Southwest observed that UDOT was allowing ribbon paving on that project even though it resulted in a much greater than two inch vertical grade separation, which UDOT allowed traffic to traverse. (R. 517, 523-525; R. 1421: 77-87; R. 1422: 331-333; R. 1424: 796, 807-811; R. 1499; Trial Ex. 20). UDOT's misrepresentation at the meeting on October 7, 2003, occurred at the same time UDOT was allowing Staker and Parsons to use ribbon paving even though it resulted in a greater than two inch vertical separation grade. This clearly constitutes a misrepresentation regarding a presently existing material fact made by UDOT to MVC/Southwest, resulting in UDOT's waiver of reliance on the written contractual notice provisions.

Third, the trial court correctly concluded that by considering the merits of MVC/Southwest's claims and deciding those claims on their merits, UDOT waived and is estopped from claiming that MVC/Southwest failed to comply with the notice provisions. See, Chaney Bldg. Co., Inc. v. Sunnyside School Dist. No. 12, 709 P.2d 904, 907 (Ariz. Ct. App. 1985) (where the court held that because the defendant had reviewed the merits of the plaintiff's claim, defendant waived the right to deny the claim solely on lack of strict compliance with the contract's notice provisions). See also, Procon Corp. v. Utah Department of Transportation, 876 P.2d 890, 893, n. 3 (Utah Ct. App. 1994) (where

the Utah Court of Appeals stated that “UDOT’s review of the possible merits of Procon’s claim arguably waived Procon’s obligation to conform to the Contract’s strict notice procedures.”)

In the instant case, UDOT’s Claims Review Board reviewed MVC/Southwest’s claims on the merits. (R. 1421: 146-147; R. 1424: 744-748; Trial Ex. 29). Specifically, UDOT reviewed and recommended that MVC/Southwest’s claims for increased paving costs, thickness reduction penalties and traffic costs be denied. (R. 1421: 146-147; R. 1424: 745-746, 748; Trial Ex. 29). UDOT’s Claims Review Board did not recommend dismissal of MVC/Southwest’s claims based on the failure to strictly comply with the contract’s written notice provisions. (R. 1424: 744, 748; Trial Ex. 29). Carlos Braceras, UDOT’s Deputy Director, then adopted the recommendations of UDOT’s Claims Review Board and denied MVC/Southwest’s claims on the merits. (R. 153; R. 1424: 746-747, 749; Trial Ex. 112).

Consistent with Chaney Bldg. Co., Inc. and dicta in Procon Corp. v. Utah Department of Transportation, because UDOT addressed the merits of MVC/Southwest’s claims, UDOT waived and is estopped from asserting that MVC/Southwest must strictly comply with the contractual notice provisions.

UDOT’s argument that UDOT’s Claims Review Board’s recommendation to deny MVC/Southwest’s claims was not an act of UDOT is erroneous. Special Provision 00727 §1.25(B) identifies the Claims Review Board as a “Department Claims Board of Review.” (Trial Ex. 103 at 78). “Department” is defined in the contract as “The Utah

Department of Transportation.” (Trial Ex. 103 at 45). Clearly UDOT’s Claims Board of Review is a UDOT entity. Even if it is not a UDOT entity, UDOT’s Deputy Director, Carlos Braceras, adopted the recommendations of UDOT’s Claims Review Board, indisputably making it a UDOT act. (R. 153; Trial Ex. 112).

Lastly, UDOT’s argument that its review of the merits could not have waived its ability to rely on the strict notice provisions because the trial court reviewed this matter de novo is without merit. The fact that the trial court reviewed the case de novo does not prevent the trial court from determining that UDOT’s review of the merits of MVC/Southwest’s claim waived UDOT’s ability to rely on the strict notice requirements as a defense. While the trial court was not bound to rule there was a waiver based on UDOT’s review of the merits, it was well within its authority to find there was a waiver based on the evidence, which it did.

b. UDOT and MVC/Southwest Modified and Waived the Contract’s Notice Provisions.

The trial court correctly concluded that UDOT and MVC/Southwest orally modified and waived the contract’s written notice provisions, thereby excusing MVC/Southwest from strictly complying with the contract’s written notice provisions. In R.T. Nielson Co. v. Cook, 2002 UT 11¶13, n. 4; 40 P.3d 1119, 1124 (Utah 2002), this Court stated as follows:

In Utah, parties to a written agreement may not only enter into separate, subsequent agreements, but they may also modify a written agreement through verbal negotiations subsequent to entering into the initial written agreement, even if the agreement being modified unambiguously indicates that any modifications must be in writing.

