

1971

Zions Cooperative Mercantile Institution v.
Jacobsen Construction Co., John Graham and
Company, Dames and Moore, Keith W. Wilcox,
Individually, and Keith W. Wilcox and Associates,
and F. C. Torkelson Company : Brief of
Respondent

Utah Supreme Court

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

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

F. Robert Bayle and Wallace R. Lauchnor; Attorneys for Appellant
Albert R. Bowen and Stephen H. Anderson; Attorneys for Respondent

Recommended Citation

Brief of Respondent, *ZCMI v. Jacobsen Construction*, No. 12431 (Utah Supreme Court, 1971).
https://digitalcommons.law.byu.edu/uofu_sc2/3123

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

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

ZIONS COOPERATIVE MERCAN-
TILE INSTITUTION,

Plaintiff and Respondent,

vs.

JACOBSEN CONSTRUCTION CO.,
JOHN GRAHAM AND COMPANY,
DAMES AND MOORE, KEITH W.
WILCOX, individually, and KEITH
W. WILCOX AND ASSOCIATES,
and F. C. TORKELOSON COMPANY,

Defendants and Appellant.

Case No. 12431

BRIEF OF RESPONDENT

Appeal from judgment of the
Third District Court for Salt Lake County
HONORABLE BRYANT H. CROFT, *Judge*

RAY, QUINNEY & NEBEKER
ALBERT R. BOWEN and
STEPHEN H. ANDERSON
400 Deseret Building
Salt Lake City, Utah 84111

Attorneys for Respondent

F. ROBERT BAYLE and
WALLACE R. LAUCHNOR
Bayle and Lauchnor
BAYLE AND LAUCHNOR
1105 Continental Bank Building
Salt Lake City, Utah 84101

Attorneys for Appellant

FILED

JUL 15 1971

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
POINTS FOR UPHOLDING THE LOWER COURT	9
ARGUMENT	10
POINT I. THE LOWER COURT PROPERLY GRANT- ED SUMMARY JUDGMENT AGAINST JACOBSEN SINCE THERE IS NO GENU- INE ISSUE AS TO THE FACT OF JACOB- SEN'S NEGLIGENCE	10
A. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN KNEW A WATER LINE IN THE ALLEY BY THE SHEET PILE WALL WOULD CONSTITUTE A HAZARD	13
B. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN KNEW THERE WAS EARTH MOVEMENT IN THE ALLEY AND THAT SUCH MOVE- MENT COULD BREAK A WATER LINE LIKE THE ONE IN QUESTION	15
C. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN HAD ACTUAL OR CONSTRUCTIVE KNOWL- EDGE OF THE EXISTENCE OF A WATER LINE IN THE ALLEY	18
D. JACOBSEN'S ONLY STATED DE- FENSE DOES NOT EXCUSE ITS NEGLIGENCE	19
E. JACOBSEN MAY NOT ESCAPE THE SUMMARY JUDGMENT AGAINST IT MERELY BY ASSERTING THAT FACTUAL ISSUES EXIST	21

sion granting ZCMI's motion for summary judgment against Jacobsen Construction Company (hereinafter referred to as Jacobsen, or as defendant).

Plaintiff does not adopt the statement of facts set forth in Jacobsen's brief. The following statement of facts views the evidence in the light most favorable to Jacobsen.

STATEMENT OF FACTS

ZCMI formulated plans for the construction of a new department store at the northeast corner of the intersection of 24th Street and Washington Boulevard in Ogden, Utah. Construction activities, including demolition and excavation, began in the summer of 1965, and the occurrence to which this case relates happened on November 25, 1965. (Amend. Compl. pars. 4, 14, R. 87; Jacobsen's Ans. pars. 1, 8, R. 134).

The construction site ran north approximately 241 feet along the east side of Washington Boulevard beginning at the corner of 24th Street, and extended approximately 176 feet east from Washington Boulevard. The construction site was bounded along the east side by an alley. (Amend. Compl. par. 2, R. 88; Jacobsen's Ans. par. 1, R. 375).

On May 11, 1965, ZCMI entered into a contract with John Graham & Company (Graham), pursuant to which Graham was to perform the architectural services on the project (R. 7-12). And, on August 2, 1965, ZCMI contracted with Jacobsen to perform the construction from

"start of demolition to completion." (R. 13, Art. 1). Under the contract Jacobsen agreed to provide all the materials and to perform all of the work required under plans and specifications furnished by Graham and at all times to act in good faith and to the best advantage of ZCMI in the employment of labor and the conduct of its activities. (R. 13, Art. I; R. 14, Art. 3(b)).

