

1967

# W. P. Harlin Construction Company, A Utah Corporation v. Utah State Road Commission : Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY OF UTAH

JUN 22 1967

W. P. HARLIN CONSTRUCTION  
COMPANY, a Utah corporation,

*Plaintiff and Appellant,*

vs.

UTAH STATE ROAD COMMIS-  
SION,

*Defendant and Respondent.*

LAW LIBRARY

Case No.  
10773

## APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial District Court  
for Salt Lake County  
Honorable Joseph G. Jeppson, Judge

UNIVERSITY OF UTAH

JUL 10 1967

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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W. P. HARLIN CONSTRUCTION  
COMPANY, a Utah corporation,

*Plaintiff and Appellant,*

vs.

UTAH STATE ROAD COMMIS-  
SION,

*Defendant and Respondent.*

Case No.  
10773

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## APPELLANT'S BRIEF

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### STATEMENT OF THE KIND OF CASE

This action involves three different claims by the General Contractor, W. P. Harlin Construction Company, appellant, against the Utah State Road Commission, respondent, for three separate breaches of contract, which contracts involve the construction of portions of Interstate 15 projects.

## DISPOSITION IN THE LOWER COURT

By a Pre-Trial Order (R. 70, 71), the Pre-Trial Judge, the Honorable A. H. Ellett, dismissed the First Cause of Action, and set up issues on the Second and Third Causes of Action. The First Cause of Action relates to the respondent's refusal to permit appellant to use appellant's combustion type Del Mag pile driving hammer.

Appellant's Motion for Reconsideration (R. 73-81) and to Amend the Pre-Trial Order, was denied by the Pre-Trial Judge. (R. 86). A Petition for Intermediate Appeal was denied by this Supreme Court.

Appellant, on October 18, 1966, filed its Motion to Amend Pre-Trial Order and to Permit Trial of the First Cause of Action. (R. 90). These Motions were to be argued at the beginning of the trial. These Motions also sought permission to make a proffer of proof on the First Cause of Action.

These Motions were argued prior to trial and were denied by the trial court. The Second and Third Causes of Action were thereupon tried to a jury, a verdict in favor of the plaintiff in the full amounts on both causes was rendered, and judgment entered accordingly and satisfied. Said judgment also dismissed the First Cause of Action, denied appellants' Motion to Amend the Pre-Trial Order, to Permit the First Cause of Action to be tried, and to make a proffer of proof; and, said judgment also affirmed the Pre-Trial Order. (R. 127, 128).

## RELIEF SOUGHT ON APPEAL

Appellant herein seeks reversal of the dismissal of the First Cause of Action, and a remand to the District Court for trial of the issues in the First Cause of Action.

## STATEMENT OF FACTS

Inasmuch as appellant's First Cause of Action was dismissed as a matter of law by the Pre-Trial Judge and the trial court denied appellant the right to make a proffer of proof, there is no evidence to support any facts. Therefore, the facts set forth herein should be accepted as alleged in the plaintiffs' various pleadings, and considered in a light most favorable to plaintiff-appellant.

The facts set forth herein, therefore, are taken for the most part from the pleadings. A more complete factual picture is shown in the various Motions and affidavits. (R. 53, 51, 65, 73, 82), but obviously much detailed evidence to support the ultimate facts would only be developed at trial or upon proffer of proof.

Harlin, appellant herein, entered into a contract for the construction of Interstate 15 overpass structures at 2nd South and 8th West Street, Salt Lake City, Utah. (R. 1). Pilings had to be driven to support the foundations for these overpass structures. The methods of driving the pilings, as well as the type of pile driving hammer allowed are set forth in certain specifications. (R. 7, 9).

The special provisions of the specifications modified the general condition by establishing the minimum energy rating of 18,000-foot pounds per blow.

The general conditions provided that a combustion type hammer could be used. This proviso is stated, as follows:

“Combustion-type pile hammers may be used in lieu of air or steam hammers; providing a rating (energy per blow) mutually agreed upon by the Contractor and the Chief Structural Engineer is established prior to use.”

