1969

Weyher Construction Company v. Cox Construction Company, Inc., and United States Fidelity and Guaranty Company : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

WEYHER CONSTRUCTION COMPANY,
Plaintiff and Respondent,

vs.

COX CONSTRUCTION COMPANY, INC., and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendants and Appellants.

Case No. 11353

RESPONDENT'S BRIEF

Appeal From Judgment for Plaintiff of the First Judicial District Court in and for Box Elder County
Honorable Lewis Jones, Judge

ELLIOTT LEE PRATT of
CLYDE, MECHAM & PRATT
351 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff and Respondent

JOHN F. PIERCEY
1180 Kennecott Building
Salt Lake City, Utah
Attorney for Defendants and Appellants

INDEX

INDEX OF AUTHORITIES

Cases Cited:

IN THE SUPREME COURT OF THE STATE OF UTAH

WEYHER CONSTRUCTION COMPANY,
Plaintiff and Respondent,

vs.

COX CONSTRUCTION COMPANY, INC., and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendants and Appellants.

Case No. 11353

RESPONDENT'S BRIEF

RESPONDENT'S STATEMENT OF FACTS

Appellants in their Statement of Facts have selected particular exhibits, portions of the testimony and summaries of evidence, most favorable to the appellants' contentions, rather than stating the facts, as they must be viewed on appeal, objectively supporting the Verdict and Findings. Thus the following corrections must be noted.

1. Contrary to the statements on pages 5 and 6 of appellants' Brief the sequence of the events concerning the agreements between Cox and Western Steel and Cox and Weyher occurred as follows:

(a) The Prime Contractor bids were opened by the State Road Commission December 21 and Cox was the low bidder (Ex. 51).

(b) Sometime prior to December 23 representatives of Western Steel Company contacted Cox about the steel. They arrived at a verbal understanding on or about December 23 that Western would receive the order for structural steel for the project. (R. 223, Ex. 36) The terms of delivery of the steel had been requested by Mr. Cox and were placed in the Proposal. (R. 225) The scheduling and final completion date for the steel work under the Proposal were determined after negotiations with Mr. Cox. (R. 227)

(c) On December 27 Western Steel ordered some of the steel items from Bethlehem Steel Company. (R. 223, Ex. 37)

(d) On January 6 Cox was notified of the award of the Prime Contract with the State. (Ex. 64, R. 357) The steel was to have been furnished and installed by Western Steel by June 30, 1966. (Ex. 36)

(e) On January 10 in the evening, Robert F. Weyher met with Mr. Cox at Manti to negotiate

the Weyher subcontract. At that time Weyher was informed that Cox had already entered into a contract with Western Steel and that he had ordered the steel from them on January 10 in his office at Manti. (R. 81) Weyher informed Cox that he couldn't finish on June 30 if the steel was also being finished on June 30, since Weyher's work would have to be performed after Western Steel Company had finished. (R. 81-84) Cox thereupon stated that he had already ordered the steel from Western Steel but that he wanted Mr. Weyher to coordinate and schedule it. Mr. Cox also stated that he had already told Western Steel of the sequence in which he wanted the steel installed. (R. 271-274)

(f) Cox and Weyher jointly phoned Western Steel at that time to see if the steel could be delivered earlier. No assurance was given that it could, but that an effort would be made to have it delivered earlier. (R. 272, Ex. 46) The Weyher subcontract had already been typed up and prepared for Mr. Weyher's signature before he arrived on January 10. It was then signed. (R. 269, Ex. 2)

(g) Thereafter on March 2, 1966, in response to a request from Ron Cox and to a letter from Cox dated February 16, 1966, Western Steel submitted a revised schedule of deliveries indicating that fabrication would be completed by the end of June. (R. 225, Ex. 22) A copy of this letter

was sent to Weyher, since by this time Weyher had contacted Western Steel several times relating to scheduling the steel onto the project. Weyher objected to this rescheduling by letter dated March 4, (Ex. 23) wherein he informed Cox of the fact that this would delay the project.

(h) On January 11 Western Steel had received back the signed agreement between Western and Cox and indicated in an interoffice memorandum that the steel would have to be delivered by June 15 is possible. (R. 235, Ex. 46).

(i) The March 2 letter indicates a mill schedule shipment date, which places final installation later than June 30. (Ex. 22)

2. The Weyher subcontract required Weyher to commence January 15 and complete by June 30. (Ex. 2) Cox received a notice from the State dated January 12 requiring it to commence work by January 22, (R. 47, Ex. 12, 13) and Cox did not commence work until January 21, 1966. (R. 47)

3. Contrary to pages 7 and 8 of the appellants' Brief, steps 9, 10, 11 and 12 did not follow the forming and pouring of the concrete work. Cox began laying gravel in April and extended it throughout the entire project until late August. (R. 457-459, Ex. 69, Ex. 1) The asphalting began in July and extended throughout August, September and October. (Ex. 69) Cox in bidding the project did not have any particular order

for undertaking his work and had no schedule. (R. 355-356 (Steps 5, 6, 7 and 8 set forth on pages 7 and 8 of appellants' Brief, commencing with the erection of steel by Western Steel on May 28 were completed with the final placing of the curb and parapet on October 7. (R. 106-110, Ex. 28) The steps 1 through 8, however, were necessary in the order shown. These steps beginning with finishing the pile cut-off by Raymond Concrete Pile Co. and extending through final excavation to the placing of concrete column caps began February 15 and extended through March 22. Weyher was not able to commence its first work of forming until February 15. (R. 101-106, Ex. 27)