The defendant Keith W. Wilcox (Wilcox) conducts his business under the name of Keith W. Wilcox & Associates in Ogden, Utah. He was retained by Graham on September 28, 1965, for the purpose of representing Graham during the entire construction period in performing construction inspection services. (R. 102 — Wilcox Ans. to Amend. Compl. par. 3; Ex. 20-P.)

The defendant Dames & Moore is an unincorporated association doing business in the State of Utah. That defendant was employed first by Graham to make a report on subsoil at the construction site. Later, approximately September 29, 1965, Jacobsen entered into an oral contract with Dames & Moore to supply the design criteria for a bracing system for a temporary sheet pile wall to be installed on the construction site. (R. 221—Jacobsen's Ans. to Amend. Compl., par. 5).

Demolition of certain structures and excavation commenced in August, 1965, and some structural piles began to be driven. Since the land on the site sloped steeply from east to west down to Washington Boulevard, excavation of the site to grade would result in a wall of earth approximately thirty feet high along the entire east

side. (Sperry Depo. pp. 7-15; plate 2A, Ex. 4-P). To retain that wall of earth, Jacobsen decided (Leo Jacobsen Depo. p. 5)¹ to install a retaining wall composed of corrugated iron sheet pilings, 45 feet long and 16 inches wide. (Sperry Depo. p. 7); Ex. 3-P).

A pile driver weighing 60 tons drove the sheet piles into and flush with the ground surface along the east side of the construction site, parallel with and next to the alley located at that point (Sperry Depo. pp. 20-21, 36); so that the piles, when driven, penetrated approximately 15 feet below the bottom of the intended excavation. (Ex. 3-P).

The sheet piling was substantially all driven before any appreciable excavation was made toward the rear of the construction site. Excavation in that area then proceeded as follows: Approximately the top eight feet of the piling was exposed by excavation, and supports consisting of round metallic struts, were then installed from the top of the sheet piling wall to the excavation floor. And, as further excavation exposed sections of the sheet piling to grade, the supporting struts bracing the sheet piling were placed in concrete foundation blocks poured on gravel beds. (Sperry Depo. pp. 7-15; Leo Jacobsen Depo. 42-43, Ex. 43-P; Steve Jacobsen Depo. 11-12). Photographs on plate 2A to Dames and Moore's "Report of Sheet Pile Wall Failure," (Ex. 4-P) depict

¹ Perhaps Graham participated in the decision, id. p. 6. The initial decision probably came from Dames & Moore in their reports regarding the structural pile system. (Curtis Depo. p. 12).

what the sheet pile wall looked like after excavation and bracing.

Driving of the sheet pile wall was completed by October 6, 1965, and excavation and bracing were under way on October 28, 1965. (Ex. 16-P.)

During installation of the bracing system, the sheet pile wall would give about two inches as each section was exposed, but after the bracing the wall tightened up and no appreciable deflection other than surface cracks was noticed except when foundation piling was driven immediately adjacent to the sheet pile wall, when some minor deflection was noticed. During the time when excavation and bracing were occurring along the sheet pile wall, approximately 300 structural piles were being driven into the floor of the excavation, including the area adjacent to the retaining wall (Kochevar Depo. p. 33; Exs. 4-P, 43-P).

By the time work was completed on the day before Thanksgiving, November 24, 1965, only two foundation piles remained to be driven in the northeast corner of the construction site. (Kochevar Depo. p. 29; Ex. 4-P).

The sheet pile wall and bracing system were designed upon the assumption that water pressure would not be permitted to build up behind the sheet piling, and weep holes were cut in the sheet piling to provide drainage for ground water occurring on the east side of the wall. (Exs. 3-P, 4-P). No significant hydrostatic load was anticipated in the design of the wall, and the wall was designed upon

the assumption that no water lines existed in the alley immediately east of the wall. (Exs. 4-P, 44-P).

On Thanksgiving day, November 25, 1965, at about 2:00 o'clock p.m., the sheet piling retaining wall collapsed and much of the sheet piling and dirt to the east of the construction site fell into the excavation area, and the entire construction site was flooded with a large volume of water. After the cave-in, a broken six-inch water line was discovered running the entire length of the sheet pile wall just a few feet to the east of the wall, under the alley. Water under high pressure was gushing from the broken pipe. (Sperry Depo. p. 29, Exs. 4-P, 43-P).

In places too numerous to cite throughout the entire record, Jacobsen, Dames & Moore and Wilcox all say they did not know there was a six-inch water main in the alley behind the sheet pile wall. Graham and Wilcox have stated that they did not care one way or the other about the water line since they considered it none of their business. (See, e.g., Wilcox Depo. pp. 18-19; Scales Depo. p. 25).