Appellant owned a combustion-type hammer known as a Del Mag D-12, with a rating in excess of 18,000-foot pounds per blow and which complied with specifications in every respect. The appellant entered into the contract and submitted its bid in reliance upon the specifications and upon the contemplated use of this D-12 Hammer on the project. (R. 9, 10). The respondent refused to permit the use of the D-12 Hammer, thus requiring appellant to obtain a much larger combustion-type hammer at additional cost. Appellant thereupon claimed in its Complaint (R. 9), in its claims at the Pre-Trial (R. 70, 71), and in its Motion for Reconsideration (R. 73-81), as follows:

1. That it submitted its bid and was awarded the contract in reliance upon the said specification and upon its use of the D-12 Hammer in accordance therewith.

2. That the hammer did have more than the

minimum rating of 18,000-foot pounds per blow, and that it complied with and could comply with the specifications relating to pile driving.

3. That it further relied upon the fact that the State, under identical specifications for the construction of Interstate structures at 21st South Street immediately prior to the subject contract, had agreed to the rating of the D-12 Hammer, had permitted and accepted its use throughout said project through the same Structural Engineer as was employed upon the subject project, and with a Contractor, Tolboe & Harlin Construction Company, in which the same W. P. Harlin was a partner and involved in the pile driving work on the project and with which the plaintiff was in privity; that the State knew that appellant would use and had anticipated using the same D-12 Hammer on the subject project, but had made no complaint as to its use nor change in the specifications until after the project had started.

4. That the State breached the contract by arbitrarily, unreasonably and without any cause refusing to agree to the use of the hammer even though the hammer complied in all respect with the specifications and could readily have performed the required work.

5. That the State arbitrarily disregarded the energy rating requirement of the aforesaid specification, and required appellant to submit its D-12

Hammer to a test entirely beyond and unrelated to the requirements of the specifications, which test was inadequate, inconclusive, incompetent and incorrect as a basis for refusing the use of the D-12 Hammer, and which test still showed that the D-12 Hammer did comply with the specifications, and that this was a breach of the contract.

6. That had a proper test been made, the D-12 Hammer would have been shown to comply with the specifications; and, that as a matter of fact, the same D -12 Hammer was permitted to be used after the test, back on the same 21st South project on which it had been originally used.

7. That the State was equitably estopped from refusing to accept the hammer and had waived its right to reject the hammer.

Subsequent to the filing of the Complaint and the Answer, various Interrogatories and Answers thereto were filed; (R. 27, 142, 146, 44) depositions were taken (R. 39, 43) and various Motions filed and denied (R. 13, 14) until the matter came on for Pre-Trial before the Honorable A. H. Ellett.

The Pre-Trial Order was entered in which the Court summarily and incompletely stated claims of the plaintiff (R. 70, 71), and then held as a matter of law:

“That the plaintiff is not entitled to recover on the First Cause of Action and that the claims of the plaintiff as to arbitrariness in refusing to agree on the rating of the hammer is not suffi-

cient to permit the plaintiff to recover even though the hammer may have had 22,500-foot pounds of energy."

The Court further stated, on the question of arbitrariness, that:

"In Interrogatory No. 3 of Set 2, the plaintiff admits that it had nothing to show by way of arbitrariness of the defendant in refusing to agree on the rating of the hammer, except that the hammer had been used on another job by partners, one of which is the chief stockholder of the plaintiff corporation."

Thereafter, appellant filed its Motion for Reconsideration, claiming that the Pre-Trial Order would result in manifest injustice and seeking to amend the Pre-Trial Order in order to submit the matter to the trier of the facts. (R. 73-81). This Motion was denied without hearing by a minute entry, dated July 26, 1966, (R. 73), and thereafter by a formal Order, signed September 1, 1966. (R. 86).

A Demand for Jury Trial was filed and appellant filed its Motion to Amend Pre-Trial Order and to Permit Trial of the First Cause of Action. (R. 90, 91). These Motions, including therein appellant's motion to make a proffer of proof, were denied just prior to the trial. (R. 127-129). Jury trial on the other two causes was had. This appeal is thereupon taken from Judgment denying Trial of First Cause.

