1991

Frontier Foundations, Inc., a foreign corporation v. Layton Construction, Co., Inc. a Utah Corporation : Petition for Writ of Certiorari

Utah Supreme Court

J. David Nelson; Robert D. Dahle; Maddox, Nelson & Snuffer; Attorneys for Appellants.
Warren Patten; W. Cullen Battle; Fabian & Clendenin; Attorneys for Appellee.

DOCKET NO. _____

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

October 28, 1991

FRONTIER FOUNDATIONS, INC., a foreign corporation,	:	
Plaintiff/Appellants,	:	District Court Case No. 20506
LAYTON CONSTRUCTION, CO., INC. a Utah Corporation,	:	Appellate Court Case No. 900121-CA
Defendant/Appellant	:	
	:	Supreme Court Case No. 910225
vs.	:	
THIOKOL CORPORATION aka MORTON-THIOKOL CORPORATION, a Utah corporation, and JODY WOOD	:	
Defendant/Respondent.	:	

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by misconstruing the undisputed fact that the boring logs were part of the contract documents.

2. Whether the decision of the Court of Appeals applying L.A. Young Sons Constr. Co. v. County of Tooele, 575 P.2d 1034, 1037 (Utah 1978) to this case despite the fact that the boring logs were clearly included in the contract documents is in direct conflict and contradiction of the Supreme Court decisions in Jack B. Parson Constr. Co. v. State, 725 P.2d 614 (Utah 1986) and Thorn Constr. Co. v. Depart. of Transp., 598 P.2d 365 (Utah 1979).

3. Whether an owner's liability for a contractor's reliance upon an affirmative representation contained in the contract documents that the boring logs were from "a representative area near the site" can be relieved, as determined by the Court of Appeals, by the inclusion of a disclaimer statement "The logs of borings is provided for Contractors' information but is not a warrant of subsurface conditions."

OPINIONS ISSUED BY THE COURT OF APPEALS

Judges Bench, Greenwood and Jackson of the Utah Court of Appeals decided Case No. 900121-CA and filed the Opinion for publication on September 26, 1991. The decision was split with Judge Greenwood writing the opinion, Judge Jackson concurring and Judge Bench dissenting.

JURISDICTION

The Utah Court of Appeals filed its Opinion for Publication on September 26, 1991. The Utah Supreme Court has jurisdiction to review the decision of the Utah Court of Appeals by a writ of certiorari pursuant to Utah Code Annotated Section 78-2a-4 (1986).

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUES, ORDINANCES AND REGULATIONS

No controlling provisions of constitutions, statues, ordinances or regulations apply to the resolution of this case except for Rule 49 of the Utah Rules of Appellate Procedure and Section 78-2a-4 of the Utah Code Annotated, neither of which deal with substantive issues in the case.

STATEMENT OF THE CASE

The Utah Court of Appeals Background information is inserted as a good statement of the case except for the factual error regarding the boring logs which is the subject of this petition for writ of certiorari. The Court of Appeals said the boring logs were not included in the contract documents. It is the undisputed fact that the boring logs were included in the contract documents. The Utah Court of Appeals states the case as follows:

> Layton Construction Co. (Layton) was the successful bidder to act as general contractor on a building project for Thiokol, to be constructed at Thiokol's facility in Box Elder County, Utah. Layton utilized plans and specifications provided by Thiokol in preparing its bid. Layton and Thiokol executed a Purchase Order/Contract (construction contract) on July 17, 1986, which incorporated the specifications provided earlier to Layton. On August 7, 1986 Frontier Foundations, Inc. (Frontier) executed a subcontract with Layton, whereby Frontier agreed to perform the portion of the construction contract requiring driving interlocked steel sheet piles approximately forty-nine feet into the earth.

Frontier based its bid, in part, upon boring logs Thiokol had included in its bid specifications. The boring logs were reports of soil sample analyses at various depths.