4. The Western Steel structural steel had to be fabricated and thereafter erected on the project before the State Road Commission could establish the final finish grade. Weyher could not commence its work until these two steps had been completed on any particular structure. (Ex. 28, R. 107) Western Steel began delivery of its steel to the project on the westbound 14th Street railroad structure on May 24 and delivered its last steel to the project at Forest Street structure over I-15 on August 18. (Exs. 39, 40, 41, 42, 43 and 44) The steel was erected in place beginning on the 14th Street westbound railroad bridge on June 20 and on the last of the six bridges at Forest Street on August 29. (Ex. 28) After sending the March 2 letter, Western Steel had no further complaint from Cox (R. 227) until August 9 at which time Cox notified Western Steel it was in default under its contract. (Ex. 38,

R. 231) On December 8, 1967, Cox paid the final retention to Western Steel, except for a partial payment still owing. (Ex. 45)

5. After Western Steel and Cox had consummated their agreement, Western became aware of Weyher as a subcontractor. (R. 234) and received calls from Weyher from time to time relative to expected delivery dates of different items of steel. These contacts related to coordination. (R. 244) Had the steel been delivered on time, Weyher would have been able to finish. However, the failure to deliver and install the steel prevented him from working. Even after the steel came, the Weyher performance extended over a longer period of time than was anticipated because the steel delivery was spread out over a substantially longer period of time than should have been the case. It began May 24 and was finally delivered August 24 and finally erected on August 29. (R. 88, 89, Ex. 28) The contracting for and ordering of the steel had already been done by Cox so that Weyher had no opportunity to do any of this ordering. (R. 279, 281, Ex. 22) (R. 242) (R. 222, 234, Ex. 36)

6. Contrary to the statements at pages 9 and 10, Cox, when he bid the job to the State, had no definite idea about when the asphalt or gravel was going to be placed in surfacing the roadway. (R. 355, 356) At the time he entered into the subcontracts with Weyher, Western Steel and Gilmore, he did not know when the project would start since he had not received the

notice to proceed from the State. (R. 360) Mr. Cox had no schedule of how the work was going to proceed. (R. 361) The only dates were those to which he held Western Steel and Gilmore Steel to complete their work, to-wit: June 30. (R. 362, 363) Contrary to appellants' argument at page 10 of their Brief, Cox commenced his work on the surfacing without regard to the degree of completion of any of the structures. He began laying gravel on 14th Street in April before the first steel was even delivered to the job site, (R. 457, Ex. 6) and continued until the last of August. The gravel was placed first on April 1, along the Interstate portion; in early June along 14th Street beginning at the east end where it intersects with Highway 89 and moving on West; (R. 455) in July and on into August on 14th Street, on the D-line at Forest Street and along the R-line at Highway 30 where it goes under the Freeway. (Ex. 6) The asphalt commenced about July 11 (R. 461) on the Interstate and worked on through July 29 and August 17 through 19 it was placed up and down 14th Street south; then August 8 through August 28 the main portions of the Interstate were surfaced and around August 24 the ramps and bridge approaches were surfaced. (R. 461-463, Ex. 72) Cox did not have to come back to the project but was at the project at all times. It was not necessary to leave space one to two hundred feet on either side of the structures. (R. 503) The bridge construction had no effect on the asphalt at 14th Street and Highway 89 and Cox performed this work later on in the project.

He did not have to come back because he was laying all the other material at this time. (R. 518, 519). The Forest Street approaches were performed by Fife but they included substantially more than just the short distance on either side of the structure. (R. 486) Cox's main asphalting operation was carried on during July and August and during this time he was working throughout the project on all phases of it both graveling and asphalting. (Exs. 12, 13, and 69) (R. 495-503, Exs. 71-72)

7. There were no extra costs incurred by Cox due to delays in completing its work. Having started in April Mr. Cox worked on through the project whenever his equipment was on the project. (Exs. 6, 71, 72)

8. Contrary to the last statement on page 12 relating to the notice of claim, notice was given of the claim because of the structural steel problem. (Exs. 16, 17, 18, 22, 23 and 48) (R. 261) Article 16 of the subcontract does not relate to any delays but only those delays by the owner's agent suspending the prosecution of the work. (Ex. 2)

ARGUMENT

Appellants in their Brief raise two general questions: (a) Was the evidence sufficient to support the Court's Findings of Fact and the jury's answers to the Special Interrogatories; and (b) did the Court commit prejudicial error in giving the Instructions? The

above questions relate to the award of damages for delays and will be discussed in the above sequence.

POINT I

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The evidence must be viewed in the light most favorable to the jury's answers. *Burkhalter v. Grandeur Homes,* 17 Utah 2d 278, 409 P. 2d 614; *Smith v. Gallegos,* 16 Utah 2d 344, 400 P. 2d 570; and *Gordon v. Provo City,* 15 Utah 2d 287, 391 P. 2d 430. As stated by the Court in *Gordon,* it will not disturb the jury's finding,

> "So long as it is supported by substantial evidence, that is evidence which, together with the fair inferences that may be drawn therefrom, reasonable minds could conclude as the jury did. . . ."

As indicated in preface to respondent's Statement of Facts, appellants have not presented the evidence in an objective manner but have picked out portions of the testimony and evidence most favorable to appellants' position. Therefore, with reference to the particular findings questioned by appellants beginning on page 25 of appellants' Brief the following comments are submitted to show there is sufficient evidence to support the verdict and Findings of Fact. Since appellants have taken excerpts from some of the Findings,

and attacked them piecemeal, appellants' questioned Findings will be considered under the complete finding designated by paragraph number.