The line was buried a few feet underground in the alley which ran next to the sheet pile wall. It ran northward from an Ogden City water main at 24th Street, along the alley by the construction site, and connected to a visible fire hydrant located a few feet north of the excavation. The existence of this water line was clearly shown on the official records, plats, and maps of the city of Ogden, and those plats, maps, and records were at all times available to the general public, including the

defendants. (Jacobsen's Ans. to Amend. Compl. Pars. 4, 5, R. 135; Graham's Ans. to Amend. Compl. Par. 4, R. 169; Wilcox's Ans. to Amend. Compl., Pars. 10, 11, R. 103-104).

In addition to the fact that the six-inch water line was shown on the records of Ogden City, the record shows that on or before December 31, 1964, ZCMI employed Caldwell, Richards & Sorensen, Inc., engineers and consultants, to make a boundary, topographic, and utility survey of the construction site. (Ex. 52-P).

The utilities plats which were thereafter prepared and submitted to Graham by Caldwell, Richards & Sorensen clearly showed the six-inch water main running along the alley to the fire hydrant, with the inscription "6" water line to hydrant—approx. location." (Ex. 24-P).

Subsequently, Graham prepared and issued a document entitled "Design Criteria and Outline Specification," dated June 16, 1965. (Ex. 1-P) which, on page six thereof, under the heading of "Site Criteria," and under an item entitled "Utilities," contained the following comment: "Water: City water 12" main along Washington Blvd.; 6" line along 24th Street. 6" line along alley." Jacobsen admits having received this information prior to November 1, 1965, (Par. 1, Req. for Admissions served by ZCMI upon Jacobsen, R. 177, Jacobsen Br. 9).

From the commencement of construction activities to November 25, 1965, the alley under which the pipe in question was buried was under severe stress and wear due to construction vehicles (including the 60 ton pile

driver). That stress caused continual subsidence of the earth in that area, necessitating frequent earth fill by Jacobsen (Sperry Depo. pp. 54-55, 58-59), the stress and subsidence caused Jacobsen employees, including the foreman, to inquire whether or not there was a water line under the alley (Sperry Depo. pp. 57-58), but no investigation was made. (Stephen Jacobsen Depo. p. 21).

As early as November 11, 1965, cracks appeared in the surface of the alley to the east of the sheet piling retaining wall, and the cracks were photographed at that time by Louis C. Kochevar, geologist and field engineer for Dames & Moore (Kochevar Depo. p. 20, Ex. 45-P and 46-P). Jacobsen's foreman knew the cracks were there (Sperry Depo. p. 28).

It is undisputed that the actual cost of repairing the damage to the project caused by the collapse of the retaining wall totaled \$49,003.57, which amount was paid by ZCMI to Jacobsen to effect the necessary repairs. (R. 135—Jacobsen's Ans., par. 8).

After the wall failed, Dames & Moore was employed to make a report on the cause of the failure. That report was submitted on January 25, 1966, (Ex. 4-P) and it indicated that the wall had been designed on the assumption that no water bearing lines existed in the alleyway. Upon receipt of the report, ZCMI notified all defendants to this action that it intended to hold the responsible party or parties liable for the damages which had been incurred. Jacobsen admits being so notified as early as January, 1966. (Leo Jacobsen Depo. 50-51; Dean Wil-

liams Affidavit, R. 27, par. 3). Subsequently, ZCMI was notified by its counsel that it would be impossible short of a court action to determine which defendant or defendants named in this case, if any, would be legally responsible to ZCMI for the damage. (Dean Williams Affidavit, R. 271, par. 6).

This action was commenced by ZCMI on July 12, 1966, and, as indicated by the record, the parties have been vigorously engaged in pursuing their respective positions from that time to the present. Throughout the entire period, ZCMI continued to make payments to the defendants as bills were received from Graham. The last payment to Jacobsen, amounting to \$39,000.00, was made on November 2, 1967. (Dean Williams Affidavit, R. 273, par. 11). Discovery and preparation of the case proceeded uninterrupted by all parties hereto subsequent to that time with no reference appearing in the record with respect to such payments from ZCMI to the defendants up to the time that various motions for summary judgment were filed in the fall of 1969.

Jacobsen has admitted that ZCMI was not contributorily negligent in any respect with respect to the occurrence in question. (Jacobsen's Ans. to Interrog. No. 3, R. 240).

POINTS FOR UPHOLDING THE LOWER COURT

POINT I

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AGAINST JACOBSEN SINCE THERE IS NO GENUINE ISSUE AS TO THE FACT OF JACOBSEN'S NEGLIGENCE.