The bid specifications described the boring logs to be from"a representative area near the [project] site" but cautioned that they were "not part of the contract documents," and were "not a warrant of subsurface conditions." The bid specifications included a map indicating a 1400 foot distance between the location of the soil tested and the project site. The boring logs accurately indicated there was no gravel or cobble at the site tested, but Frontier encountered gravel and cobble at the project site during actual construction. Because of the unanticipated gravel and cobble, Frontier alleged it completed its portion of the project at three times its projected expense and twice the projected time. Frontier's delay resulted in increased costs for other subcontractors and for Layton, and consequent increased costs for the total project.

Frontier sued Layton seeking additional compensation for extra work performed because of the unanticipated subsurface conditions. Layton cross-claimed against Thiokol for Layton's liability to Frontier because of the unexpected subsurface conditions. Frontier subsequently settled with Layton and acquired Layton's claim against Thiokol.

Frontier/Layton filed a joint motion for partial summary judgment granting recovery of extra expenses on the basis that Thiokol had misrepresented a material fact. Thiokol filed a cross motion for summary judgment dismissing Frontier/Layton's claims for extra compensation, alleging: (1) there was not affirmative representation of subsurface conditions at the project site; and (2) Frontier/Layton unreasonably relied upon the soil boring logs.

The trial court granted Thiokol's motion for summary judgment and denied Frontier/Layton's motion for partial summary judgment.

Utah Court of Appeals Opinion, September 26, 1991, page 2 [Bracketed material original] [Emphasis added]

ARGUMENT

The Court of Appeals erred by misconstruing material undisputed facts. The Court of Appeals at least in part based it's

decision on the erroneous belief that the boring logs were not part of the contract documents. The language from the opinion which shows the courts erroneous assumption is as follows:

> The bid specifications described the boring logs to be from a 'representative area near the [project] site' but cautioned that they were not part of the contract document. [Bracketed material original] [Emphasis added]

Court of Appeals Opinion, Page 2.; and,

> The trial court found that while the boring logs are presented as being from "a representative area near the site" specifically identified on the accompanying map, the disclaimers that the logs were not part of the contract documents and "not a warrant of subsurface conditions," specifically limited Layton's use of the logs.

Court of Appeals Opinion, Page 5. [Emphasis added].

The boring logs were part of the contract documents and in fact that is what the contract said. Section 02010 of the Subsurface Investigations specifically provides:

SECTION 02010

SUBSURFACE INVESTIGATIONS

PART I - GENERAL

1.01 DESCRIPTION

A. Soil borings of a representative area near the building site have been taken by Chen & Associates, Salt Lake City, UT.

B. A copy of the boring logs is included.

C. The soils report was obtained only for the Engineers use in the design and is not a part of the Contract Documents. The log of borings is provided for Contractors' information but is not a warrant of sub-surface conditions.

(See Exhibit A, 1.01(B & C)). R281. [Emphasis added]

The Court of Appeals confused "boring logs" with "soil reports." While it is true that the soil reports were excluded from the Contract Documents, the boring logs were included in the Contract Documents and made a part of the bid package that was given to prospective bidders.

A. THE IMPORTANCE OF DISTINGUISHING BETWEEN "BORING LOGS" AND "SOIL SAMPLES"

The misconception by the Court of Appeals is extremely important to a correct and just disposition of this case. The issue of whether the boring logs were or were not included in the contract documents is important because it determines whether the Court should apply the holding of L.A. Young Sons Constr. Co. v. County of Tooele, 575 P.2d 1034, 1037 (Utah 1978) or Jack B. Parson Const. Co. v. State of Utah Department of Transportation, 725 P.2d 614 (Utah 1986) and Thorn Construction Company, Inc. vs. Utah Department of Transportation, 598 P.2d 365 (Utah 1979).

In L.A. Young Sons Constr. Co. v. County of Tooele, 575 P.2d 1034, 1037 (Utah 1978) the Supreme Court considered a set of facts where a contractor had relied on water table information which had been provided at the contractor's request, but was not part of the contract documents. In L.A. Young the information provided was specifically not part of the contract documents and the disclaimer not only did not warrant the information but banned recovery even if there were differing site conditions. The pertinent language from L.A. Young is as follows:

> The information concerning the water table was not included in the plans and specifications but was provided

> at plaintiff's request. the information concerning the test was accurate. There was no representation that the water table would be the same at the time plaintiff commenced construction. It was pure assumption on the part of plaintiff the water table would remain constant. Furthermore, the contract contained a specific disclaimer as to any information regarding soil or material borings or test. "The information is not guaranteed and no claims for extra work or damages will be considered if it is found during construction that the actual soil or material conditions vary from those indicated by the borings."