A. FINDINGS OF FACT NO. 2 IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

1.

Appellants claim, at page 25 of their Brief, that the following finding is not supported by the evidence.

> "That Cox entered into a contract with Western Steel Company on January 10, 1966, after having ordered certain structural steel from Western Steel prior thereto . . ."

On December 23, 1965 Western Steel submitted its Proposal and Agreement to furnish the steel on the project. (R. 222, Ex. 36) Mr. Howard Jensen testified in connection with this Proposal as follows:

> "Q. Going back to December, 1965, about December 23, did you have any contact with Cox after you sent this proposal to him?
>
> A. Our fabricated sales engineer, Mr. Lew Kimball, had contact with Mr. Cox in bringing this to a conclusion.
>
> Q. At about in December of '65 did you have occasion to undertake any orders or obtain any orders or send any orders with reference to steel on your proposal?
>
> A. Well, at the time we made up this proposal on December 23, I think we had a verbal understanding that we would be awarded this job and

that we would proceed on it, and I believe it was on December 27 when we entered an order with Bethlehem Steel Company for some of the more critical items as far as delivery is concerned, to get this project underway. I think we had contacted them and found out what some of their rollings on steel were and decided it was urgent that we enter and order as soon as possible to obtain a booking on their orders in their mill." (R. 222 and 223)

"Q. Now, Mr. Jensen, after you had this contract with Cox when did you first have any schedule of the delivery of the steel to the project made up?

A. Well, we had been asked by Mr. Cox to meet a certain schedule that he desired to meet on his project, and I think that the terms of that were substantially put into this proposal." (R. 225)

An order was given to Bethlehem Steel for some of the items, December 27. (R. 224, Ex. 37)

On January 10, in the evening, when Robert Weyher and Cecil Cox met to discuss the signing of the Cox-Weyher subcontract. This conversation occurred:

"Q. Did you have any discussion at that time with him with reference to ordering this steel?

A. Yes.

Q. Can you give us that conversation?

A. Well, when I arrived Mr. Cox had the subcontract, which we both signed, for the work on the concrete work, prepared. He prepared it in

his office, I presume. At least he had it prepared to submit to me for my signature, and as I reviewed it I noted the provision in there in regards to the steel, and as I was not buying the steel nor did I know what arrangements had been made with either of the steel suppliers, Gilmore Steel for the reinforcing steel or Western Steel for the structural steel, I inquired of him as to what arrangements and with whom he had made these arrangements.

Q. And what did he say?

A. And Mr. Cox told me that there were agreements with both of these steel suppliers for the furnishing and erection of the steel and he would handle that item, he would pay for it, he would buy it from them, and that they would have it there in sufficient time for me to do my work. But he merely wanted me to schedule and coordinate the delivery of the steel so that when we were in need of it the steel contractors, both Gilmore and Western, would have sufficient notice so that they could get it to the job on time so we wouldn't lose any time." (R. 81 and 82)

On cross examination Mr. Weyher stated:

"Q. All right now, what else was included in the discussion?

A. We talked about the contract that Mr. Cox told me he had with Western Steel for the delivery of the structural steel.

Q. As a matter of fact he told you that he had a bid proposal from them and let you see it, did he not?

A. No, that's not my recollection.

Q. Didn't he tell you that he was not going to let this subcontract to you unless you would take the responsibility for the delivery of the structural steel?

A. He certainly did not.

Q. And didn't you call Mr. Kimball of Western Steel to confirm the delivery?

A. Mr. Cox and I both called Western Steel." (R. 271 and 272)

* * *

"Q. We'll get into your recollection on that in a few minutes. Now you say that it is not your recollection that Cox told you that he would not let this subcontract to you unless you would agree to be responsible for the delivery of the structural steel?

A. Well, I certainly did not agree. I agreed to coordinate the scheduling of the structural steel and the reinforcing steel, and that I did." (R. 273)

* * *

"Q. And what was the occasion then for your calling Mr. Kimball?

A. Because Mr. Cox told me that he'd entered into a contract with Western Steel and that they had agreed to get it all there by June 30.

Q. Isn't it a fact that Cox told you he would not buy that steel from Western Steel until you had entered into the subcontract and agreed to take the responsibility?

A. No, sir." (R. 274)

* * *

"Q. As a matter of fact, Mr. Weyher, you agreed to take the responsibility for the delivery from Western Steel, and that's why you called Kimball; isn't that a fact?

A. No. I agreed to schedule and coordinate delivery so that it would fit in with the concrete work.

Q. And why did you call Kimball?

A. Well, I started to tell you and I'll try again. I called Mr. Kimball — Mr. Cox and I both called him.

Q. Do you remember that? You were both on two phones?

A. I don't know whether I was on the phone all of the time alone or whether Mr. Cox was on the phone part of the time with me or whether Mr. Cox was not on the phone at all. I do recall that later Mr. Lew Kimball, who we called, made a note that said that both of us called him." (R. 274 and 275)

Again in answer to a question of Mr. Piercey regarding the subcontract Mr. Weyher testified,

"Q. Yes, and that says more than scheduling, doesn't it? It says, 'responsible for ordering the steel and making sure it gets there on time so as not to delay the subcontractor's performance.'

A. Well, in your interpretation it becomes an impossible condition, because it was already ordered by somebody else." (R. 279)

Mr. Cox, in discussing the Western Steel completion date, testified:

"Q. Right? Then so far as Western Steel is concerned, how did you fix the time that Western Steel was to perform? According to their agreement also?

