1982

Frank R. George v. Oren Limited and Associates : Brief of Respondent

Utah Supreme Court

Stephen G. Homer; Attorney for Plaintiff-Respondent;
Lorin N> Pace; Attorneys for Defendant-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK R GEORGE doing business as FRANK GEORGE AND SONS CONSTRUCTION COMPANY, Plaintiff-Respondent vs OREN LIMITED AND ASSOCIATES, a Utah partnership, Defendant-Appellant	Case No. 18359

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT AND JUDGMENT
OF THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY

The Honorable Calvin Gould, Judge

STEPHEN G HOMER
P. O. Box 493
West Jordan, Utah 84084
Attorney for Plaintiff-Respondent

LORIN N PACE
Cannon, Hansen & Wilkinson
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Defendant-Appellant

TABLE OF AUTHORITIES CITED

STATEMENT OF THE NATURE OF THE CASE

The Respondent agrees with the statements of the Appellant concerning the nature of the case, except those statements contained in the third paragraph. At not time did the Appellant plead [see Rule 8(c), Utah Rules of Civil Procedure] as an "affirmative defense" the lack of the license by the Respondent.

DISPOSITION BELOW

The Respondent agrees with the statements of the Appellant concerning the disposition below. The Respondent contends that this appeal can only concern the ruling and judgment entered by Judge Gould. The denial of Appellant's Motion to Dismiss, heard by Judge Cornaby on Febuary 2, 1982, is not involved in this appeal because the denial of the motion to dismiss is not a final order from which an appeal may lie [Rule 72(a), Utah Rules of Civil Procedure] and because the Appellant did not file a notice of appeal concerning that ruling within the time period required by law.

STATEMENT OF FACTS

The Respondent agrees with the statements of the Appellant concerning the facts as shown by the testimony in the trial court below. However, the Respondent believes that such testimony also showed additional pertinent facts.

The parties contracted among themselves to have the Respondent install improvements (curb and gutter, sidewalks, water and sewer lines, and street paving) within a subdivision located in Farmington, Utah. It was the contemplation of all the parties to the contract that the improvements would be done to specifications stipulated by Farmington City. [Transcript, p. 9] The testimony further indicated that the actual execution of the contract

was delayed while the Appellants were waiting for final approval of the construction drawings and other plans by Farmington City. [Transcript, p. 10] The reason for such control by the City is that these improvements are intended to become the property of the City upon completion of the subdivision and accordingly, the City should have some say in how they are installed. [See Transcript, p. 17]. Thus, Farmington City was going to inspect the installation of the improvements by the Respondent. Of these inspections, the testimony indicated:

> Mr. George: " . . . We are controlled, our quality of work is controlled by the Farmington City inspector, our project engineer, who designs the job doesn't inspect it. All of my work is inspected by Farmington City, or wherever we are at. They inspect it. We test it. I have to pay for---in the case of the sanitary sewer, it has to be air tested. It has to be pumped with air and hold, hold air, so that you can't get water infiltrating into the sewer, or out of it. It has to meet these standards and conform to the city standards. I have another man who is a specialist. It seems like we are all specialists now days. He has the equipment to---the big compressors, to come and pump up the line and make the determination. If it doesn't hold air, if it doesn't pass, he tells Farmington City. Farmington City then, or anybody else, withholds approval from accepting the job until such time as you make these repairs. The man comes back, retests it, and then tells the city or the owners that yes, this has passed. And it is in compliance with all the city standards.

(Emphasis added.) [Transcript, p. 16]

This was confirmed by testimony of Mr Max Forbush, the city manager for Farmington City:

> Mr. Homer: And would you indicate whether or not your ordinance sets specific stands of quality for those improvements?
>
> Mr. Forbush: Yes, it does, it had to pass inspection.
>
> Mr. Homer: Okay. And does Farmington City provide inspectors that would inspect this work?
>
> Mr. Forbush: Yes, we do.