Id. at 1038 and 1039. [Emphasis Added]

Conversely, in Jack B. Parson Const. Co. v. State of Utah Department of Transportation, 725 P.2d 614 (Utah 1986) and Thorn Construction Company, Inc. vs. Utah Department of Transportation, 598 P.2d 365 (Utah 1979) the Supreme Court held in both of those cases that when an owner provides information which is made part of the bid package upon which a prospective bidder relies that the contractor is entitled to reasonably rely on that information and disclaimers of the information will not save the owner from paying equitable adjustments if the information later proves to be wrong. The pertinent language from Parson which is the later case and which is essentially identical to Thorn is as follows:

> A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover [damages] in a contract action . . . .
>
> The Thorn Court then held that if affirmative representations made are inaccurate, and the inaccuracies make the plans and specifications misleading, the contractor can recover damages caused by reasonable reliance upon them.

Id. at 616. [Bracketed material original]

In addition to the bold, black letter statement of the law found in Parson above quoted, Justice Zimmerman gave a good synopsis of public policy why equity favors making owners responsible for the information they include in their bid documents and why we should not let owners hide behind disclaimer statements. That synopsis is as follows:

> This Court's refusal in Thorn to permit a general disclaimer to impose a requirement that a bidder must investigate the state's specific affirmative representations to determine their truth has a sound basis in policy. Permitting a bidder to rely upon affirmative statements will place responsibility for the accuracy of bidding information on the party best suited to determine whether it is misleading - the state. It also obviates the necessity for bidders to pad their bids to protect against unexpected costs that may be incurred as a result of carelessly prepared plans and specifications. On the other hand, the rule urged upon us by UDOT can only be expected encourage sloppy work by those preparing plans and specifications and to increase the cost of state projects, for no better reason than to relieve the state's employees of any duty to be accurate in representing facts known to them.

Id at 617.

B. THE IMPORTANCE OF DISTINGUISHING BETWEEN THE HOLDINGS OF L.A. YOUNG AND PARSON AND THORN AS IT RELATES TO CREATING A CONFLICT WITH PRIOR SUPREME COURT DECISIONS AND WHETHER AN OWNER CAN HIDE BEHIND DISCLAIMERS

In L.A. Young the Court was faced with a situation where information, accurate for when and where it was taken, was provided to the contractor, not in the bid documents, but rather at the contractor's request. Also, in the L.A. Young case the disclaimer had additional language in it not found in the disclaimer in this case. That additional language is:

> [a]nd no claims for extra work or damages will be

> considered if it is found during construction that the actual soil or material conditions vary from those indicated by the burrowing.

L.A. Young Sons Constr. Co. v. County of Tooele, 575 P.2d 1034, 1037 (Utah 1978) at 1038 and 1039.

The disclaimer in the Layton/Thiokol contract does not say that if there is a difference between the boring logs and the conditions actually found, that the contractor will not be able to claim additional compensation for extra work or damages. The disclaimer is totally silent in that regard.

In the case at bar the boring logs were included in the contract documents. Section 02010 of the Subsurface Investigation of the Contract Documents above reproduced states at Section 1.01B says "A copy of the boring logs is included." (See Exhibit A, 1.01(B & C)). R281. [Emphasis added] Subsection 1.01, subsection C says "The log of borings is provided for the Contractor's information but is not a warrant of subsurface conditions." (See Exhibit A, 1.01(B & C)). R281.