## ARGUMENT

### POINT I.

THE COURT ERRED IN ENTERING  
PRE - TRIAL ORDER DISMISSING  
PLAINTIFF'S FIRST CAUSE OF ACTION

A. THE COURT ERRED IN NOT ESTABLISHING AS ISSUES OF FACT AND  
LAW THE DEFENDANT'S ALLEGED  
BREACH OF THE CONTRACT.

The Pre-Trial Court, in dismissing the First Cause of Action, disregarded the clear issues of fact and law relating to the question of breach of contract by the defendant. The purpose of a Pre-Trial is to formulate the issues. As stated in 3 *Moore, Federal Practice* Page 1116:

“It should be noted that the formulation of issues under Rule 16 is essentially a triable matter between the parties and the court. The rule providing that the Pre-Trial Order limit the issues for trial to those not disposed of by admissions or agreements of counsel, the court should not impose on the parties its own views of what the issues are.”

*Rule 16, Utah Rules of Civil Procedure*, provides for a Pre-Trial procedure and the formulation of issues thereby. As is indicated in the last paragraph of the rule, the court should make an Order which limits the issues to those not disposed of by admissions or agreements.

In this case, there are many issues of fact and law, and none of them were disposed of by any admissions or agreements of the parties.

There were factual issues relating to the question of whether or not the State followed the provisions of the specifications in testing and thereafter rejecting the appellant's D-12 Hammer; there were factual issues relating to the question of estoppel on the part of the State to refuse to accept the D-12 Hammer; there were factual issues relating to whether or not the State had in fact agreed to the use of the hammer; there were factual issues as to whether or not the State had exceeded the specification provisions relating to agreement as to the energy rating; and, there were factual issues relating to the arbitrary and unreasonable action of the State in testing the D-12 Hammer, and in the refusal to permit the use of the hammer even before the test results were known, notwithstanding the results of the test. All of these factual issues were ignored by the Pre-Trial Order, and notwithstanding the lack of evidence, exhibits or trial in any way of these issues, the Court determined that the First Cause of Action could be dismissed as a matter of law.

It is clear that the above matters are questions of fact or mixed questions of law and fact and are, therefore, within the province of the trier of the fact. In this case, the trier of the fact was a jury, and appellant was denied a trial by jury.

Again, as stated in *Moore, Federal Practice*, Page 1117:

"It is fair to say that while parties should normally be held to admissions carefully and solemnly made, on the other hand the Pre-Trial Order must not be an inexorable decree. It is defined to promote litigation on the merits, and a Pre-Trial must not, of course, be used to thwart its very objective."

This Pre-Trial Order has clearly eliminated the main issues in the case. It certainly is contrary to the intent of Rule 16.

**B. THE COURT ERRED IN ITS PRE-TRIAL ORDER IN CONCLUDING FROM THE ANSWER TO INTERROGATORY NO. 3, SET NO. 2, THAT APPELLANT HAD NOTHING TO SHOW BY WAY OF ARBITRARINESS, EXCEPT THE CONTENTION THAT THE HAMMER HAD BEEN USED ON ANOTHER PROJECT.**

An examination of the particular Interrogatories (R. 146) and the Answer thereto, (R. 44, 45) indicates the following question:

3. "What facts evidence proposed tests or suggestions did the plaintiff present to defendant to show that plaintiff's Del Mag D-12 Diesel Hammer, *and* possess the energy rating which plaintiff claimed."

The answer to that interrogatory is, as follows:

3. "Nothing was presented at that particular time, other than the fact that the defendant had approved the use of another job and the fact that the manufacturer had made this particular rating."

The question and answer indicate clearly that no arbitrariness or unreasonableness is being discussed or even contemplated. The question simply asks the plaintiff to tell what facts, evidence, proposed tests, or suggestions were presented to the defendant to demonstrate the energy rating of the D-12 Hammer. The answer given relates to the particular time of making the test and indicates that two evidences of the energy rating were stated, i.e., the prior approval of use on another job, and the fact that the manufacturer had made the rating. The arbitrariness involved in this First Cause of Action has to do with many other facts than with the actual rating of the hammer. The actions of the State leading up to the test, the actions of the State during the test, as well as the subsequent actions of the State after the test in its disregard of the energy rating, are facts relating to arbitrariness. Furthermore, the State admitted and recognized that the D-12 Hammer had a proper rating (R. 49), and further recognized that the testing was not for the purpose of determining the rating, but was made merely to compare the appellant's D-12 Hammer with some other hammer furnished by appellant's competitor (R. 55), which latter hammer was in no way comparable to appellant's hammer.