(Emphasis added.) [Transcript, p. 85]

The testimony further indicated that the Appellant, as the developer, was required by Farmington City to establish an escrow account in the amount of $269,500.00 to guarantee the installation of these improvements. [Transcript, p. 86] The evidence also indicated that it was the practice of the parties that as the various stages in the installation of the improvements were completed, the Respondent, as contractor, would approach the Appellant, who would request that the City direct the escrow holder to release to the Respondent funds for the work he had completed. [Transcript, pp. 86-89] This arrangement, with the City in the middle and exercising control over the payment to the contractor [Respondent] worked well until the winter of 1979-1980, when, as a result of mismanagement and misapplication of funds, by the developers [Appellant] and their agents, there was no money left in the escrow account to pay for the work completed by the Respondent. [Transcript, p. 108-113]

In May of 1980 the agent of the Appellant tendered to the Respondent a letter [Exhibit K] directed to Farmington City, requesting that the City release to the contractor the funds for work he had completed earlier. When the contractor presented this letter to the escrow holder [American Savings], he was informed there was no money in the improvement guarantee account to pay him. [Transcript, pp. 26-28] The letter [Exhibit K] was issued by the Appellant's agents over six months after the claimed breach of the contract by the Respondent (contractor) for not completing the contract in the summer or early fall of 1979!

It is undisputed that at the time of contracting and performance thereunder, the Respondent did not have a contractor's license issued by the Utah Department of Business Regulation. He had obtained his first contractor's license in 1958, but had allowed it to lapse in 1969. [Transcript, p. 17]

until 1980. Thus, the Respondent had been licensed for over ten years. He testified:

> Mr. Homer: . . . Did, during that eleven or ten year period, the State Department of Business Regulation ever come out and inspect any of the work you had done?
> Mr. George: Not to my knowledge, they never did.
> Mr. Homer: What was the extent of the control or the supervision that the Department of Business regulation exercised over you during that eleven year period?
> Mr. George: None.
> Mr. Homer: Following 1969, were you so licensed?
> Mr. George: Yes, I reinstated my license in, I think it was June, 1980.
> Mr. Homer: Okay. And during the eleven year period from 1969 until you reinstated your license in June of 1980, did you continue to engage in the work, sewer contractor and water line contractor?
> Mr. George: Yes, sir, I did.
> Mr. Homer: Okay. And did you ever have the State come out and inspect you or close you down or anything like that?
> Mr. George: No, sir.
> Mr. Homer: And did you have occasion to work for any municipality during that time, or do work in municipalities for other subdividers?
> Mr. George: I done lots of work in subdivision work, work for the federal government, which they require no license. I worked for several of the cities in the county. I suppose all of the cities in the county, the State of Utah, several of the government, the federal government, agencies, yes.
> Mr. Homer: And did your work pass the inspection by those municipalities?
> Mr. George: Yes, sir, it did.
> Mr. Homer: And were those inspections of a similar nature to the Farmington City inspection you have just described?
> Mr. George: Yes, sir, they were.

[Transcript, pp. 18-19]

This lack of any supervision by the Department of Business Regulation over contractors engaging in "subdivision work" was confirmed by Mr Walt Clock, one of the building inspectors for Farmington City. At the time of trial, he had been a building inspector for almost five and one-half years.

Mr. Homer: . . . And let me go back to these daily inspections, the ones that you made, did you find Mr. George's performance to be up to the City standards?

Mr. Clock: Yes, it was meeting the requirements of subdivision standards.

Mr. Homer: Okay. And you didn't see any problem with the work he was doing?

Mr. Clock: No.

Mr. Homer: During this time, Mr. Clock, did you ever see any inspectors from the State Department of Business Regulations come out?

Mr. Clock: No.

Mr. Homer: To your knowledge as a City Building Inspector, would agents from that department of Business Regulations come out and inspect work done within a city by a person doing contracting work?

Mr. Clock: The only time that I have been involved with it is not so much on the subdivision development, but in houses. And occasionally, you know, if they have a problem, they will come out and inspect. Or in most cases it has been a case where they had a complaint and they have been out checking for a business license--I mean contractor's license. And in most cases they call me when they come in the area, but not always.

Mr. Homer: And would it be safe to say that you would say then that they would not come out except for a complaint being registered with that office?

Mr. Clock: Well, I don't know. I am not sure of their exact procedure. But in my dealings with then they have been there generally on a complaint. But this has been about three different

times. But again, it had to do with the building and not with subdivision development; that was house building.