In the instant case, by verbally directing MVC/Southwest on several occasions (as more fully described above) to not ribbon pave and proceed with work as directed in areas where there was a greater than two inch vertical grade separation, UDOT and MVC/Southwest modified the contract's notice provisions, thereby excusing MVC/Southwest from the necessity of providing written notice to UDOT. UDOT's repeated verbal directions to MVC/Southwest to proceed with the work without requiring MVC/Southwest to provide written notice constitutes a clear modification of the contract's written notice requirements. If UDOT and MVC/Southwest had not intended to modify the notice requirements, UDOT would have requested MVC/Southwest to comply with the contract's written notification provisions rather than repeatedly directing MVC/Southwest to continue paving work.

c. UDOT is Estopped From Enforcing the Contract's Notice Provisions.

The trial court's conclusion that UDOT is estopped from enforcing the strict written notice provisions of the contract was accurate. As UDOT correctly states, estoppel requires "a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted" that induces "reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act," and a resulting "injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act."

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 14, 158 P.3d 1088.

In the instant case, UDOT's repeated directives to MVC/Southwest to not ribbon pave where it would result in a greater than two inch vertical separation grade after receiving verbal notice from MVC/Southwest that such directives would result in increased costs and other negative impacts clearly constitute statements and acts on the part of UDOT which are inconsistent with its current claims that MVC/Southwest should have provided UDOT with written notice that UDOT's directives were extra work requiring additional compensation. UDOT's repeated directives to MVC/Southwest to proceed with work caused MVC/Southwest to reasonably believe that there was no need to provide written notice to UDOT since UDOT had already made up its mind on the issue of what paving methods it was going to allow. Allowing UDOT to now rely on the strict written notice provisions of the contract is inconsistent with its repeated directives to MVC/Southwest to continue work without requiring written notice.

CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's rulings that: (1) MVC is entitled to damages resulting from UDOT's refusal to allow ribbon paving on significant portions of the I-215 Project; (2) UDOT breached the contract by interfering with and changing the means and methods by which MVC/Southwest should have been allowed to pave the I-215 Project and failing to pay for extra costs associated with said interference and change; (3) MVC/Southwest's numerous verbal notices to UDOT throughout the course of the project of increased costs and other negative impacts to MVC/Southwest due to UDOT's directives, constituted sufficient notice, thereby

excusing MVC/Southwest from complying with the strict notice provisions of the contract; and (4) UDOT modified, waived and is estopped from relying on the strict written notice provisions of the contract due to UDOT's course of conduct before, during and after the subject project.

ARGUMENT
(Relating to Cross-Appeal)

I. MVC/Southwest Was Entitled to a 3/8 of an Inch Thickness Deficiency on Each of the Two Separate Layers of Asphalt Installed by MVC/Southwest.

As discussed more fully below, the contract specifications for the I-215 Project, which were drafted by UDOT, are ambiguous as to the allowable thickness deviations on the asphalt installed by MVC/Southwest. The trial court should have found that MVC/Southwest's position that it was entitled to a 3/8 of an inch thickness deficiency on each of the two separate layers of asphalt installed by MVC/Southwest is the correct interpretation of the contract specifications relating to allowable thickness deviations.

Pursuant to Utah law, "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." Interwest Construction v. Palmer et al., 923 P.2d 1350, 1359 (Utah 1996); Webbank v. American General Annuity Service Corp. et al., 2002 UT 88, ¶ 20; 54 P.3d 1139, 1146 (Utah 2002). "When determining whether a contract is ambiguous, any relevant evidence must be considered." Lunceford v. Lunceford, 2006 UT App 266, ¶ 13; 139 P.3d 1073, 1075. "If a contract is ambiguous, the court will construe it against the drafter only after concluding that extrinsic evidence

does not reveal the intent of the parties and uncertainty remains.” Allstate Enterprises, Inc. v. Heriford et al., 772 P.2d 466, 469 (Utah Ct. App. 1989).

In Kaczynski v. J. Videira’s Paving, LLC, 2008 WL 344655 (Conn. Super. Ct. 2008), the plaintiff hired the defendant, a paving company, to install a new driveway. Id. at 1. The contract, which was prepared by the defendant paving company, provided that the asphalt on the new driveway should be compacted 3” to 2”. Id. After the driveway was installed, it began to crack and plaintiff sued the defendant claiming, among other things, that asphalt was not installed at the thickness required by the contract. Id. Specifically, the plaintiff claimed that the contract required the defendant to “lay down 3 inches of asphalt and compact it down to 2 inches of thickness”, but that the defendant failed to do so in several areas. Id. The defendant countered by arguing that the contract only required the defendant to lay down 3” to 2” of asphalt and then compact it, which would mean that the contract presumably allowed for the asphalt to be less than 2” after compaction. Id.