- A. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN KNEW A WATER LINE IN THE ALLEY BY THE SHEET PILE WALL WOULD CONSTITUTE A HAZARD.
- B. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN KNEW THERE WAS EARTH MOVEMENT IN THE ALLEY AND THAT SUCH MOVEMENT COULD BREAK A WATER LINE LIKE THE ONE IN QUESTION.
- C. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE EXISTENCE OF A WATER LINE IN THE ALLEY.
- D. JACOBSEN'S ONLY STATED DEFENSE DOES NOT EXCUSE ITS NEGLIGENCE.
- E. JACOBSEN MAY NOT ESCAPE THE SUMMARY JUDGMENT AGAINST IT MERELY BY ASSERTING THAT FACTUAL ISSUES EXIST.

POINT II

JACOBSEN'S ATTEMPT TO AVOID THE CONSEQUENCES OF ITS NEGLIGENCE BY ARGUING THAT IT WAS PAID, IS WITHOUT FACTUAL OR LEGAL SUPPORT.

ARGUMENT

POINT I

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AGAINST JACOBSEN SINCE THERE IS NO GENUINE ISSUE AS TO THE FACT OF JACOBSEN'S NEGLIGENCE.

The Court should be advised at the outset that no real dispute exists as to the *cause* of the damage complained

of in this lawsuit. As the Lower Court found, only two possible theories of causation exist in this case. (R. 384, Memorandum Decision on Motions for Summary Judgment):

(a) Did the retaining wall collapse because of faulty construction by Jacobsen of the support system, with the collapse of the wall resulting in the rupture of the water main; or

(b) Did the movement of the ground east of the retaining wall cause the water main to rupture, thereby building up water pressure behind the retaining wall and causing the wall to collapse as a result of the fact that the wall and support system were never designed or intended to support that type of hydrostatic pressure?

In its brief, Jacobsen makes no real effort to dispute those theories of causation, although it improperly suggests (Br. 2) that faulty construction by Jacobsen may no longer be an issue.

However, the only theory of causation seriously pursued by the parties to the case is that one or more of the defendants failed to locate the water line behind the wall, and protect against its rupture. Foreseeably, the earth behind the wall moved enough to break the line and the water collapsed the sheet piling.

In its motion for summary judgment against Jacobsen, ZCMI asserted that there was no genuine issue as to the material fact that Jacobsen negligently failed to

locate the pipe in question and to protect the construction site from the consequences of a rupture of the pipe, and that such rupture was at all times a foreseeable consequence of the construction activities being carried on. In granting ZCMI's motion against Jacobsen, the Lower Court stated (R. 384, Memorandum Decision on Motions for Summary Judgment):

"The primary responsibility for the retaining wall and its construction was that of Jacobsen, who certainly knew, or in the exercise of reasonable care, should have known, of the existence of the water main along the alleyway and no legal excuse exists for its failure to protect against it. As between plaintiff and Jacobsen, both of the two issues of fact set forth as 'a' and 'b' above must be resolved against Jacobsen for clearly in either case there is no genuine issue as to the material fact of Jacobsen's negligence."

In reaching its conclusion, the Lower Court is supported by evidence given almost exclusively by officers and employees of Jacobsen. And, as this Court has stated previously in *United American Life Ins. Co. v. Willey*, 21 Utah 2d 279, 285, 444 P.2d 755, 758 (1968), summary judgment can properly be granted upon facts given by defendant's officers and employees in their depositions.

In the points made herein, the Court will note that ZCMI has carefully limited its argument to depositions and other evidence either given by Jacobsen's officers and employees or admitted by them to be valid. Jacobsen has filed no affidavits and nothing exists in the record of this case to contradict the evidence of negligence reviewed below.

Moreover, this Court could almost take judicial notice of the proposition that it is a breach of ordinary care for a contractor to undertake major excavations, drive more than 300 structural piles (Kochevar Depo. p. 33), drive sheet pilings 45 feet into the ground with a 60 ton pile driver (Sperry Depo. pp. 7, 35-36; Ex. 3-P), and engage in other heavy construction activity, and fail to know from easily accessible public records located in city offices close by the construction site, or from other sources, that there was a six-inch water line running along the entire east side of the site, connected to a fire hydrant in plain view.

That proposition needs only one other link to make out a case against Jacobsen: If Jacobsen knew, or should have known, that the pipe was in the alley by the sheet pile wall, should it or would it, in the exercise of ordinary care, have known that the pipe was in danger of being broken by construction activities and circumstances known to Jacobsen to exist, with foreseeable damage to the site? Assuming an affirmative answer to that question, it is ipso facto that Jacobsen owed ZCMI a duty immediately to take some steps to prevent what occurred from happening (simply having the water turned off or relocating the pipe would have eliminated the hazard).

The record supports these propositions without any genuine controversy.