Mr. Homer: To your knowledge has an agent from the Department of Business Regulations, the Contracting Division, ever come out and inspected a subdivision within Farmington City?

Mr. Clock: Not to my knowledge.

[Transcript, pp. 92-93.]

ARGUMENT

I

UTAH LAW DOES NOT ABSOLUTELY BAR AN UNLICENSED CONTRACTOR FROM ENFORCING HIS CONTRACT WHERE THERE ARE ADEQUATE PROTECTIONS AND TO DENY ENFORCEABILITY WOULD OPERATE AS AN UNREASONABLE FORFEITURE

Appellant has cited some older Utah cases [Smith vs American Packing & Provision Co., 102 Utah 351, 130 P.2d 951 (1942); Olsen vs Reese, 114 Utah 411, 220 P.2d 733 (1948); Mosley vs Johnson, 22 Utah 2d 348, 453 P.2d 149 (1969); and Meridian Corporation vs McGlynn/Garmaker Co., 567 P.2d 1110 (Utah 1977)], interpretting Section 58-23-18 (and its predecessor) as barring an unlicensed contractor from recovery. However, Appellant glosses over those more-recent Utah cases which obviously apply to the instant situation and which ought to be controlling.

In the case of Lignell vs Berg, 593 P.2d 800 (Utah 1979), the Utah Supreme Court wrote:

> The evidence clearly shows, at the times of BBC's execution and performance of the contract at issue, BBC was not licensed to engage in the business of contractor. It acted in that capacity, therefore, in violation of 58-23-1. Consequently, argue the Owners, BBC is without status to enforce the contract or resort to the courts on any theory to obtain recompense for its work.
>
> This Court has had frequent occasion to comment on the status of unlicensed contractors, and has persistently construed

the cited statute as having been designed to protect the public and consequently to bar recovery by unlicensed contractors for services rendered under their contracts. The most recent Utah cases so holding are Mosley v Johnson and Meridian Corp. v McGlynn Garmaker Company [citations omitted]. The rationale of those cases is, however, that the party from whom the contractor seeks to recover is in the class the legislature intended to protect. A litigant is not a member of that class if the required protection (i.e. against inept and financially irresponsible builders) is in fact afforded by another means.

In Fillmore Products v Western States Paving, Utah, 561 P.2d 687, we adopted the point of view expressed by Professor Corbin, viz., "the general rule" (of nonenforceability) is not to be applied mechanically but in a manner "permitting the court to consider the merits of the particular case and to avoid unreasonable penalties and forfeitures."

In this case, the denial of recovery to BBC would indeed impose unreasonable penalties and forfeitures, particularly because the Owners were never deprived of the kind of protection the licensing statute was designed to afford.

593 P.2d at 804-805. (Emphasis added. Footnotes omitted.)

The legal approach advocated by the Appellant "mechanically applies" the rule; that approach likewises denies the court the opportunity to "consider the merits of the particular case and to avoid unreasonable penalties and forefeitures." Id.

In the instant situation, the Appellant had the "required protection . . . afforded by another means" (i.e. the inspections by Farmington City). Similarly, the denial of recovery to the Respondent would "indeed impose unreasonable penalties and forfeitures" upon him.

Appellant, on page 10 of its brief, attempts to distinguish Fillmore Products from the instant case by noting that the Respondent here was not acting as a subcontractor to a general contractor and that the project was not under the control or direction of a project engineer. This approach is obviously more concerned with "form" than with the real "substance" of the situation. In Fillmore Products, the Court noted:

> . . . In this case it is clear than an unlicensed contractor is dealing with a licensed general or original contractor. And the

> defendants have not disputed that the entire sewer project was under the supervision of a licensed project engineer, that all of the work had to meet the specifications and requirements of the general contract and that all of the work had to be approved and accepted by the project engineer before any payment was made by the Town of Ferron.

561 P.2d at 690. (Emphasis added.) In this situation, the parties did not have a "project engineer" to oversee the work; they had the Farmington City building inspector. They didn't have an overall general contract, whose standards had to be met; they had the requirements of the Farmington City subdivision ordinance.

Justice Wilkins, speaking for a unanimous Court in Fillmore Products, continued:

> The parties should be able to present their positions to the court because under the facts of this case---which are undisputed concerning whether the general rule supra ought to be applied---the law intended for protecting the public might become "an unwarranted shield for the avoidance of a just obligation."