A. No, I told Western Steel that they had to be through with their work by June 30.

Q. You didn't have any beginning date for Western Steel?

A. I don't think it showed a beginning date. They just had to have their work done. They had to have the supplies in on the job and finished by a certain time.

Q. By June 30?

A. Yeah.

Q. And that was the important date so far as Western Steel was concerned, June 30; is that correct?

A. Well, I don't know what they call important dates.

Q. Well, what did you call the important date?

A. That was an important date for me." (R. 362)

Cox's statement to this effect is also found in the Western Steel Memorandum. (R. 235, Ex. 46) There would seem therefore substantial evidence to support the finding that sometime prior to January 10 Cox and Western Steel had an arrangement sufficiently solid to warrant Western Steel ordering from Bethlehem Steel. There is also sufficient evidence to show that prior to the signing of the Cox-Weyher Subcon-

tract, Cox had already entered into his agreement with Western Steel; that Weyher relied upon Cox through Western Steel to get the steel to the job site in time for Weyher to finish by June 30; and that Weyher would not have signed and thus bound himself under the subcontract to finish by June 30 if that had not been the case. It is *not* reasonable to infer from these facts that Cox, having made the arrangements with Western Steel as to June 30, completion date, and then claiming to leave everything up to Weyher, would nevertheless have signed the Western Steel agreement after signing Weyher's agreement. There could be no reliance upon Weyher in that respect since Weyher could not do his work until Western Steel's work was finished. The reliance claimed by Cox works backwards and is without reason.

2.

Appellants claim at page 26 of their Brief that there is no evidence to support the finding,

> ". . . that thereafter on or about March 2, 1966, Western Steel Company and Cox without Weyher's consent modified the said steel agreement . . . and did further modify the schedule of fabrication, delivery and installation of the steel . . ."

After negotiations in December, between Western Steel and Cox, resulting in the informal agreement between them and the ordering of some preliminary items of steel, the delivering and scheduling of the items had been agreed to. Thereafter on January 10

Cox affixed his signature to the Proposal to which he had previously agreed and to which he had previously added some typed agreements. Thereafter a letter was sent from Western Steel to Cox dated March 2, (Ex. 22) concerning which Mr. Howard Jensen of Western Steel testified as follows:

"Q. Now, Mr. Jensen, after you had this contract with Cox when did you first have any schedule of the delivery of the steel to the project made up?

A. Well, we had been asked by Mr. Cox to meet a certain schedule that he desired to meet on his project, and I think that the terms of that were substantially put into this proposal.

Q. After you had entered into this proposal then did you have occasion to communicate with Cox regarding the scheduling of the steel?

A. At at later period I think Ronnie Cox had gotten in touch with us regarding scheduling, and I believe — well, now, there's a letter that I wrote to him in response to his call to us. I presume that's the one you have.

Q. I'll show you what's been marked in this case heretofore as exhibit 22, which is a copy of a letter dated March 2, addressed to Cox from Western Steel, and ask you if you can identify that for us.

A. That's the letter that was written on March second when we outlined to him what kind of commitments we felt we had on the mills for delivery of steel, and where we told him the order in which we had understood that these were to be delivered, and —" (R. 225 and 226, Ex. 22)

Mr. Jensen further testified in answer to Mr. Piercey's question about whether Weyher, later on, had contacted him to expedite the Forest Street bridge:

> "A. I can't remember if he did, but if he'd done I'd have had to tell him it was in vain, because we had this absolutely scheduled, our shipments from the mill in a certain order, and I think we at the beginning of this job made a statement that after we set the schedule up it would have to be followed." (R. 239)

3.

Appellants claim at page 29 of their Brief that there is no evidence to support the finding:

> ". . . that Cox was informed of the modified delivery and fabrication schedule by Western Steel and made no objection thereto thus agreeing to and permitting the steel to be delivered and erected subsequent to June 30, 1966. . . ."

The letter from Western Steel to Cox is not only in response to inquiries from Ronnie Cox (R. 225) but was in response to a letter from Cox dated February 16, which letter is mentioned in the first line. (Ex. 22) Thus the evidence is simply this: In response to a request from Cox orally made and in further response to a written request of February 16, both requests following on the heels of the execution of the agreement between Western Steel and Cox, Western Steel in compliance with the request sets forth its schedule for mill deliveries of the steel for the different portions of the project. Mr. Jensen of Western Steel testified:

"Q. Now I notice that — let's see. The schedule that appears on this letter of March 2, 1966, indicates the order of delivery to different bridges on the project. As I understand, that was pursuant to a request of Cox, is that true?

A. I think when we first negotiated this contract we decided the order of delivery. I can't remember whether that was — whether the order of delivery was made at our suggestion. It seems to me it was. We told him it would be more convenient for us to get certain work out. But anyway it was agreeable to the parties and it never became a question of controversy in here from then on, to the best of my knowledge." (R. 226 and 227)

It is reasonable to infer that Cox agreed to the new schedule. If not and if it intended to hold Western Steel to its original contract completion date, it would have made and should have made some objection to this new schedule. Just as reasonably we must assume that if Cox intended on holding Weyher to his June 30 date, notwithstanding this change in steel schedule, there would have been some duty to respond to the March 2 letter. Just as obviously there should reasonably have been some duty on the part of Cox to respond to Weyher's letter of March 4, (Ex. 23) in which Weyher objected to this new schedule of Western Steel. The jury and the Court are both certainly entitled to reasonably infer that there was an agreement by Cox for the extension of the steel schedule and there was an agreeement or at least a recognition by Cox that Weyher would not be held to the June 30 date.