- A. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN KNEW A WATER LINE IN THE ALLEY BY THE SHEET PILE WALL WOULD CONSTITUTE A HAZARD.

Richard Sperry, Jacobsen's superintendent on the ZCMI job, gave perhaps the most revealing testimony of any witness. The flavor of it was distilled in the following exchange (Sperry Depo. p. 59), which Steve Jacobsen agreed with in his deposition, p. 31):

"Q. And I assume that whenever a construction job is being performed in a city, that water lines, power lines, gas lines, things of that nature are a matter of concern during the excavation?

A. That's right. Actually they're a matter of concern during the whole job. I've broke my share of them."

Sperry was concerned with water lines in the alley from the very first day he went on the job (Sperry Depo. pp. 57-58):

"A. I asked the first day I was there.

Q. Pardon?

A. I asked the very first day I was there when I saw the mess that was in the alley."

Both Steve and Leo Jacobsen shared Mr. Sperry's concern about water lines:

"Q. If you had knowledge of a water line in that alley east of the sheet pile wall, would you have been concerned?

A. Very much so.

Q. And that is because of the earth movement against the sheet pile wall might break the line?

A. That is correct."

(Stephen Jacobsen Depo. p. 16)

"Q. Would it be important on a building project like this to locate water lines before sheet piling was driven?

A. I would say it's very important.

Q. Particularly if one ran east and west intersecting the sheet piling being driven?

A. Yes.

Q. And would it also be a matter of concern that the sheet pile wall would deflect some and the soil would move and the water line could be broken by that?

A. I am sure that is part of our concern.

Q. It would be a matter of concern, wouldn't it.

A. Yes."

(Leo Jacobsen Depo. p. 11)

B. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN KNEW THERE WAS EARTH MOVEMENT IN THE ALLEY AND THAT SUCH MOVEMENT COULD BREAK A WATER LINE LIKE THE ONE IN QUESTION.

Mr. Sperry was detailed and graphic in his deposition with regard to the constant subsidence and movement in the earth in the alley behind the retaining wall, including his knowledge of the crack in the alleyway depicted in the photographs marked as Exs. 45-P and 46-P. (Sperry Depo. pp. 8, 16-21, 25-26, 27, 35-37, 59, 61).

The gist of that testimony is contained in the following statements:

"Oh, there was movement there all the time.

Q. Approximately how much, if you know?

A. Oh, I'd say the alley probably settled 18 inches during the course of it, and we'd fill it back.

(p. 16)

* * *

Q. But you did have a general subsidence going along all the time?

A. All the time."

(p. 59)

And, Mr. Sperry was acutely aware of the disastrous effect such earth movement could have on any water line in the alley.

"Q. Would six inches of settlement, if it were in an area containing a cast iron jointed water pipe, be sufficient to crack it?

A. I'd say any settlement is enough to crack it. I've seen them crack from an eighth of an inch to quarter inch of settlement.

Q. Well, six inches is a considerable amount, is it not?

A. I can't see how it lasted as long as it did.

(p. 61)

* * *

A. . . . I just couldn't believe that it wasn't already broke before we already started because we broke them a lot easier than that. I mean, a broken water line is not really new to us. But I couldn't see how there could possibly be any utilities in the alley with the damage of the alley before I got there.

Q. And so up until November 25, 1965, it was your opinion that there were no water lines in the alley?

A. That's right. I figured if there was one there they should have been flooded the first day they was there. If you'd seen the conditions of the alley, nobody could think there was anything in it.

(p. 37)

The Jacobsen people were so concerned about movement of the sheet pile wall that they kept a transit on it at all times, with Steve Jacobsen being responsible to record any movement in the wall. Steve officially noted movement in the wall of up to four inches. (Stephen Jacobsen Depo. pp. 10-13). Steve was also aware that earth movement can be a hazard to a water line:

"Q. When earth moves could that cause a hazard to a water line . . .

A. I am sure it could.

(p. 13)

* * *

Q. If you had knowledge of a water line in that alley east of the sheet pile wall would you have been concerned?

A. Very much so.

Q. And that is because of the earth movement against the sheet pile wall might break the line?

A. That is correct."

(p. 16)

Leo Jacobsen also knew of earth movement in the alley and shared the view that such movement could break a

water line in the alley. (Leo Jacobsen Depo. pp. 11, 30, 56-57).

C. THERE IS NO GENUINE ISSUE AS TO THE FACT THAT JACOBSEN HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE EXISTENCE OF A WATER LINE IN THE ALLEY.

Prior to November 1, 1965, Jacobsen admits having received a document prepared by Graham entitled "Design Criteria and Outline Specification," which stated at page 6:

"8 utilities

a. water: city water 12" main along Washington Blvd.; 6" along 24th Street; 6" line along alley. Use domestic, fire protection, planter sprinklers, and hose bibbs at grade and parking on roof."