The Court misinterprets the interrogatory and answer thereto in stating that the appellant "admits it had nothing to show by way of arbitrariness . . . except that the hammer had been used on another job by partners . . ." Obviously, the answer does not so admit, but it also states, and this the Court ignores, that appellant informed respondent of the actual manufacturer's rating. The answer also limits the question to the actual conducting of the test. In appellant's Motion for Reconsideration, the facts leading up to the test are set forth in Paragraphs (c), (d), (e), (f), (g), (h), (i) and (j). (R. 74-77).

The same Answers to Interrogatories indicate other facts upon which the appellant relied to show the arbitrary actions of the State. It is not fair nor accurate to isolate Answer No. 3 and give it the broad effect which the trial court did to the complete disregard of the other Answers to Interrogatories. The Interrogatory and the Answer thereto upon which the trial court relies simply has nothing to do with an admission as to lack of arbitrariness. It states simply that at the time of the test, appellant informed respondent that it had already used the hammer on a prior job, which was accepted by the State, and that the rating of the hammer complied with the specifications. As appellant set forth in its Motion for Reconsideration, the State was well aware of the problems relating to the testing it was going to undertake and was well aware of the inadequacies of this testing and of the fact that it did not comply with the requirements of the speci-

fications. In no way can it be said that the appellant admitted that the only evidence of arbitrariness was the rating of the hammer and the fact that it was used on the prior job.

**C. THE COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE PLAINTIFF COULD NOT RECOVER ON THE FIRST CAUSE OF ACTION.**

The Pre-Trial Court, in its Order, held:

“as a matter of law that the plaintiff is not entitled to recover on the First Cause of Action.” (R. 71).

This determination puts in issue the sufficiency of the appellant's claims much in the same fashion as does a Motion to Dismiss. Therefore, all of the allegations of the Complaint and Amended Complaint must be taken as true. The Court thus in effect states that the First Cause of Action does not state a proper claim against the defendant. This determination is in error. The elements of the allegations should be considered and are summarized, as follows:

**ALLEGATIONS OF THE PLEADINGS**

(a) That Harlin and the State entered into the construction contract. (R. 1).

(b) That the contract contained the following General Condition:

“Combustion-type pile hammers may be used in lieu of air or steam hammers, providing a rating (energy per blow) mutually agreed upon by the Contractor and the Chief Structural Engineer is established prior to use.”

The contract also contains the Special Provisions that the minimum energy rating for a hammer shall be 18,000-foot pounds per blow. (R. 9).

(c) That Harlin bid and was awarded the contract in reliance upon said specifications and upon using its D-12 combustion hammer, which hammer had an energy rating of more than the required 18,000-foot pounds per blow, i.e., 22,500 foot pounds per blow; and, that said hammer did and would comply with specifications. (R. 9, 35).

(d) That the State breached the contract by not following the above specification, and determining the energy rating, but by adding another test not provided for in the specifications, to-wit, a test made to compare the driving ability of the D-12 hammer with another type hammer, and by requiring the driving ability of the D-12 hammer with another type hammer, and by requiring the plaintiff to use a combustion-type hammer with an energy rating of 39,500-foot pounds per blow, this exceeding the specification rating of 18,000-foot pounds. (R. 2, 9).

(e) That the State further breached the contract by arbitrarily, improperly, knowingly and

willfully disregarding the energy rating of the D-12 Hammer and rejecting the hammer based upon an inaccurate and inconclusive test which neither determined the energy rating nor in any way determined the capability or incapability of the D-12 Hammer to meet the specifications, and which test was initiated and carried out by appellant's competitor. (R. 9).

(f) That Harlin also relied upon the fact that the State had previously agreed to the 18,000 rating and to the use of the D-12 Hammer on the subject project, in accordance with the said General Condition; that Harlin had, therefore, complied with the specification, and that the State had breached the specification by not permitting the use of the D-12 Hammer.