Id. (Citation in footnote omitted.) The trial court judge did not err by allowing the case to be presented. He likewise did not err in refusing to grant Appellant's motion for judgment n.o.v. From his advantaged position of having conducted the two-day jury trial and heard the same arguments on two separate occasions, he wrote:

> The Court concludes that this case falls within the doctrine enunciated in the Fillmore Products, Inc. v. Western States Paving, Inc., 561 P. 2nd 687, i.e., there is a substantial penalty or forfeiture involved if plaintiff is denied recovery; there was never any question that plaintiff was entitled to be licensed, in that he was licensed before and immediately after the subject contract; he was known by the general partner of defendant prior to contracting; and defendant was adequately protected by reason of the fact that the project had to be tested and approved by the Farmington City Engineer.
>
> . . .

Memorandum Decision of Judge Calvin Gould, dated March 12, 1982. [The complete text of his opinion is included as an Appendix to this brief.] (Emphasis added.)

II

THE PENALTIES ASSOCIATED WITH ENGAGING IN CONTRACTING WITHOUT A STATE LICENSE OUGHT TO BE STRICTLY CONSTRUED AND LIMITED TO THEIR EXPRESS TERMS

Section 58-23-18 of the Utah Code Annotated provides that engaging in the business of a contractor without having first procured the appropriate license therefor is a "misdemeanor". There was no evidence presented to show that the Respondent was ever prosecuted, let alone convicted, of this criminal offense for his acts arising in the instant transaction. The decision to prosecute is for the appropriate regulatory and prosecutorial authorities, not the Appellant, to make. The Respondent, uncharged and certainly unconvicted, is entitled to the "presumption of innocence" until proven guilty "beyond a reasonable doubt." By applying the older Utah case law while disregarding the two case doctrines of less than five years, the Appellant is advocating a penalty (i.e. the "loss" to the Respondent of over $60,000) be assessed in an amount almost TWO HUNDRED TIMES that prescribed by law for a class B misdemeanor!

On this particular point, Justice Crockett, in the Mosley decision, supra, wrote:

> One of the most elementary principles of justice is that where one contracts for goods or services from another he must pay for them. It is appreciated that there are some exceptions where the law does not so require. But it is so squarely contrary to basic concepts of justice to deny compensation to one who has rendered service, and to give an unearned benefit to the recipient of the service, that this is done only when cogent and persuasive considerations of public policy render the result necessary. This is usally where there is involved the commission of a crime or the doing of something wherein there is such a hazard to health, safety or morals, that it is deemed that the harm to result from enforcement of such a contract outweights the injustice of not enforcing it. In my opinion there is nothing shown in this case from which it can reasonably be concluded that the drilling of a well without a permit has any such vital relationship or hazards public health, welfare or morals, as to impose the penalty

of denying plaintiff pay for his work and to unjustly enrich the undeserving defendants.

453 P.2d at 152-153.

Along this same theme, Justice Wilkins, writing for the majority in Fillmore Products, wrote:

> Although many courts yearn for a mechanically applicable rule, they have not made one in the present instance. Justice requires that the penalty should fit the crime; and justice and sound policy do not always require the enforcement of licensing statutes by large forfeitures going not to the state but repudiating defendants.

561 P.2d at 689.

This is exactly on point with the instant situation. The parties themselves were not concerned that the Department of Business Regulation [the licensing agency for contractors] would have any immediate concerns in the project undertaken by the Respondent. All inspections and supervision would be effected by the agents of Farmington City. Prior to the execution of the contract, both parties understood this simple principle: if the Respondent did not satisfy Farmington City, he would not be paid! The "protection of the public" was accomplished---not by compliance with the state licensing statute---but rather by the satisfactory completion of the work according to Farmington City specifications.

Article I, Section 18 of the Utah Constitution provides, in part:

> No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall be passed.

(Emphasis added.) This provision patterns the United States Constitution, which provides:

> No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Article 1, Section 10. (Emphasis added.)

It is the function of the judiciary to interpret the statutes passed

by the Legislature. The cases cited by the Appellant [Smith, Meridian, Olsen and Mosley], which construe the Utah contractors licensing statutes as rendering unenforceable those contracts made by an unlicensed contractor, were not decided upon this constitutional basis. Thus, it is proper for the Court to reconsider the holdings of those cases.