(Request for Admissions serviced by ZCMI on Jacobsen on November 12, 1969, R. 177).

Jacobsen's officers either did not read the document or forgot what they had read. If they did not read it, they, nevertheless, are "deemed conversant of it." *O'Reilly v. McClean*, 84 Utah 551, 37 P.2d 770 (1934).

In addition, the existence of the fire hydrant in the alley adjacent to the construction site (known to and viewed with considerable interest by all of the Jacobsen personnel) should at the very least have amounted to constructive notice that there was a water line in the alley. While the Jacobsen people steadfastly insist that they made oral inquiries as to the line serving the fire hydrant, which inquiries allegedly led them to believe that the line came from the north, instead of from the south along the

east side of the construction site, (Sperry Depo. pp. 60-61, 65-66; Stephen Jacobsen Depo. pp. 8-9, 38, 45; Leo Jacobsen Depo. pp. 43-45), they utterly failed to make any formal investigation (Sperry Depo. pp. 27, 70, 78; Steve Jacobsen Depo. pp. 8, 21, 39). Stephen Jacobsen appropriately summed up the situation when he said (Depo. p. 21):

A. I would seriously doubt it because we never made, to my knowledge, any investigation."

Leo Jacobsen also underscored the fact that their belief that the hydrant was served from the north was based on "an informal determination." (Leo Jacobsen Depo. p. 9).

Under these circumstances, even if Jacobsen did not know of the existence of the water line in the alley, it certainly *should* have known in the exercise of reasonable care. In fact, Leo Jacobsen admitted that Jacobsen's failure to make a formal inquiry with regard to the water line question was contrary to the company's customary practice. (Leo Jacobsen Depo. pp. 53-54).

D. JACOBSEN'S ONLY STATED DEFENSE DOES NOT EXCUSE ITS NEGLIGENCE.

In its brief to this Court (Br. 11-22), Jacobsen's attempt to escape its negligence reduces itself to just one basic argument. Jacobsen contends that since it hired Dames & Moore to design the bracing system for the sheet pile wall, Jacobsen should have been able to rely on Dames & Moore, as experts, to locate the water line in the alley behind the wall and design the wall so as to

protect the pipe from breaking. However, as indicated by the considerable testimony quoted hereinabove, the Jacobsen people were sufficiently expert and experienced themselves to know that any movement of the earth in the alley might break a water line if one was there. And, as also indicated by the many citations to the record above, the Jacobsen people had actual knowledge that their construction activities (including driving the sheet piles with a 60 ton pile driver—Sperry Depo. pp. 35-37) were causing movement of the earth in the alley.

The very fact that the Jacobsen people would allow sheet pilings to be driven up to 45 feet into the ground without making a formal investigation to determine if there were any water lines in the vicinity would indicate negligence in and of itself, and that part of the construction was almost completed *prior* to the Dames & Moore people ever having been retained to design the bracing. (See, e.g., Curtis Depo. p. 11). Moreover, the Jacobsen people admit that they were concerned about water lines in the alley, independent of any involvement by Dames & Moore. Richard Sperry testified (Depo. p. 65) :

“Q. And did you have any opinion before Thanksgiving as to how that particular hydrant may have been served?

A. I just—Just what I asked Les Tracy. And he told me it serviced another street.

Q. Do you know if you saw that the first day you arrived on the job?

A. Yes.

Q. Were you immediately concerned about the possibility of there being a pipe serving that in the alley?

A. Yes."

The fact that there was considerable soul searching in the Jacobsen organization following the sheet pile wall collapse as to why the water line had not been located, amounts to an admission on their part that they erred in not having found out about the line. See, e.g., Leo Jacobsen Depo. pp. 9, 10; Sperry Depo. pp. 31-32).

Certainly, Jacobsen realized that the responsibility for shoring the alley rested upon it. (Leo Jacobsen's Depo. pp. 16, 34-35; Ex. 8-P).²

E. JACOBSEN MAY NOT ESCAPE THE SUMMARY JUDGMENT AGAINST IT MERELY BY ASSERTING THAT FACTUAL ISSUES EXIST.

Jacobsen represents to this Court that factual issues with respect to its possible negligence exist. However, the undisputed facts, as reviewed above, belie such an assertion. In *Foster v. Steed*, 19 Utah 2d, 435, 438, 432 P.2d 60, 62 (1967), this Court, quoting its own opinion in

² Jacobsen's responsibility was contractual as well, and Judge Croft granted ZCMI's motion for summary judgment on grounds of breach of contract in addition to that of negligence (R. 384). ZCMI re-asserts breach of contract here and urges this Court to affirm the Lower Court's decision on that point. However, no extended argument is made on the point since the contract provision is clear on its face. And, if the document entitled "General Conditions of the Contract" is considered to be contractually binding (as urged by Jacobsen in its argument on payment, Br. 24-25), then Jacobsen's contractual responsibility becomes even more explicit. (See, e.g., Ex. 2-P p. 1).