(g) That in the absence of a specific agreement, the State was estopped to deny the use of the hammer by reason of the fact that the same hammer had been used and accepted upon the 21st South project by the State immediately prior to the letting of the subject contract under the same General Conditions and Special Provisions, with the same Chief Engineer for the State, upon a similar project and with the Tolboe & Harlin Construction Company, with which there was privity down to the plaintiff and appellant herein; and, that the State had knowingly maintained the same General Conditions and Special Provisions,

and had known that the same hammer would be used on the subject project.

(h) That the State had waived the requirement that the used of the hammer be agreed to. (R. 2. 9).

The foregoing allegations more than adequately state a claim for a breach of contract by the State under the following principles of law:

### BREACH OF CONTRACT

The General Condition set forth in (b) above, permits use of the hammer, if the hammer has the proper energy rating and if the rating is agreed to by the State. The Special Provision modifies the General conditions and sets the minimum rating for the hammer at 18,000-foot pounds per blow. The Contractor is entitled to rely upon this specification and upon the conditions imposed therein governing the use of the hammer, to-wit, the agreement as to the energy rating. Although it certainly may be argued that the Special Provision modifies the General Condition and establishes the rating for purpose of the agreement and in effect eliminates the necessity of an agreement, except as to a determination of the actual rating of the hammer itself. *Wunderlich vs. United States, ex rel Reischell-Cottrell*, 240 Fed. 2d 20 (C.C.A. Tenth). Even though the specification is permissive, it is a representation upon which the Contractor may rely.

*F. H. McGraw vs. United States*, 82 Fed. Supp. 338; and, *Johnson vs. United States*, 153 Fed. 2d 846.

Here, the State allegedly (R. 44) and admittedly (R. 55, 142) was not testing the energy rating, but was instead imposing another test—one of comparison as to the ability of the two hammers to penetrate a dense strata of ground. This was a condition outside of the specifications and an attempt to impose into the problem the Chief Engineer's opinion, thus constituting a clear breach of the contract.

In *Midgley vs. Campbell Building Company*, 38 Utah 293, 112 Pac. 820, this very question was before our court. In that case, the contractor was required to furnish goods "in each case in strict accordance with the plans and specifications." However, the Architect rejected the goods upon another basis. The court held that this was arbitrary and was a breach of the contract, and that the goods would have to be rejected for failure to comply with the specifications, and not for failure to comply with some other requirement.

In *Davies vs. Kahn*, 251 Fed. 2d 324, the court held to the same effect and stated:

"Unless authorized by the contract, an Architect has no inherent power to insist on an article of particular manufacture not specified in the contract over one that in all respects responds to the contract."

In *United States vs. Adams*, 160 Fed. Supp. 143, 358 Fed. 2d 986, the Government Inspector required

the Contractor to perform tests beyond those called for in the specifications. The court recognized the right to inspect, but held that:

“The inspections were arbitrary and not in conformity with the procedures and requirements as set forth in the agreed inspection plan.”

Judgment was granted in favor of the contractor.

It is clear, therefore, that even without any arbitrariness on the part of the State, the deliberate use of a test not required or provided for in the specifications and exceeding that set forth in the specifications, constitutes a breach of the contract as a matter of law. Even in a case where the specifications do not establish the criteria for determining the operative fitness, our court, in *Haymore vs. Levinson*, 8 Utah 2d 66, 328 Pac. 2d 307, has held that:

“The better considered view, and the one we adhere to, is that the party favored by such a provision has no arbitrary privilege of declining to acknowledge satisfaction. . . .”

In *Volume 3 of McBride & Wachtel, Government Contracts, Law-Administration-Procedure*, at Paragraph 27.40, the writers state that:

“With respect to the impropriety of an inspection, a failure on the Government’s part to conduct an inspection or test in exact accordance with the contract specifications, makes that inspection unreasonable.”

Numerous Armed Services Board of Contract Appeal cases are cited in support thereof. See also *New York*

*Market Gardners Association vs. United States*, 43 Ct. Cls. 114; *Heid Bros., Inc. vs. United States*, 69 Ct. Cls. 704; and, *Lamport Manufacturing Supply Company vs. United States*, 65 Ct. Cls. 579.