Appellants seem to contend that once Cox signed the proposal and agreement with Western Steel he had no further responsibility or even any interest in the performance of Western Steel. This does not appear to be reasonable when the following is considered:

(a) The importance of scheduling the completion of each subcontractor's work. (R. 362-364)

(b) The contact by Ron Cox and the letter of February 16, inferentially asking for a commitment on the delivery of the steel. (R. 225-227, Ex. 22)

(c) The letter dated August 9, 1966, addressed to Western Steel asking Western to speed up, which is in the same form as is a letter to Weyher Construction Company. (Exs. 38 and 48)

(d) The payment of $340,000.00 to Western Steel. (R. 368)

(e) The payment on December 8, 1967, and letter of transmittal indicating the contractual relationship and concern of Cox. (Ex. 45)

(f) The inclusion of Western Steel amongst the other subcontractors under a designation of specialty company in a letter requesting an increase in the prequalification. (Ex. 68, R. 450)

(g) The obvious reference in a letter dated August 30 written to other subcontractors to keep ahead of the operation so as to not delay with the oiling. (Ex. 50)

B. FINDINGS OF FACT NO. 3 IS SUPPORTED BY SUBSTANTIAL EVIDENCE

1.

Appellants contend at page 30 that there is no evidence to support the finding,

> "That Cox having ordered the steel and having agreed with Western Steel to the delayed schedule made it impossible for Weyher to order the steel. . . ."

Appellants state at page 31,

> "It is uncontested that plaintiff knew at the time it signed the subcontract agreement with Cox that Cox was going to enter into a purchase agreement with Western Steel. . . ."

Such an alleged fact certainly is contested. At the time Weyher signed the Cox subcontract he had been informed by Cox and knew that Cox had already entered into the agreement with Western Steel. This prior Western Steel agreement prompted Weyher and Cox to discuss the effect upon Weyher's work of the simultaneous completion dates of June 30 and resulted in a telephone call to Western Steel to see whether or not the delivery date could be accelerated. (R. 81-84) It is obvious that the steel had already been ordered by Western Steel and Weyher could thus not do anything more than coordinate or schedule the steel.

Mr. Weyher testified in response to questions by Mr. Piercey:

"Q. Now tell me what you did between January the tenth and May the 24th with Western Steel with respect to being responsible for ordering the steel and making sure the steel items will be taken care of in plenty of time so as not to delay the contract.

A. I didn't order it, because it was impossible. It had already been ordered by Mr. Cox.

Q. Now, as a matter of fact it had not been ordered until concurrently with the signing of this subcontract; is that correct?

A. You talked about January —

Q. The tenth.

A. Until some future date, and surely it must have been ordered then, and I responded correctly I think.

Q. All right, go ahead and tell me what you did with respect to ordering and making sure the steel items would be taken care of in plenty of time so as not to delay the contract.

A. I didn't do anything in regard to the ordering.

Q. And you didn't do anything with regard to making sure they were delivered in time so as not to delay the contract either, I take it?

A. Yes, I tried to schedule it and I urged them to hurry if they could, because I pointed out we needed to do our work, but I had no control over them, I had no contractual relationship with them.

Q. But as a matter of fact you had assumed the

responsibility under this contract with Cox, hadn't you?

A. No, I had not." (R. 281 and 282)

The coordinating and scheduling, however, was in turn rendered impossible by Western Steel's schedule of March 2. (Ex. 22) Weyher did all it could to coordinate the placing of the steel which is the usual pattern followed in the construction of this type of work. Weyher commenced attempting to coordinate the delivery of the steel after the Cox-Western Steel contract was consummated. (R. 234, 244, 263)

It is highly improbable for a jury or court to assume that Cox would obligate itself with Western Steel for $340,000.00 upon an agreement to furnish and install steel by June 30, and have no responsibility thereunder. Neither the court or jury made such an unreasonable inference.

2.

Appellants claim at pages 31 and 32, that there is no evidence to support the following:

> ". . . that Cox interfered with Weyher's work and thus prevented Weyher from performing under the terms of the subcontract by June 30, 1966 . . . and that Cox had ordered the steel and by so ordering and agreeing to the new scheduling interfered with and made it impossible for Weyher to comply. . . ."

The evidence in support of this finding has been

fairly adequately either summarized or set out in some detail heretofore. Again it should be noted, however:

(a) Cox had, prior to his meeting with Weyher, agreed with Western Steel on the terms of the steel contract, including the June 30 date, had prepared and had typed thereon said terms for delivery of steel.

(b) Cox had already prepared and typed in the subcontract for Weyher including page 11 before Weyher met on the evening of January 10.

(c) The ordering of the steel by Cox to be completed by June 30 had already occurred.

(d) Because of the conflict in the two June 30 dates and also the Gilmore Steel June 30 date, they telephoned Western Steel to determine whether or not the June 30 completion date could be moved ahead by two weeks, and this possible acceleration of the ordering and delivery of the steel was indicated by Western Steel.

(e) In reliance upon the very obvious fact that the steel had to be completed in sufficient time prior to his completion date for him to properly do his work, Weyher undertook its subcontract agreement with Cox.

Appellants persist throughout their Brief in erroneously arguing upon the basis that the Cox-Western Steel agreement was "going to be entered into" at the

time that Weyher signed his subcontract and that the initial purchase from Western Steel constitutes the interference with Weyher's work. Such argument does not go to the actual question of interference. The interference arises out of the contract between Cox and Western Steel, it is true. However, it is based upon the subsequent failure of Cox and Western Steel to adhere to the original contract requirements and by modifying said original completion date of June 30 through the March 2 letter (Ex. 22) and through subsequent delays even beyond those contemplated in said letter. It is this interference which the jury and the Court reasonably infers is not the responsibility of Weyher but actually is under the primary responsibility of Cox, and which forced Weyher into the delay, extending into November.