It is fundamental to our system of jurisprudence that the Constitutions (state and national) be called into question as infrequently as possible. One tenet of that basic principle is that statutes enacted by the Legislature ought to be presumed to be constitutional and, when called into constitutional question, ought to be given a construction which does not raise issues as to the constitutionality of the statute. The four cases cited above raise such constitutional issues. It ought to be obvious that the Legislature itself could not pass legislation directly "impairing the obligation of contracts." The fact that the effect thereof is first passed through a judicial decision does not cure the constitutional invalidity. The statute says and means what this Court says it means. This Court ought to give the statute a narrow interpretation so as to avoid the constitutional issue.

The licensing statute ought to be construed consistently with its expressed terms, rather than being given an expanded construction. Under Utah law, a "forfeiture" is not favored. In interpreting an agreement, "every reasonable presumption should be indulged against an intention to allow a forfeiture." Green vs Palfreyman, 166 P.2d 215 at 219 (Utah 1946). This ought to be the same standard to be applied against interpreting a statute. Indeed, in the case of Morgan vs Sorenson, 3 Utah 2d 428, 286 P.2d 229 (1955), this Court indulged in a liberal interpretation of the suspension statute (as had been used for construing assessment work for mining claims), so as to avoid a forfeiture, which the Court characterized

as "odious to the law." Id. at 231. The Respondent is not asking the Court to construe the licensing statute "liberally," so as to avoid a forfeiture; rather, Respondent seeks a "narrow" construction (to its expressed terms) so as to avoid the severe penalties associated with the Olsen decision and its progeny.

In Russell vs Park City Utah Corporation, 548 P.2d 889 (Utah 1976), this Court wrote:

> It is true, as defendant argues, that forfeitures are not favored in the law, and that forfeiture provisions will be strictly construed against the one who seeks to enforce them. But it is also true that parties are free to contract according to their desires in whatever terms they can agree upon; and further, that the contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it.

Id. at 891. (Emphasis added.) That's all the Respondent seeks: to strictly construe the statutory language effecting the forfeiture and to allow enforcement of the contract the parties agreed to!

One merely read Section 58-23-18 to discern that there is no language which imposes such a forfeiture upon the contractor similar to the Respondent.

On Page 9 of its brief, the Appellant cites American Jurisprudence, Second. To illustrate, I will quote the portion of that paragraph which is pertinent to this discussion:

> Under a statute providing that a contractor cannot maintain an action unless he alleges and proves that he was duly licensed at all times during the performance of the contract or when his cause of action arose, it is commonly held that he cannot recover . . .

51 Am. Jur. 2d, Licenses and Permits, Section 65. (Emphasis added.)

Section 58-23-18 says nothing about the ability of a contractor to "maintain an action." It merely specifies that he is guilty of a "misdemeanor." Justice Crockett, again writing in Mosley, supra, noted:

> Where the resolution of such a question is based upon a

> statute, it is to that statute that we should look to determine whatever penalty and/or sanction was intended for its violation. In this instance the statute simply provides that a person drilling a well is guilty of a misdemeanor and subject to fine or imprisonment, but provides no other sanction or disability. It is important to keep in mind that where our legislature has intended that there be sanctions or limitations for the failure to comply with a statute it has expressly so provided.

453 P.2d at 153. (Emphasis added.)

In 1981, the Legislature adopted Section 58A-1-26. That statute is absolutely clear that no unlicensed contractor can "commence or maintain any action in any court of the state for collection of compensation. . ." This statute was not in effect at times material to this lawsuit; the Appellant even concedes such. It is cited here, however, to show the ease with which the Legislature could have expressed itself to accomplish the desired result. The 1981 expression of the legislative will does not show a "philosophical legislative intent" as Appellant claims (p. 13 of his brief); rather, it is an admission that the Legislature itself was uncomfortable with the former language.