In determining what the contract meant when it provided the asphalt should be compacted 3” to 2”, the court stated that “A contract is ambiguous if [the] agreement on its face is reasonably susceptible of more than one interpretation.” Id. at 2. The court determined that the contract was ambiguous, finding that the contract language “3” TO 2” ASPHALT COMPACTED is reasonably susceptible of meaning either (1) two to three inches of asphalt which is then compacted, presumably to a lesser thickness, or (2) two to three inches of asphalt after compaction.” Id.

In finding that the contract was ambiguous, the court determined that the extrinsic evidence, which consisted of testimony of the parties, did not significantly illuminate what the parties meant by the paving thickness language; rather it showed that the plaintiff understood it to mean one thing, while the defendant understood it to mean another. Id. The court held that because the contract was ambiguous, it must be construed against the drafter, which was the defendant, and found that in “Construing the contractual term against the defendant the court finds that the agreement called for asphalt measuring two to three inches after compaction.” Id.

In the instant case, the contract specifications relating to allowable thickness deviations in the asphalt installed by MVC/Southwest for the I-215 Project are ambiguous and capable of more than one reasonable interpretation. The relevant contract specification addressing allowable thickness deviations is found in paragraph 1.4 of the contract specifications. Specifically, paragraph 1.4(E) states as follows:

Thickness: **Base acceptance on the average thickness of a lot. A thickness lot equals a density lot.** Divide a thickness lot into five sublots equal to density sublots. Thickness acceptance for thin lift projects (2 inches or less) consists of checking thickness regularly with a depth probe during placement and taking corrective action as necessary.

1. Take a minimum of two randomly selected thickness tests within each subplot.
2. **The same core samples taken for density may be used for thickness verification.**
3. The Department accepts a lot when:
 - a. The average thickness of all sublots is not more than ½ inch greater nor 1/4 inch less than the total thickness specified.
 - b. **No individual subplot shows a deficient thickness of more than 3/8 of an inch.**

(Trial Ex. 3 at 346; Trial Ex. 103 at 346). (Emphasis added).

Paragraph 1.4 (A) of the contract specifications state that “A lot equals the number of tons of HMA [hot mix asphalt] placed **during each production day.**” (Trial Ex. 3 at 345; Trial Ex. 103 at 345). (Emphasis added).

On the I-215 Project, UDOT and MVC/Southwest agreed that the total five inches of asphalt to be laid would be performed in two separate lifts on separate days; the first a three inch lift and the second a two inch lift. (R. 1421: 43-44; R. 1424: 639, 898; R. 1515). Density and thickness were measured each day during the course of the I-215 Project and the same cores were used to measure both density and thickness consistent with paragraph 1.4(E)(2) of contract specifications. (R. 1421: 34, 36-37; R. 1515).

After a majority of the paving work had been completed by MVC/Southwest, UDOT informed MVC/Southwest for the first time that some areas of the paving were deficient in thickness according to core measurement results. (R. 1421: 38, 64-65; R. 1422: 465-466). In coming to this conclusion, UDOT only allowed for a 3/8 of an inch deficiency on the total five inches of asphalt laid. (R. 1421: 71, 103). In support of its position that MVC/Southwest was only entitled to a 3/8 of an inch deficiency on the total five inches, UDOT relied on paragraph 1.4(E)(3)(b) of the contract specifications, which states that “The Department accepts a lot when no **individual subplot** shows a deficient thickness of more than 3/8 of an inch.” (R. 1424: 882-883, 917-918, 923-924; R. 1515; Trial Ex. 3 at 346; Trial Ex. 103 at 346). UDOT ultimately assessed penalties against MVC/Southwest in the amount of \$166,416.00. (R. 1425: 953).

The trial court found that the contract specifications relating to allowable thickness deviations were “**less than clear**.” (R. 1515). Despite finding such, the trial court found that UDOT’s interpretation of the allowable thickness deficiency was more reasonable and that the allowable thickness deficiency of 3/8 of an inch applied to the total thickness of the asphalt pavement (5 inches) and not to each individual lift (3 inch lift and 2 inch lift). (R. 1515-1516). Accordingly, the trial court denied MVC/Southwest’s thickness claim of \$166,416.00. (R. 1525).