Therefore, the boring logs were clearly included in the contract documents. That fact has never been disputed by the parties to this litigation. Also, as stated above, the disclaimer relied on by Thiokol in this case does not proscribe a claim for extra work or damages as did the disclaimer in the L.A. Young case. The holdings in both Parson and Thorn disfavor disclaimers and in both of those incidences voided them. Except for the public contract versus private contract distinction, the facts and holdings in Parson and Thorn are exactly on point with the facts

in this case. Therefore, the Court of Appeals application of L.A. Young to the uncontradicted facts of this case creates a holding which is in direct contradiction to the Utah Supreme Court holdings in Parson and Thorn.

C. CASE OF FIRST IMPRESSION

This is a case of first impression in the State of Utah regarding changed condition disputes in the private versus public sector. The Utah Court of Appeals' decision was widely split with Judge Greenwood writing the opinion, Judge Jackson concurring and Judge Bench dissenting. We believe it is an extremely important issue facing both contractors and owners in Utah. Accordingly, we asked to have the Supreme Court decide the case at the time the appeal was filed. We asked for a clear statement of the law as it applies to contracts in the private sector. We believe that this case was wrongly decided in the Court of Appeals and that confusion over when a contractor is entitled to rely on bid documents provided by the owner still abounds. We believe that because the Court of Appeals decision is in direct conflict with the decisions in Parson and Thorn that the Utah Supreme Court ought to decide this case.

CONCLUSION

Because the boring logs, not to be confused with the soils report, unlike the facts of L.A. Young, were part of the contract documents and were part of the bid package upon which prospective bidders formulated their bids and because the disclaimer in L.A. Young was more restrictive and forbade claims for extra work and

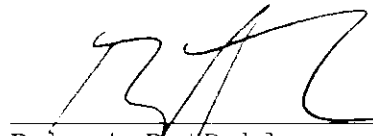
damages even if the conditions differed, the holding in L.A. Young does not apply to this case. Because the boring logs were included in the contract documents and because the disclaimer in this case does not specifically bar claims as did the disclaimer in L.A. Young, the holdings in Parson and Thorn apply to this case. Therefore, the disclaimer in this case is contractually ineffective and void as per the holding in Parson and Thorn and as per the public policy announced by Justice Zimmerman in Parson.

Frontier/Layton assert that the only question that should be before this Court or any of the courts below is whether Frontier/Layton reasonably relied on the information provided. The Utah Court of Appeals never reached that issue. Frontier/Layton assert that because of the testimony of Julian Liu, the affidavit of Jim Nordquist, and the testimony of Robert Weyher that even the question of reasonable reliance has been answered as a matter of law.

For all of the foregoing, Frontier/Layton respectfully requests that the Utah Supreme Court grant this petition for writ of certiorari.

DATED this 28th day of October, 1991.

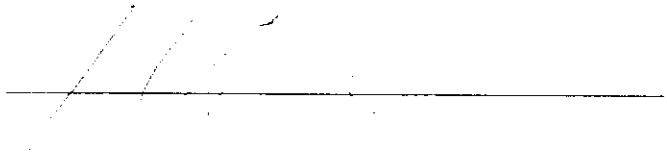
MADDOX, NELSON, SNUFFER & DAHLE



Robert D. Dahle

CERTIFICATE OF DELIVERY

I hereby certify that four (4) true and correct copies of the foregoing were hand delivered to the following named individuals at their respective addresses on Warren Patten and Cullen Battle, Fabian & Clendenin, 215 South State, 12th Floor, Salt Lake City, Utah 84101 and one (1) copy was mailed, postage prepaid, to Lynn B. Larsen, 10 East South Temple, #500, Salt Lake City, Utah 84133 this 28th day of October, 1991.



IN THE UTAH COURT OF APPEALS

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Frontier Foundations, Inc., Plaintiff and Appellant, v. Layton Construction Co., Inc., Defendant and Appellant, and Morton-Thiokol Corporation, Thiokol Chemical Corporation, Defendants and Appellees, and Reliance Insurance Company, Defendants.	OPINION (For Publication) Case No. 900121-CA F I L E D (September 26, 1991)

First District, Box Elder County
The Honorable F.L. Gunnell

Attorneys: J. David Nelson, and Robert D. Dahle, Murray, for Appellant
Warren Patten, W. Cullen Battle, and Diane Banks, Salt Lake City, for Appellee Morton Thiokol

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Before Judges Bench, Greenwood, and Jackson.