Finally, as a matter of equity, the contract should be enforced. The contract proposal was submitted by the Respondent to the Appellant in May of 1979. Approximately two or three weeks later, the proposal was returned to the Respondent. It had been executed by the Appellant's agents. [Transcript, pp. 9-10. This particular point---exactly when the contract proposals were presented and an representations concerning a "completion date" were disputed. Appellant claimed the meeting occurred in the early spring and that a late summer or early fall completion date was promised by the Respondent. This issue was presented to the jury under the Appellant's theory that it was the Respondent who breached the contract by failing to complete the contract on time. In light of the jury verdict upon special interrogatories, which

expressly found in Respondent's favor, the "facts" must be that the meeting occurred in May 1979.] That two- or three-week period should have been adequate for the Appellant to ascertain the license status of the contractor. It would have been a matter of public record! The Appellant chose not to even invest one dime for a phone call to the Business Regulation Department. In the brief of the Appellant, Mr. Kaplan and Mr Sullivan are characterized as "babes in the woods" with respect to this transaction. Yet they were about to invest $400,000 in the project. Similarly, Mr Kaplan testified quite extensively [Transcript, pp. 205, 208-210] concerning his experience with many other contractors, even in foreign countries.

In a similar vein, the Appellant has consistently acted as though there were an enforceable contract. [As noted earlier, no "affirmative defense" was pleaded.] On the contrary, their position was that there was a contract and that the contract was enforceable by them so as to support a counter-claim worth several hundred thousand dollars of injury caused by the Respondent's alleged breach. The Appellant persisted in that approach until---on the eve of trial---it saw it could not prevail and sought then to avoid its obligations altogether. It just isn't right that the Appellant can have a benefit conferred upon it and then be allowed to rescind its obligation to pay for that benefit on the basis of a slight technicality which was not of concern to the parties at the time of contracting. The Appellant exercised its right to present to the jury the issues it wanted: that it was harmed by the unprofessional (i.e. untimely) performance of the Respondent. The jury verdict saw that for what it really was: a ruse to avoid the just obligations it had voluntarily incurred.

The Appellant had a fair trial. Justice requires that the jury verdict be affirmed and that Respondent be allowed his recovery.

CONCLUSION

Under the pertinent case law, the licensing statute is not to be "mechanically applied" so as to bar an unlicensed contractor from recovery. Rather, the court is to "consider the merits of the particular case and to avoid unreasonable penalties and forfeitures." That happened in this case. The case was fully prepared and presented to a jury; the jury found in favor of the Respondent. The trial judge expressly found that to bar Respondent's recovery on the basis of his unlicensed status would operate as a "substantial penalty or forfeiture." There was adequate other "protection" for the developers (in the form of the Farmington City inspections).

Equity and the rules of statutory construction require a narrow construction of the statute so as to avoid a forfeiture and to avoid constitutional issues. Equity and justice require that the law be decided so as to not work a "penalty or forfeiture" upon the contractor, while allowing a windfall to the undeserving subdivision owner whose land has been significantly benefited.

Respectfully submitted this 13th day of August, 1982.

STEPHEN G HOMER
Attorney for Plaintiff-Respondent

CERTIFICATE

I certify that I mailed two copies of the foregoing BRIEF OF RESPONDENT to Mr Lorin N Pace, 1200 Beneficial Life Tower, 36 So. State Street, Salt Lake City, Utah 84111, this 13th day of August, 1982.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

DAVIS COUNTY, STATE OF UTAH

FRANK R. GEORGE, d/b/a Frank George & Son Construction, Plaintiff, vs. OREN LIMITED & ASSOCIATES, a Utah limited partnership, Defendant.	MEMORANDUM DECISION Civil No. 1-28371

The Court concludes that this case falls within the doctrine enunciated in the Fillmore Products, Inc. v. Western States Paving, Inc., 561 P. 2nd 687, i.e., there is a substantial penalty or forfeiture involved if plaintiff is denied recovery; there was never any question that plaintiff was entitled to be licensed, in that he was licensed before and immediately after the subject contract; he was known by the general partner of defendant prior to contracting; and defendant was adequately protected by reason of the fact that the project had to be tested and approved by the Farmington City Engineer.

Defendant's Motion for Judgment N.O.V. is accordingly denied, and Judgment pursuant to Verdict on Special Interrogatories is to be entered in the form of Exhibit "A" attached hereto.

DATED this 12th day of March, 1982.

CALVIN GOULD, DISTRICT JUDGE