Therefore, allegations either of the arbitrary or unreasonable refusal to agree, or allegations of the imposition of different tests than those provided for in the specifications are sufficient as a matter of law for a proper cause of action. At the very least, the allegations raise questionse of fact as to the arbitrary or unreasonable actions of the State.

## WAIVER OF CONDITIONS

Obviously, the State can waive a condition of the contract. Appellant has alleged such a waiver and such an allegation alone or in conjunction with a claim of estoppel is sufficient. See *New York Market Gardners Association v. U. S.*, supra; and *McBride-Wachtel*, supra, Par. 27.40.

## PRIOR AGREEMENT OF THE STATE

There is an allegation that the State had agreed upon and had accepted the use of the D-12 combustion hammer. If there is a prior agreement, then, of course, the State berached the contract by refusing to honor the condition which has been complied with by the Contractor. Obviously, evidence should be taken in connection with such an allegation of a prior agreement.

## EQUITABLE ESTOPPEL

Inasmuch as the Special Provisions establish a minimum energy rating of 18,000-foot pounds per blow, that Special Provision takes precedence over the General Condition which established the need for the parties to agree upon a rating. *Hollerback vs. United States*, 233 U. S. 165; and, *Erickson vs. United States*, 107 Fed. 204 (C.C.A. 9th). It certainly is reasonable to contend that no agreement was required. This contention is substantiated by the actual facts:

On the 21st South project, (R. 2, 10, 17 and 34) there was no specific agreement signed. However, the same D-12 hammer was used by the Contractor, was accepted by and approved by the State throughout the entire project, and in fact was accepted and approved by the State when the hammer was returned to that 21st South project after it had been wrongfully rejected on the subject project. (R. 65, 73-75, 78). As further indication of the waiver of the express agreement, appellant, when forced to obtain a new and larger Del Mag combustion hammer, used it on the subject job with the State's acceptance but without testing or without specific agreement by the State prior to use. Thus, the State, both under the allegations and under the general facts which would be shown in support thereof, had waived the requirement of an express agreement.

However, in addition to the foregoing waiver and in expansion thereof, the State, under the Doctrine of

Equitable Estoppel, cannot deny the use of the D-12 combustion hammer. The State knew of the use and the acceptance of the D-12 and its rating of 18,000-foot pounds per blow or more under the same General Conditions and the same Special Provision on the 21st South structure project. All conditions were identical to the subject problem, excepting that the contractor on the 21st South project was legally a different entity, but practically the same. In any event, there was privity between the Contractor on the 21st South job and the Contractor on the subject job through dissolution of the Tolboe & Harlin Construction Company partnership entity and transfer of assets, including the D-12 hammer to appellant. (R. 73, 74, 83).

The general rule as developed in the dissent in *State vs. Northwest Magnesite Company*, 182 Pac. 2d 543, is that:

“A Governmental agency may be estopped, as right and justice may require, where the act or contract relied on to create the estoppel was within its corporate powers, although the method of exercising the power was irregular or unauthorized.” (Citing 31 *C.J.S.*, *Estoppel*, par. 144).

The principle of equitable estoppel is followed in Utah and is enunciated in various cases, such as: *Tanner vs. Provo Reservoir Company*, 76 Utah 335, 344; *I.X.L. Stores vs. Success Markets*, 98 Utah 160, 166; *Kelly vs. Richards*, 95 Utah 560; and, *Union Tank Car Company vs. Wheat Bros.*, 15 Utah 2d 101.

The plaintiff-appellant herein can take advantage of this estoppel even though it is legally and technically a different entity, since estoppel enures to the benefit of those in privity. 19 *Am. Jur.*, Page 809. But even privity is unnecessary, if the one making the representations knows or should have known that the other party will rely thereon. 31 *C.J.S.*, Paragraph 130. The facts, as to whether or not the necessary elements of estoppel exist are, of course, for the trier of the facts, in this case the jury, to determine. *Albers vs. Los Angeles County*, 398 Pac. 2d 129.

Many facts exist in support of the theory of estoppel, and the facts are set out in part in the Memoranda (R. 83, 84 )and in the Motion for Reconsideration. (R. 73-75). However, the allegations are sufficient and this issue, both as a matter of law and of fact, should have been retained in the First Cause of Action.