GREENWOOD, Judge:

Frontier Foundation, Inc. and Layton Construction Co., Inc., (collectively Frontier/Layton), appeal from an order of the trial court which: (1) grants Thiokol Chemical

Corporation's (Thiokol) motion for summary judgment dismissing Frontier/Layton's claims for additional compensation under a construction contract, and (2) denies Frontier/Layton's motion for partial summary judgment on such claims.[1] We affirm.

BACKGROUND

Layton Construction Co. (Layton) was the successful bidder to act as general contractor on a building project for Thiokol, to be constructed at Thiokol's facility in Box Elder County, Utah. Layton utilized plans and specifications provided by Thiokol in preparing its bid. Layton and Thiokol executed a Purchase Order/Contract (construction contract) on July 17, 1986, which incorporated the specifications provided earlier to Layton. On August 7, 1986 Frontier Foundation, Inc. (Frontier) executed a subcontract with Layton, whereby Frontier agreed to perform the portion of the construction contract requiring driving interlocked steel sheet piles approximately forty-nine feet into the earth. Frontier based its bid, in part, upon boring logs Thiokol had included in its bid specifications. The boring logs were reports of soil sample analyses at various depths.

The bid specifications described the boring logs to be from "a representative area near the [project] site" but cautioned that they were "not part of the contract documents," and were "not a warrant of subsurface conditions." The bid specifications included a map indicating a 1400 foot distance between the location of the soil tested and the project site. The boring logs accurately indicated there was no gravel or cobble at the site tested, but Frontier encountered gravel and cobble at the project site during actual construction. Because of the unanticipated gravel and cobble, Frontier alleged it completed its portion of the project at three times its projected expense and twice the projected time. Frontier's delay resulted in increased costs for other subcontractors and for Layton, and consequent increased costs for the total project.

Frontier sued Layton seeking additional compensation for extra work performed because of the unanticipated subsurface conditions. Layton cross-claimed against Thiokol

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1. The parties stipulated that Frontier/Layton's defamation claim was resolved before the trial court and that the judgment on appeal is a final appealable judgment under Utah R. App. P. 3.

for Layton's liability to Frontier because of the unexpected subsurface conditions. Frontier subsequently settled with Layton and acquired Layton's claims against Thiokol.

Frontier/Layton filed a joint motion for partial summary judgment granting recovery of extra expenses on the basis that Thiokol had misrepresented a material fact. Thiokol filed a cross motion for summary judgment dismissing Frontier/Layton's claims for extra compensation, alleging: (1) there was no affirmative representation of subsurface conditions at the project site; and (2) Frontier/Layton unreasonably relied upon the soil boring logs.

The trial court granted Thiokol's motion for summary judgment and denied Frontier/Layton's motion for partial summary judgment.

ISSUES

Frontier/Layton contends the trial court erred in denying its motion for partial summary judgment because it was entitled to rely on the boring logs as indicating the general quality of soil to be encountered at the project site since the boring logs were presented as being from "a representative area near the site." Thiokol contends, to the contrary, that its disclaimer and map showing the source of the boring log samples precluded Frontier/Layton from justifiably relying on the boring logs.

STANDARD OF REVIEW

Summary judgment shall be rendered "if . . . there is no genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). On appeal of a summary judgment, we view the facts and all reasonable inferences in a light most favorable to the party opposing the motion. Blue Cross and Blue Shield v. State, 779 P.2d 634, 636 (Utah 1989). On review of a trial court's interpretation of a contract, we note that "[w]hether a contract is ambiguous is a question of law." Village Inn Apartments v. State Farm Fire and Casualty Co., 790 P.2d 581, 582 (Utah App. 1990) (citing Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983)). Further, "[i]f a contract is determined to be unambiguous, its interpretation is also a question of law." Village Inn, 790 P.2d at 582. We accord no deference on appeal on questions of law, but review for correctness. Christenson v. Munns, 812 P.2d 69, 71 (Utah App. 1991).