The facts are as follows. Following the wall collapse ZCMI caused Dames & Moore immediately to look into possible causes and submit a report. (Dean Williams Dep. p. 9). That report, submitted on January 25, 1966 (Ex. 4-P,) suggested possible negligence upon someone's part, but no conclusive evidence appeared indicating what party might be negligent. ZCMI *immediately* notified all the parties to this lawsuit that action would be taken to determine who was liable (if anyone) and to recover from any party found to be liable. (Dean Williams Affidavit, pars. 3-6; R. 270-271; Leo Jacobsen Depo. pp. 50-52).

Counsel for ZCMI informed it that liability, if any, could only be determined through a lawsuit. (Dean Williams Affidavit, par. 6, R. 271). And, not only was ZCMI not in a position until the Lower Court's ruling in this case, to know of the many parties involved exactly against whom, if any, it had a valid claim, it did not even know the extent of the damage it suffered until Jacobsen informed it of the amount in June, 1966. (Dean Williams Affidavit, pars. 7-8, R. 271-272, and exhibits thereto). This case was filed in July, 1966.

All during the period November 25, 1965 through June, 1966, ZCMI was making regular payments to Jacobsen through billings from the architect. The billings did not segregate specific parts of the amount involved to be for repair of the damage in question, but most of the cost of repairing the damage was probably paid *prior* to the receipt by ZCMI of the Dames & Moore

report. (Dean Williams Affidavit, R. 272, par. 9).³ The complaint, filed in July, 1966, specifically sought recovery of amounts already paid to Jacobsen.⁴

After this suit was filed in 1966 the record shows it to have been vigorously pursued by all parties, including Jacobsen, to the present time, five years later.

In 1967, ZCMI, as required by its contracts with the various defendants, completed the final installments of payments it had been making continuously and regularly to them and to all those working on its new store. (Dean Williams Affidavit, par. 11, R. 273).

None of those payments carried the slightest suggestion that ZCMI was waiving or abandoning any claim or right which it had (Dean Williams Affidavit, par. 11, R. 273). And, the record shows that the payments caused no interruption in the progress of this lawsuit.

Two years after final payment to it, in which time activity by all parties to this suit continued unabated, Jacobsen filed a motion for summary judgment asserting that the payment two years before had relieved it as a matter of law of any need to pay even if it was negligent.

Upon these facts it is impossible to conceive of any rational basis or justification for extending the general

³ It should be noted that all references to Dean Williams' Affidavit as other references to the record in this brief, are undisputed by any evidence elsewhere in the record.

⁴ The reason why ZCMI paid Jacobsen appears in Mr. Williams' affidavit but it is not listed here because a factual difference may exist on the point.

rule on payment to a new area wholly remote from the reason for which the rule exists. The payments in question were paid before ZCMI had any knowledge that it had a claim against anyone (prior to January 25, 1966). The claim now asserted to be barred was against multiple parties with no way for ZCMI to know whether the claim would be determined to be really against Jacobsen. Jacobsen itself obviously did not regard any payment it received as a waiver or a bar since it continued its activities in this suit unabated for two more years before it followed up the argument it now pursues. And, surely no payment was used to postpone or delay litigation, or to lull Jacobsen into letting evidence grow cold or to jeopardize its defense, or any other right, one iota.

In any case, the general rule on payment would not apply here by its very terms. In situations where the rule does apply, payment must be made with full knowledge of the facts. In this case, however, no such knowledge existed. As already stated, the payments for the damage in question were made (1) prior to January 25, 1966, when ZCMI received the Dames & Moore report suggesting that someone may be at fault in a certain particular; and (2) prior to knowledge of the extent of the damage costs (Dean Williams Affidavit, pars. 7, 8, R. 271, 272).

This suit was brought in July, 1966, seeking to recover the payments made *prior* to that time and mostly prior to January 25, 1966. The recovery sought related to specific payments already made and has nothing to do with *subsequent* payments, notwithstanding Jacob-

sen's confusion of the issue by allusion to those payments. In fact Jacobsen's original answer referred to those prior payments, not to substantial payments.