Therefore, we can only conclude that the allegations of the First Cause of Action state a claim on several different theories. The trial court in its Pre-Trial Order and thereafter at the trial, summarily disposed of the First Cause of Action without properly taking into account the legal bases for the cause and without considering many facts relating thereto. By this summary disposition, the appellant was effectively prevented from having his day in court. Under the law and under the facts also as they would have been developed, plaintiff was entitled at the very least to a trial on the issues. Under the law cited above, however,

appellant would have been entitled to a judgment of liability against the State as a matter of law upon the breach of contract theory.

**D. THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE CLAIMS OF ARBITRARINESS WERE INSUFFICIENT.**

The very statement of the holding indicates its error. The arbitrary disregard of the specifications is as a matter of law sufficient to permit recovery on the part of the plaintiff-appellant. The cases cited above clearly so hold.

Furthermore, the court's conclusion that the claims were not sufficient as a matter of law are contradictory to the statement of the claim in the Pre-Trial Order. There is no evidence nor any legal basis for determining that the claim of arbitrariness is insufficient. The Court only relies in some fashion upon the alleged admission found in the answer to Interrogatory No. 3 of Set No. 2. However, such a reliance is so plainly erroneous when the actual interrogatory and its answer are read, that even that has no basis whatsoever as an admission. Furthermore, the State recognized (R. 55) that it was not concerned with the energy rating, but only with comparing the D-12 with the Raymond hammer. Thus, the answer to the interrogatory, which merely states that the plaintiff-appellant informed the State of the rating at the time of the test, does not

limit the arbitrary action of the State, but instead adds to it. However, it is clear that other events lead up to the test, including meetings on June 3 and again on June 7th. (R. 73-81; letter of June 13, 1963 from Harlin to the Project Engineer). The additional bases for arbitrariness are set forth in Answers to Interrogatories furnished by the plaintiff-appellant; (R. 44) in Affidavits by the plaintiff; (R. 53, 54) and in Answers to Interrogatories of the subject Set No. 2. (R. 44, 45). Thus, at the very least, the Pre-Trial Court had before it many factual statements which precluded any determination as a matter of law that the admission limited the arbitrariness claimed by plaintiff.

## POINT II

### THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND AMENDMENT OF THE PRE-TRIAL ORDER.

After receiving the aforesaid Pre-Trial Order, appellant immediately filed a Motion for Reconsideration, setting out in considerable detail the different facts and issues which substantiate the ultimate issues raised in the pleadings. The court's refusal to amend the Pre-Trial Order resulted in manifest injustice and was contrary to the spirit and intent of Rule 16 concerning the Pre-Trial Orders, and also Rule 15 relating to the amendment of pleadings.

The courts uniformly have considered the Pre-Trial Order Rules and the Amendment of Pleadings Rule as related in the effectuating of justice in our judicial system. Amendments to the pleadings and to the Pre-Trial Orders are generally granted so that the parties can go to trial on meritorious issues. *Hancock vs. Luke*, 46 U. 26, 38. Especially is this so where the Pre-Trial Order does not reflect the contentions of the parties. In *Calvin vs. West Coast Power Company*, (Ore.) (1941) 2 F.R.D. 248, the court held:

“Where the Pre-Trial Order does not properly reflect the contention of the parties, it may be set aside before the trial and a new conference ordered.”

Again, in *King vs. Edward Hines Lumber Company*, 68 Fed. Supp. 1019, 1021, the court stated:

“Permission has not been denied the counsel in cases where Pre-Trial Conferences were held, to change the form of an admission or even its substance before the final crystalization of the Pre-Trial Order.”

Here, our Pre-Trial Order, contrary to the usual practice, gave no period within which the parties could object thereto. Appellant had only one means to attempt to amend the June 23rd Pre-Trial Order in order to properly set out the issues, and that was its Motion for Reconsideration, filed July 6. (R. 73-81).

In *McDowall vs. Orr Felt & Blanket Company*, 146 Fed. 2d 136, the court, in reversing the refusal of the trial court to amend the pleadings in order to set up additional facts, considered Rules 15 and 16 as compatible, and stated:

“To permit the submission of the actual facts, or what is contended to be the actual facts of the present controversy, is here required for a just disposition of the case, and leave to amend should have been granted.”