ANALYSIS

We first consider whether the trial court correctly construed the construction contract.

> In interpreting a contract, we determine what the parties intended by examining the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole. The cardinal rule is to give effect to the intentions of the parties and, if possible, to glean those intentions from the contract itself. Additionally, a contract should be interpreted so as to harmonize all of its terms and provisions, and all of its term should be given effect if possible.

G.G.A., Inc. v. Leventis, 773 P.2d 841, 845 (Utah App. 1989) (citations omitted). The specifications incorporated into the construction contract include the following provisions:

> GENERAL REQUIREMENTS
>
> 1.11 SITE INSPECTION
> The contractor shall make every effort to familiarize himself with the prevailing work conditions. Any failure by the contractor to do so shall not relieve him from the responsibility of performing the work without additional cost to Morton Thiokol.
>
> . . .
>
> SUBSURFACE CONDITIONS
>
> 1.01 DESCRIPTION
>
> A. Soil borings of the representative area near the building site have been taken by Chen and Associates, Salt Lake City, Utah.
> B. A copy of the boring logs is included.

> C. The soil report was obtained only for the engineer's use in the design and is not a part of the contract documents. The log of borings is provided for contractor's information but is not a warrant of subsurface conditions.

The trial court found that while the boring logs are presented as being from "a representative area near the site" specifically identified on the accompanying map, the disclaimers that the logs were not part of the contract documents and "not a warrant of subsurface conditions," specifically limited Layton's use of the logs. The contract, viewed as a whole and giving effect to all its provisions, presents no ambiguity. There is no dispute that the information is accurate; nor is there any suggestion that Thiokol had other information regarding subsurface conditions at the project site. Layton contends only that Thiokol's inclusion of the boring logs in the contract documents justifies Layton's reliance upon them. Any such reliance does not take into account the disclaimer language, thus failing to give meaning to and harmonize all of the contractual provisions.

In most instances, parties are bound by the terms of their contract, which defines their relationship and their respective rights and obligations. Layton contracted to perform the construction project for the stated price. "[I]f one agrees to do a thing possible of performance 'he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.'" Wunderlich v. State of California, 65 Cal. 2d 777, 56 Cal. Rptr. 473, 423 P.2d 545, 548 (1967) (quoting United States v. Spearin, 248 U.S. 132, 136, 39 S. Ct. 59 (1918) (cited with approval in L.A. Young Sons Constr. Co. v. County of Tooele, 575 P.2d 1034, 1037 (Utah 1978). Layton is precluded by the contract from receiving extra compensation for expenses caused by soil conditions differing from those in the drill logs provided prior to bidding.

Layton argues further, however, that interpretation of this contract should be controlled by the Utah Supreme Court holdings in Jack B. Parson Constr. Co. v. State, 725 P.2d 614 (Utah 1986) and Thorn Constr. Co. v. Dept. of Transp., 598 P.2d 365 (Utah 1979). In Parson, the Utah Department of Transportation (UDOT) included outdated and misleading information in its bid specifications, while having more recent and accurate information in its possession which was contrary

to the information provided prospective bidders. The contract included a general disclaimer. The court followed the reasoning in Thorn, and held that a general disclaimer could not operate to require a bidder to investigate the truthfulness of specific affirmative representations. Parson, 725 P.2d at 617. Similarly, Thorn involved UDOT's inaccurate positive representation that certain construction materials were acceptable. Thorn distinguished its facts and decision from cases where there were no misrepresentations, accurate information was provided, and specific disclaimers were included. Thorn, 598 P.2d at 369 (citing Wunderlich 423 P.2d at 549; L.A. Young, 575 P.2d at 1034). Layton claims no such inaccurate representations or that Thiokol possessed better or contrary information. Indeed, the boring logs were accurate as to the area from which they were taken, the area was explicitly identified, and Layton was cautioned not to rely on the logs. Because there were no positive misrepresentations and there was a specific disclaimer, Parson and Thorn are inapplicable.[2]

In sum, the trial court correctly determined that the construction contract, read as a whole, unambiguously provides that Layton could not rely on the boring logs as representing the soil to be encountered at the construction site and, therefore Layton is not entitled to damages incurred because of differing soil conditions. We therefore affirm the trial court's grant of Thiokol's motion for summary judgment dismissing Frontier/Layton's claims for additional compensation and denying Frontier/Layton's motion for partial summary judgment on such claims. Since we hold the contract precludes

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2. In addition, this is a dispute involving a private contract, while Parson and Thorn involve public contract issues and policy considerations.

reliance on the boring logs, we do not reach the issue of reasonable reliance.