The provisions of the said contract upon which appellants rely in regard to the structural steel delay must be given meaning in the context of the entire subcontract agreement and in relationship to the circumstances surrounding the development of the delay. When Mr. Cox first took bids on these structures, he contemplated that a subcontractor M. Morrin & Sons would do the entire structure *including furnishing of all steel.* Under this concept, (R. 316) obviously such a paragraph would have materiality. And such a paragraph had been typed up for signature prior to Mr. Weyher's arrival. However, since Mr. Weyher had not proposed to do the steel, and since Cox undertook

the steel work through Western, Weyher very properly questioned this paragraph, and particularly the completion date of June 30.

It is obvious that such a paragraph relates to the actual purchasing and contracting for the structural steel. That paragraph reasonably goes to the very terms which Cox believed were so important, i.e., the price and the completion date of June 30. (R. 364) Therefore, at the time Weyher came into the picture the structual steel had already been purchased and ordered and it was to be completed on that project by June 30. This work was part of the work which Cox had originally contemplated that M. Morrin & Sons would do under a complete subcontract, including both steel and concrete.

The only meaning which can be attached to the paragraph, if it has any meaning in view of the prior agreement between Cox and Western Steel, would be to coordinate the steel to the different and particular portions of the contract work as those portions became available. This coordination, as Weyher and Jensen testified, is the ordinary type of coordination. However, such coordination obviously must be within the framework of the contract between the general contractor and the supplier, to-wit: Cox and Western. Even that type of coordinating and scheduling was taken away from Weyher by the March 2 letter from Western Steel to Cox in which the detailed scheduling of the steel to the different portions of the contract work was

set out. The only thing left for Weyher to do after that was to continually call Western Steel to try to hurry up the delivery and installation of steel in an effort to determine at what point Weyher could commence the different operations on the different structures which followed installation of the steel.

In other words, according to the strict wording of the subcontract paragraph in question, Weyher could not be responsible for ordering the steel and making sure that the steel items were taken care if in view of the contract between Cox and Western Steel with the subsequent amendment to that contract which came into effect by the March 2 letter and thereafter. Weyher did all he could to expedite the steel but as Exhibit 22 shows and as Mr. Jensen testified (**R.** 239):

> ". . . it was in vain because we had this absolutely scheduled, our shipments from the mill in a certain order, and I think we at the beginning of this job made a statement that after we set the schedule up it would have to be followed."

The contract had already been established between Cox and Western Steel and had already been modified by Cox and Western Steel, over Weyher's objection. (Ex. 23)

Both parties therefore knew at the time that Weyher entered into the subcontract with this provision included therein, that Cox had already purchased the steel, had already established the June 30 completion date of Western Steel, and by conference and joint

telephone call had determined that Western Steel would have the steel finished prior to that June 30 completion date. Thereafter on March 2, after Weyher had commenced the contract to subject Weyher to a modification in the structural steel delivery date over Weyher's objection and classifys it as Weyher's responsibility seems unreasonable to say the least. The evidence does not support such an inference and the jury was justified in finding to the contrary. The Court in Findings of Fact No. 3 properly determined that Cox had made it impossible for Weyher to comply with this provision of the subcontract.

C. THE CONCLUSIONS OF LAW ARE SUPPORTED BY THE FACTS AND ARE CORRECT UNDER THE LAW OF THE CASE

At pages 34 and 35 of their Brief, appellants argue that the Conclusion of Law No. 1 is not supported by the evidence. The facts supporting this conclusion have been set forth above by referring to different portions of the testimony and to the various exhibits. We have shown heretofore that there was substantial evidence to support the jury's verdict and the court's Findings of Fact to the effect that Cox interfered with the performance of Weyher's contract. The conclusion therefore indicates the legal result caused by the interference. Such an interfernce gives rise to a cause of action on the part of Weyher.

"As a general rule, if a contractor agrees to do certain work within a specified time, and he is prevented from performing the contract by the act or default of the other party, or by the acts of persons for whose conduct the latter is responsible, the delay thus occasioned is excused, and the contractor may not be held liable. . . ." 13 Am. Jur. 2d page 51. See also *Peter Kiewit Sons Company* v. *Pasadena City Junior College District*, 379 P. 2d 18 (Calif.); and the annotation at 16 ALR 3rd 1252.

The Courts are in accord with the general principle of law that a provision in a construction contract relieving a contractee from liability for delays is not applicable to delays caused by the conduct of the contractee constituting active interference with the performance of the contractor. See *Psaty and Fuhrman* v. *Housing Authority*, 68 A. 2d 32 (R.I. 1949), annotated in 10 A.L.R. 2d page 805. The question of which party to a construction contract is responsible for a delay in completion is a question of fact for the determination of the trier of the facts. 13 Am. Jur. 2d page 119.

POINT II

THE FINDING OF THE JURY THAT COX WAS RESPONSIBLE FOR THE DELAY IN THE DELIVERY OF THE STRUCTURAL STEEL IS SUPPORTED BY THE EVIDENCE

The matters submitted to the jury in Question 1 (a), 1 (b) and 1 (c) involve the factual determination

as to why the delays occurred and whose responsibility they were. The Court then applied said factual findings to the contract provisions, as it had indicated it would throughout the trial, and supplemented the jury's answers by its own findings. Thereafter Conclusions of Law were made applying the factual determinations to the law of the case and, of course, to the contract document itself. The instruction requested by appellants to the effect that the subcontract provision should have been given to the jury is unnecessary. The jury was well aware of the provisions of the subcontract. Throughout the record are found ample references thereto by witnesses, counsel and the Court. The application of the contract provisions to various legal defenses asserted by appellants was properly considered by the Court in making its own Findings of Fact. Conclusions of Law and Judgment.