There certainly is no genuine question on the record with regard to the fact that payments made by ZCMI to Jacobsen at *any* time, and certainly prior to July, 1966, were made without full knowledge of facts regarding liability on Jacobsen's part. Such knowledge by ZCMI did not ripen until just prior to the filing of its motion for summary judgment in the fall of 1969, and, as shown by Jacobsen's continued defense, the question will remain open until action by this Court. Just to illustrate the development of facts in this case—Wadsworth's deposition was not taken until October 28, 1968; Steve Jacobsen's deposition on September 15, 1969; Leo Jacobsen's deposition on September 15, 1969; Scales deposition on May 2, 1968; Huff's deposition on October 28, 1968; Harrison's deposition on May 2, 1968; Curtis' deposition on October 28, 1968—and so on. Other discovery, as the record shows, was also under way. It was not even settled until pretrial that the engineer, Torkelson, would be let out on the ground that improper design, as determined at that time, was not the cause of the damage.

Under such circumstances it is impossible to say that ZCMI made any payment to Jacobsen under full knowledge of facts establishing that Jacobsen had committed an act which would make it liable to ZCMI. And without such knowledge the rule on payment relied upon by Jacobsen is inapplicable by its very terms, as well as being inapplicable in principle.

With respect to Jacobsen's citation of an excerpt from Article XXVII (dealing with waiver of claims), of a document entitled "General Conditions of the Contract," (Br. 24-25), let it first be said that such document was not even in existence when ZCMI and Jacobsen entered into their contract for the construction of the Ogden store (Dean Williams Affidavit, par. 12). And, the document, which was drafted and mailed by Graham, was not signed by either party.

Second, the cited provision limits its own scope with regard to waived claims by the concluding phrase "except those previously made and still unsettled." — a phrase which conditions the entire sentence, and which certainly applies to the facts of this case since ZCMI's lawsuit against Jacobsen surely constituted a claim previously made and still unsettled.

Third, Jacobsen's argument, partly expressed and partly implied (Br. 25) that the cited provision applies here as an alleged "determination" by the architect that ZCMI had no claim against Jacobsen—hence final approval of payment — is devoid of support in the record. A lawsuit was in full stride in 1967, and the architect Graham (a defendant), certainly was not handing down any "final and conclusive" determination that no further controversy existed between one of its co-defendants and ZCMI.

And, last, the evidence in this case is beyond dispute that ZCMI was not and did not waive its rights against Jacobsen. Waiver has been defined by this Court in

Wooley v. Loose, 57 Utah 336, 347, 194 P. 908, 912 (1920), as follows:

“Waiver is the *voluntary* abandonment of surrender, by a capable person, of a right known by him to exist, *with the intent that such right shall be surrendered and such person forever deprived of its benefit.*

Waiver is the *voluntary and intentional* relinquishment of a known legal right and *implies an election to dispense with something of value* or forego some advantage which the party waiving might, at his option, have demanded or insisted upon.”
(Emphasis supplied)

To the same effect see *Phoenix Insurance Company v. Heath*, 90 Utah 187, 194, 61 P.2d 308, 311-312 (1936); *American Savings and Loan Ass'n v. Blomquist*, 21 Utah 2d 289, 292, 445 P.2d 1, 3 (1968); and 28 Am. Jur. 2d, Estoppel and Waiver, Sec. 158. The record shows that ZCMI never intended to abandon or waive any of its rights. The evidence is all to the contrary.

Moreover, as Judge Croft noted in his opinion below (R. 385):

“... by filing its action plaintiff put all defendants on notice that it intended to litigate the question of liability for the damage and to recover from those determined to be liable for such damage, and that payment of the costs of repairing the damage to Jacobsen for doing such repair work does not now preclude a determination of plaintiff's claim, and I so rule.”

This Court's teaching as to what constitutes notice supports Judge Croft's conclusion. See, e.g., *Universal C.I.T.*

Corporation v. Courtesy Motors, 8 Utah 2d 275, 278, 333 P.2d 628, 629, (1959); 66 C.J.S., Notice, Sec. 2.

CONCLUSION

The Lower Court's thoughtful and extensive consideration of this case is wholly supported by the record, and should be affirmed.

Jacobsen's negligence and breach of contract are so clearly established as to eliminate any genuine issue of fact; and its attempt to escape its obligation to pay for the damage caused by its negligence and breach by seeking refuge behind a recitation of the unsupported general rule on payment simply ignores the facts of this case.

Rules exist for salutary purposes. No such purpose exists in the facts of this case which would support Jacobsen's argument on payment. The law does not favor the wrongdoer, nor does it exist to assist him in the avoidance of his obligations.

Accordingly, the summary judgment entered against Jacobsen in favor of ZCMI should be affirmed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER
ALBERT R. BOWEN
STEPHEN H. ANDERSON
400 Deseret Building
Salt Lake City, Utah 84111

Attorneys for Respondent