Pamela T. Greenwood, Judge

I CONCUR:

Norman H. Jackson, Judge

I DISSENT:

Russell W. Bench, Presiding Judge

COVER SHEET

CASE TITLE:

Frontier Foundations, Inc.,,
Plaintiff and Appellant,
v. Case No. 900121-CA
Layton Construction Co., Inc.,
Defendant and Appellant,
and
Morton-Thiokol Corporation,
Thiokol Chemical Corporation,
Defendants and Appellees,
and
Reliance Insurance Company;
Defendants.

September 26, 1991. OPINION (For Publication).
Opinion of the Court by PAMELA T. GREENWOOD, Judge; NORMAN H. JACKSON, Judge, concurs. RUSSELL W. BENCH, Presiding Judge, dissents.

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of September, 1991, a true and correct copy of the foregoing OPINION was deposited in the United States mail to each of the parties listed below:

J. David Nelson (Argued)
Robert D. Dahle
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Warren Patten
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Salt Lake City, UT 84111

and a true and correct copy of the foregoing OPINION was deposited in the United States mail to the district court judge listed below:

The Honorable F. L. Gunnell
Box Elder County Courthouse
One South Main Street
Brigham City, UT 84302

Deputy Clerk

TRIAL COURT:
First District, Box Elder County #20506

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF BOX ELDER
STATE OF UTAH

FRONTIER FOUNDATIONS, INC. a foreign corporation, Plaintiff	:	MEMORANDUM DECISION
	:	Civil No. 870020506
vs.	:	
LAYTON CONSTRUCTION CO., INC. A Utah corporation, ALAN S. LAYTON, David S. Layton, MORTON-THIOKOL CORPORATION, a Utah corporation, RELIANCE INSURANCE COMPANY, and JOHN DOES I - IX, and JODY WOOD, Defendants	:	

This matter came before the Court on Morton Thiokol's Motion for Summary Judgment and Layton Construction Company and Frontier Foundation Company's Cross-motion for Partial Summary Judgment. The issue presented before the Court in both Motions is the applicability and application of the differing site conditions clause of the contract presented before the Court in this litigation. The Court having reviewed the extensive pleadings on file in this case as well as the Motions and supporting affidavits and material presented therewith now enters the following Memorandum Decision.

MEMORANDUM DECISION

As a threshold inquiry the Court is faced with the determination with the novel question of determining the applicable

law that applies to this situation. The Court is of the opinion that although the Utah cases cited are cases involving Public Works Contracts, they are of value as precedent in this fact situation and the public contract/private contract distinction is of no legal import. Accordingly, the Court has applied the doctrines and principles established in the Thorn Construction Company and subsequent Jack B. Parson Construction Company cases cited in the material presented to the Court.

These cases established a three-prong test for determining the applicability of a differing site conditions provision. The criteria established by the cases is:

1. Affirmative representations made.
2. The representations are inaccurate.
3. The inaccuracies make the plans and specifications misleading.
4. Reliance there upon is reasonable.

Applying this analysis to the present case, the Court notes that the plans and specifications did include a representation that soil borings of a representative area near the building site have been taken by Chen and Associates. It is conceded by all parties that a copy of the boring logs was included which showed the exact location of the boring site which was over 1000 feet away from the site in question. The next provision of the contract Subsection C of Part I as it relates to subsurface investigations indicates that, "The soils report was obtained only for the Engineers use in the design and is not a part of the contract documents. The log of borings is provided for contractors information but is not a warrant of subsurface conditions."