POINT III

IT WAS PROPER TO FIND THAT PLAINTIFF WAS ENTITLED TO DAMAGES FOR DELAY IN THE AMOUNT OF $1,226.85

The matters complained of by appellants under Point III involve the legal interpretation of the various contractual provisions and are not proper subject matter of instructions to the jury. The various contract articles are discussed below to indicate the lack of any legal effect upon the issues herein.

Such a contractual provision is no defense to the contractor. "No damage" clauses are very often placed in construction contracts. However, if they are included in contracts,

> ". . . they are construed strictly, because of the harsh results which may flow from their enforcement. A delay which extends for so long a time that it may be regarded as an abandonment will subject the contractee to liability. Moreover, even though a particular delay may fall within the literal meaning of such a provision, the provision will not be enforced if the delay is a result of fraud or *active interference* on the part of the one seeking the benefit of the provision." (Emphasis added) 13 Am. Jur. 2d p. 55, 56.

In this case the paragraph must be construed strictly. The paragraph does not excuse the contractor from responsibility for the acts or operations of itself, but only for the acts of other subcontractors or material suppliers. Thus strictly construed, the clause says nothing about delays or interferences by the Contractor. However, even if it did by its strict interpretation absolve the contractor from the responsibility for delay, nevertheless where Cox has actively agreed to and participated in the cause of the delay, he cannot be permitted to take advantage of this exculpatory clause. In discussing exculpatory clauses this Court in *Union Pacific Railroad Company v. El Paso,* 17 Utah 2d 255, 408 P. 2d 910, has stated:

> ". . . that the law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which the law imposes on everyone: that of using due care for the safety of himself and others."

The Court also comments on some basic contract principles which should be considered in resolving a dispute about such provisions in a contract. The Court said:

> "The first is that each party is entitled to assume that the other intends to conduct himself as a reasonable and prudent person would under whatever circumstances may thereafter arise, which presupposes that he will commit no wrongful act nor be guilty of negligence."

This Court further indicates that the provisions must be taken in context with the other provisions of the subcontract. Certainly it cannot be considered to apply where the contractor, Cox, modified its subcontract with Western Steel.

B. ARTICLE XIV - CLAIMS FOR EXTRA WORK OR DAMAGES

The Court properly held that adequate notice of claims under this clause was given to Cox. As soon as Weyher learned that the Cox-Western Steel contract was being changed through the March 2 letter (Ex. 22) Weyher within two days objected thereto and notified Cox of the delay. (Ex. 23) Thereafter on August 9 (Ex. 48) Weyher returned a Cox Construction Company letter noting on the bottom thereof,

"We are on schedule, we have sufficient forces on the job to keep up with the erection of the structural steel which is being furnished and installed by you and is not a part of our contract. Delivery of this steel has materially delayed our work. The strike *is* June also caused some delay."

This Court in *Utah State Building Board v. Walsh Plumbing,* 16 Utah 2d 249, 399 P. 2d 141, held that the failure to give notice, where a contract requires notice is not fatal.

"In this connection it should be kept in mind that where a contract such as this requires the giving a notice, unless the failure to give it in some way puts a party to a disadvantage or adversely affects his rights, he should not be permitted to evade his just obligations under the contract because of a mere technical failure to give notice."

C. ARTICLE XV - BASIS AND SCOPE OF PAYMENT.

The application of this provision in the subcontract has no factual foundation in the testimony whatsoever. There was never any contention made throughout the trial that full and final payment of the contract price precluded the claim for damages. As a matter of fact, it is admitted that the contract price was never fully paid to Weyher. (Ex. 26, R. 97) In any event, even had full and final payment been made on the contract such payment does not preclude a suit for breach of contract.

D. ARTICLE XVI - DELAYS.

Appellants have quoted this Article of the subcontract out of context. A reading of the entire Article shows that the delays referred to therein are those caused by the owner or owner's agent. The preceding portion of the Article, which appellants have not quoted, reads as follows:

> "It is understood and agreed that the Subcontractor shall comply with the instructions given by the Owner or Owner's agent, including any instructions requiring him to delay or suspend the prosecution or completion of the work provided for herein, and that the Subcontractor will not . . ."

It is obvious therefore that Article XVI has no application to the issues at hand. There is no contention nor evidence to the effect that the owner—the State Road Commission ordered any suspension of work.

POINT IV

THE INSTRUCTIONS TO THE JURY WERE PROPER

Under Rule 49 the Court may submit to the jury written interrogatories and in so doing shall give to the jury such explanation and instruction concerning the matter as may be necessary to enable the jury to make its findings upon each issue.

> "If in so doing the Court omits any issue of fact raised by the pleadings or by the evidence,

each party waives his right to a trial by jury of the issues so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the Court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on a special verdict." (Rule 49 URCP)

The Court obviously submitted to the jury some very specific questions. All of the other questions concerning issues of fact and issues of law were reserved and were made the subject of rather extensive Findings of Fact, Conclusions of Law and Judgment entered by the Court. There was no attempt on the part of the Court or of counsel to attempt to submit to the jury all of the mixed questions of law and fact which may have been implicit in the various defenses raised by each party. There was no demand made that all of the issues be submitted to the jury.