The trial court should have found that the contract specifications relating to allowable thickness deviations are ambiguous and that MVC/Southwest’s interpretation that it was entitled to a 3/8 of an inch deficiency allowance on each individual lift that was laid (both the 3 inch lift and the 2 inch lift, for a total of 3/4 of an inch deficiency on the total 5 inches of thickness laid) was a reasonable interpretation of the contract specifications relating to allowable thickness deviations.

Paragraph 1.4(E) sets forth the manner in which testing for thickness was to be conducted on the I-215 Project. It states that UDOT will accept a **lot** when: (a) the average thickness of all **sublots** is not more than 1/2 inch greater nor 1/4 inch less than the total thickness specified; (b) no **individual subplot** shows a deficient thickness of more than 3/8 of an inch. (Trial Ex. 3 at 346; Trial Ex. 103 at 346). The first question in determining what the allowable thickness deviation is requires an understanding of what constitutes a “lot” and a “subplot.” Paragraph 1.4(A) states that “A lot equals the number of tons of HMA [hot mix asphalt] place during **each production day**.” (Trial Ex. 3 at

345; Trial Ex. 103 at 345). (Emphasis added). Put more clearly, a “lot” is a day’s production of asphalt (i.e. how much asphalt was installed by MVC/Southwest in one day). (R. 1424: 931).

As for what constitutes a “sublot”, paragraph 1.4(A) clarifies that a sublot makes up part of a “lot” when it states: “Divide each lot into four sublots based on the scheduled production day.” (Trial Ex. 3 at 345; Trial Ex. 103 at 345). Therefore, a “sublot” is part of a day’s production of asphalt.

Clearly, as set forth above, the contract specifications state that thickness was to be measured in lots and sublots, which constitutes a day’s production of asphalt installed. On the I-215 Project, UDOT and MVC/Southwest agreed that the total five inches of asphalt to be laid would be performed in two separate lifts on separate days; the first a three inch lift and the second a two inch lift. (R. 1421: 43-44; R. 1424: 639, 898; R. 1515). Therefore, the three inch lift performed within a day’s production would constitute a “lot”, while the two inch lift performed on a different day would constitute a separate “lot”.

On the I-215 Project, measurements (core samples) to determine thickness were performed each day. (R. 1421: 34, 36-37, 42; R. 1515). Pursuant to paragraph 1.4(E)(3)(b), which is what UDOT used in determining thickness, and MVC/Southwest’s position, MVC/Southwest was entitled to a $\frac{3}{8}$ of an inch thickness deficiency on each individual sublot (i.e., $\frac{3}{8}$ of an inch on each sublot included in the 3 inch lift, and an additional $\frac{3}{8}$ of an inch on each sublot included in the 2 inch lift for a total of $\frac{3}{4}$ of an

inch deficiency on the total five inches installed by MVC/Southwest). (R. 1421: 43, 69, 71, 75, 103; 1424: 926-927; R. 1424: 882-883, 917-918, 923-924; R. 1425: 952-953; R. 1515; Trial Ex. 3 at 346; Trial Ex. 103 at 346). However, MVC/Southwest was only given 3/8 of an inch deficiency and was penalized \$166,416.00 as a result of UDOT's and the trial court's erroneous interpretation of the allowable thickness deviation.

UDOT was responsible for crafting clear and coherent contract specifications relating to allowable thickness deviations, which it failed to do. Paragraph 1.4 is confusing and ambiguous and capable of more than one reasonable interpretation; namely MVC/Southwest's interpretation that paragraph 1.4 allows for a 3/8 of an inch deficiency on both the three inch lift and the two inch lift, for a total 3/4 of an inch deficiency on the total five inches of thickness.

Accordingly, this Court should reverse the decision of the trial court, find that the contract specifications relating to allowable thickness deviations are ambiguous, find that MVC/Southwest's interpretation of the allowable thickness deviations is reasonable and instruct the trial court to enter judgment in favor of MVC/Southwest on the thickness reduction claim.

II. MVC/Southwest is Entitled to Interest on its Damages From November 11, 2003, the Time its Damages Were Calculable With Reasonable Mathematical Accuracy.

Pursuant to Utah case law, "Prejudgment interest may be recovered where the damage is complete, the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and figures." Encon Utah, LLC v. Fluor Ames Kraemer,

LLC, 2009 UT 7, ¶ 51; 210 P.3d 263. “If sufficient certainty exists, courts should allow interest from the time when damages became fixed, rather than from the date of the judgment.” Andreason v. Aetna Cas. & Surety Co., 848 P.2d 171, 177 (Utah Ct. App. 1993). See also, Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 20, n.5; 82 P.3d 1064, 1069 (“Where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time. . . .”). See also, Davies v. Olson, 746 P.2d 264, 270 (Utah Ct. App. 1987) (“The statutory legal rate of interest is applied from the date payment is due to the judgment date.”).