Essentially Plaintiff's position is that the providing of the soil borings logs and the maps and accompanying documents was in effect a warranty of the site conditions being the same, despite the

acknowledgment of all parties that it was in a distant location and despite the express disclaimer above quoted.

A review of all the material submitted to the Court satisfies the Court first; that there are two basis for Granting Thiokol's Motion for Summary Judgment:

1. Even if the provisions of the contract are considered to indicate that the soil boring presented is a "representative" area, there is a specific disclaimer indicating the use to which that information is to be put. This in the mind of the Court is not a general disclaimer which would be invalid as against a specific representation, but is a specific disclaimer relating to the specific clause in question.
2. A second basis for Granting Defendant Thiokol's Motion for Summary judgment is that there must be a reasonable reliance by the contractor upon the information presented to the contractor by Thiokol and that the representations must be affirmative and inaccurate and that the inaccuracies are misleading.

The Court cannot find in the review of the documents, material and matters presented that there is anything misleading about the information presented. It was clearly identified as to where the soil borings were taken, there was no affirmative representation that the conditions would be the same in either location as contrasted with the facts presented in both the Thorn case and in the Jack Parson case, where there was information available but not disclosed or oral representations made which were inaccurate. In this case all of the information that was available was presented and the contractor would now have the Court say that since Thiokol presented the information they are bound by it even though the information presented was presented in its totality indicating that it was not in the same area, was at a distant

location and even though there was a specific disclaimer as to the purpose for which the information was presented. In this case Plaintiff's position would be to say if Thiokol withheld information then they certainly fall within the perimeters of the Parson & Thorn case as to misleading the contractor and if they present all information they in effect warrant that the same will be true in all settings. The Court finds that as a matter of public policy this is an untenable position.

The Court also notes that there are strong public policy arguments both directions all of which have been presented by the parties. Certainly there is a strong argument that Thiokol should pay for the work that was done. On the other hand, there is a purpose for a bidding procedure and a contractor should take reasonable steps prior to submitting a bid to ascertain that in fact he will be able to perform on the bid. This Court has no information to ascertain but what other bidders who were not low in this case, did in fact undertake a more thorough investigation of the conditions and did take reasonable steps to ascertain whether or not the conditions on the two locations would be in fact the same and as a result of these investigations submitted higher bids which resulted in their not being awarded the contract. It seems to the Court that there are very strong equitable arguments on both sides which leaves the Court a factual question as to the application of the law to this situation.

For the foregoing reasons the Court Grants Thiokol's Motion for Summary Judgment and Denies the remaining Partial Summary Judgment Motions and directs Counsel for Thiokol to prepare an order in conformance with this opinion.

DATED this 6 day of ~~October~~ November, 1989.

F.L. Gunnell
District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION postage prepaid, to the following: J. David Nelson, Bailey Nelson & Conklin 7050 Union Park Center, Suite 160, Midvale, UT 84047, Lynn B. Larsen, Attorney at Law, 500 Kennecott Bldg., 10 East So. Temple, Salt Lake City, UT 84133, Warren Patten, Esq., & W. Cullen Battle, Esq., Fabian & Clendenin, Twelfth Floor, 215 So. State Street, Salt Lake City, UT 84111 and Curtis D. Elton, Esq., Attorney at Law, 10 E. So. Temple, Suite 500, Salt Lake City, UT 84133.

Dated this 8th day of November, 1989.

Marla Liljenquist
Deputy Clerk

SECTION 02010

SUBSURFACE INVESTIGATIONS

PART 1 - GENERAL

1.01 DESCRIPTION

A. Soil borings of a representative area near the building site have been taken by Chen & Associates, Salt Lake City, UT.

B. A copy of the boring logs is included.

C. The soils report was obtained only for the Engineers use in the design and is not a part of the Contract Documents. The log of borings is provided for Contractors' information but is not a warrant of subsurface conditions.

1.02 QUALITY ASSURANCE

A Soil Engineer may be obtained by Morton Thiokol to observe performance of work in connection with excavating, filling, and grading. Readjust all work performed that does not meet technical or design requirements but make no deviations from the Contract Documents without specific and written approval of the Engineer.