This Court has stated in ***Robinson v. Hreinson,*** 17 Utah 2d 261, 409 P. 2d 121, that,

> "The parties have had what they were entitled to: a full and fair opportunity to present their contentions and the evidence supporting them to the Court and jury. When this has been done all presumptions are in favor of the validity of the verdict and judgment."

Appellants claim that the instructions did not fairly present defendants' theory of the case to the jury. Both the plaintiff's claims and the defendants' claim on its Counterclaim are summarized by the Court in In-

struction No. 5. Such a summary of the pleadings is proper. *Taylor v. Weber County,* 4 Utah 2d 328, 293 P. 2d 925. The basic issue relating to delays is evenly and fairly set forth in the Instruction No. 1, questions 1(a), 1(b) and 1(c), without reference to names of either party. There is a further Instruction No. 1(A) which indicates the possible answers but in turn invites counsel to discuss the respective theories of the case. The Instruction further invites the jury to ask questions, if necessary. The Special Interrogatories beginning with No. 2(a) relate to the particular damage claims being asserted by the plaintiff. Appellants raise no question as to the verdict of the jury or the findings of the Court relative to the Interrogatories No. 2 through No. 7(b) and the jury recommendations. Thus there can be no prejudical error now claimed by appellants in regard to those Interrogatories.

Appellants claim prejudicial error in not giving defendants' requested Instruction No. 1. Defendants' requested Instruction No. 1 is in effect a judgment in favor of defendants as a matter of law upon the theory that no evidence was adduced in favor of plaintiff's case. As the record shows and as we have pointed out in this Brief there was substantial evidence to support the jury's Verdict and the Court's Findings and Conclusions and Judgment.

Appellants further complain that Instruction No. 2 should have been given. It is interesting to note the all inclusive manner in which appellants requested a

great number of instructions merely by reference to numbers under the JIFU. One must surely recognize that Judge Jones did not give the great number of instructions which many judges do give. However, the instructions when considered as a whole adequately inform the jury of the questions to be answered. The instructions further define the burden of proof and a fair preponderance of the evidence in Instruction No. 2 (R. 612) There is nothing in the record to indicate that the jury was misinformed or that it did not understand its function in answering these questions. Counsel had ample opportunity to argue all phases of the case and, of course, did so.

Whichever issues the jury did not decide the Court did decide in the Findings of Fact, Conclusions of Law and Judgment which were much more comprehensive than is the usual case where matters have been submitted to a jury.

Specific mention is made by appellants of the Instruction No. 5 as being demonstrative of the prejudicial presentation of the claims of the parties. It is obvious, however, that most of the claims in the lawsuit were those of the plaintiff and Instruction No. 5 merely listed the various claims and the amounts being sought thereunder. Said statement of the claims would appear to be more prejudicial to the plaintiff, in that it made no mention whatsoever of the contract moneys being withheld by Cox which contract moneys in the amount of $26,000.00 were a substantial item in the plaintiff's case.

"The question here involved is whether the case was presented to the jury in such a manner that it is reasonable to believe that the parties had an opportunity to present their evidence and have a fair and impartial trial by the Court and jury. If that result has been accomplished irregularities or minor errors should be disregarded. Reversal of a judgment is justified only when there is some error of such a substantial nature that there is a likelihood that the result would have been different in its absence." *Eager* v. *Willis*, 17 Utah 2d 314, 410 P. 2d 1003.

The comprehensive coverage of this case by both parties cannot be questioned. The record is voluminous as is the number and content of the exhibits. All of the evidence which both parties attempted to put in was received and considered by the Court and jury. Throughout the trial many references were made by the Court and by counsel to the contract documents and to the issues involved. Extensive argument was had, although it is not reported as part of the record. Appellants put on much evidence relating to the alleged delays to Cox's work and to alleged damages suffered by Cox. The Court and the jury after considering such claims found them to have no merit. Respondent Weyher, put on extensive evidence relative to delay and to the damages suffered. The Court and jury found merit in only some of the damages of plaintiff but did find merit in the plaintiff's position as to the delays. The jury did come back in one instance to ask a question but were satisfied in all other respects. Appellants have shown nothing which would indicate any reversal

would have resulted if different Instructions had been given. The Instructions although brief were more than adequate when considered in light of the extensive evidence and argument which was presented throughout the trial.

SUMMARY

Appellants seek relief in this case upon three grounds, none of which can be supported by the record. There is nothing to indicate, either in the record or in appellants' Brief, that Weyher could be liable to Cox for the claimed delay. Furthermore, appellants have not taken issue with the determination by the Court and jury that Cox's claim for delay and damages is untenable. The Court and jury considered appellants' claim for costs and found no merit therein. To grant a further hearing under Point III of appellants' claimed relief in order to determine the amount of damage suffered by Cox would be contrary to the Findings of the Court, and appellants in this case have not questioned the determination by the Court that Cox's claim is unfounded.

All three Points upon which appellants rely, however, are sufficiently laid at rest by answering the two questions affirmatively: (a) Was the evidence sufficient to support the jury's findings; and (b) were the Instructions given properly so that prejudicial error was not committed by the Court? We believe that the

record fully supports the jury's answers to the Special Interrogatories and the Court's Findings of Fact, Conclusions of Law and Judgment. Respondent respectfully petitions this Court that the jury's Special Verdict, the Court's Findings of Fact, Conclusions of Law and Judgment be affirmed.

Respectfully submitted,

CLYDE, MECHAM & PRATT

By .....

Elliott Lee Pratt

Attorneys for Plaintiff and Respondent