Again, in the annotation at 22 *A.L.R.* 2d 613, the annotator states:

“The courts manifest an inclination to grant or deny an amendment on a Pre-Trial Order on much the same grounds and conditions as those influencing the granting or denial of motions to amend the pleadings.”

In *Maryland Casualty Company vs. Reichenmaker*, 146 Fed. 2d 75, the court reversed the trial court's refusal to permit the injection of new issues where the parties had stipulated to a contrary fact situation. The court therein held that the spirit of the exception to Rule 16 concerning the modification of the Pre-Trial Order at the trial to prevent manifest injustice, was consistent with Rule 15 (a), providing that leave to file amended pleadings would be freely given when justice so requires.

In our own court in *Reich vs. Christopoulos*, 123 Utah 137, the issues at the trial exceeded those in the Pre-Trial Order, and an amendment of the Pre-Trial

Order was permitted. This court cited Rule 15, permitting amendment of the pleadings, and stated:

“It would be anomalous if the pleadings could be so amended but the Pre-Trial Order could not . . . the amendment was equivalent to an amendment to conform to the evidence. The trial court did that which was necessary and proper to effectuate justice.”

In *Miles vs. Pennsylvania Railroad Company*, 158 Fed. 2d 326, the issue was whether the deceased was an employee or not. The plaintiff had asked for a jury, but had agreed to certain facts subject to reserving the rights of each party to introduce additional evidence. The trial court was held to have improperly denied these issues as a matter of law, but should have proceeded to trial on the facts.

The Pre-Trial Court and Trial Court has thus effectively prevented any amendments to the pleadings, and turned the Pre-Trial into a summary judgment proceeding without proper notice, or legal factual basis. This has deprived appellant of a substantial right to trial and is manifestly without justice.

### POINT III.

#### THE COURT ERRED IN DENYING PLAINTIFF ITS RIGHT TO A JURY TRIAL.

The issue of performance of a contract or compliance with the specifications is factual. The issue of

arbitrariness is likewise factual. 13 *Am. Jur.* 2d, Pa. 129, and 54 *A.L.R.* 1268. The existence of the elements of equitable estoppel also involves a determination of facts. *Albers v. Los Angeles County*, supra.

It is true that at the time of the Pre-Trial Order, a Demand for Jury had not been made, but it is also true that at the time plaintiff-appellant moved to amend the Pre-Trial Order and to include the First Cause of Action in the trial of the case, a Demand for Jury had been filed, and the case was to have been tried by a jury.

Under *Rule 38, Utah Rules of Civil Procedure*, and under the many cases decided by this court, including *James Manufacturing Company vs. Wilson*, 15 Utah 2d 210, 390 Pac. 2d 127; *Holland vs. Wilson*, 8 Utah 2d 11, 327 Pac. 2d 250; and *Finlayson vs. Brady*, 121 Utah 204, 240 Pac. 2d 491, a party is entitled to a jury trial.

In order to preserve the record and to give this Appellate Court the facts upon which it could properly and intelligently determine whether or not the plaintiff-appellant had a proper claim, the appellant sought to make a proffer of proof before the trial. This proffer was denied and such denial is prejudicial to appellant, and is substantial error. It has prevented appellant from properly presenting this appeal record.

## SUMMARY

Appellant Harlin, through the summary disposition of the First Cause of Action at the Pre-Trial stage, the summary denial of the right to amend the Pre-Trial Order by the Pre-Trial Judge, the further denial of the Trial Judge to permit amendment of the Pre-Trial Order, and the denial of the right to try the First Cause of Action, together with the denial of the right to make a proffer of proof, have resulted in extreme and manifest injustice to appellant. Legally, as the citations show, he has a good cause of action against the defendant. Factually, he can support and prove under the required burden of proof the allegations set forth in his pleadings. It is, therefore, equitable and just, as well as legally proper, for this Court to permit a trial upon the issues in the First Cause of Action. To this end, appellant respectfully requests that the Orders of the Pre-Trial Judge and the Trial Judge be reversed, that the proffer be allowed, and that the First Cause of Action be set down for trial in the District Court.

Respectfully submitted,

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