However, it is not required “all of the damage figures must be known and remain static throughout the litigation. Rather, the standard focuses on the measurability and calculability of the damages.” Encon Utah, LLC v. Fluor Ames Kraemer, LLC, 2009 UT 7, ¶ 52. The fact that “parties dispute or reduce the amount of damages does not in and of itself mean that damages are incomplete or cannot be calculated with mathematical accuracy.” Id. at ¶ 58.

In the instant case, the trial court correctly determined that MVC/Southwest was entitled to prejudgment interest of 10% per annum on its awarded damages of \$548,832.52. (R. 1425: 1048; R. 1525). However, the trial court incorrectly determined that prejudgment interest did not begin to accrue until November 1, 2004, which was approximately one year after the I-215 Project was completed and approximately one year after MVC/Southwest’s increased costs had been determined with reasonable

mathematical certainty on November 11, 2003. (R. 1425: 968-969, 1048; R. 1525; Trial Ex. 24).

Specifically, by November 11, 2003, MVC/Southwest had compiled a detailed analysis of increased costs suffered by MVC/Southwest due to UDOT's directive that ribbon paving not be used by MVC/Southwest on certain areas of the I-215 Project. (R. 1421: 113-150; Trial Ex. 24). In the cost analysis, Mike Moehn of Southwest identified in detail the amount of MVC/Southwest's increased costs, which included amounts for increased paving costs, labor costs, equipment costs, supervision costs, grinding costs, testing costs, trucking costs and materials costs. (R. 1421: 113-150; Trial Ex. 24). Together with an itemization of these increased costs, Mike Moehn detailed the means and methods utilized by him to determine the amount of the increased costs and the sources of information used by him to determine the increased costs, including production reports, job accounting reports, job cost details, summary reports, time cards, equipment cards, subcontractor/supplier invoices, equipment usage reports, bid information, cost distribution summaries and labor reports. (R. 1421: 113-150; Trial Ex. 24).

As to MVC/Southwest's increased cost analysis compiled on November 11, 2003, the trial court specifically ruled that "Mike Moehn's methods in determining Meadow Valley/Southwest's damages that occurred due to UDOT's requirement that Meadow Valley/Southwest not ribbon pave portions of the Project were reliable, credible, accurate, and reasonable." (R. 1513, 1524). The trial court also ruled that "UDOT failed

to present any evidence suggesting that Mr. Moehn's methods in determining damages relating to Meadow Valley/Southwest not being allowed to ribbon pave portions of the Project were anything but reliable, credible, accurate, and reasonable." (R. 1513).

As there is no question that MVC/Southwest's increased costs compiled on November 11, 2003, were reliable, credible, accurate and reasonable, pursuant to the case law cited above, the Court should have ruled that November 11, 2003, was the date prejudgment interest should have begun to accrue, rather than November 1, 2004, because MVC/Southwest's increased costs were complete, measurable and calculable by reliable facts and figures by no later than November 11, 2003.

Accordingly, this Court should find that the trial court erred in establishing November 1, 2004 as the date interest on MVC/Southwest's damages began to accrue and rule that interest on MVC/Southwest's damages should accrue beginning on November 11, 2003.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's ruling that MVC/Southwest was only entitled to a 3/8 of an inch thickness deficiency on the total thickness of the asphalt installed by MVC/Southwest and find that MVC/Southwest was entitled to 3/8 of an inch deficiency on each of the two layers installed by MVC/Southwest, for a total 3/4 of an inch deficiency on the total asphalt thickness. The contract specifications relating to allowable thickness deviations in asphalt thickness are ambiguous and MVC/Southwest's interpretation that is entitled to 3/8 of an inch

deficiency on each of the two layers installed is reasonable. This Court should remand this matter back to the trial court and instruct the trial court to enter judgment in favor of MVC/Southwest on the thickness reduction claim.

In addition, this Court should find that the trial court erred in establishing November 1, 2004 as the date interest on MVC/Southwest's damages began to accrue and find that November 11, 2003 is the date that interest on the damages begins to accrue. MVC/Southwest's damages were calculable with reasonable mathematical certainty by November 11, 2003.

DATED this 17 day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, two (2) copies of the BRIEF OF APPELLEE AND CROSS-APPELLANT on this 18 day of August, 2009, to the following:

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