

1967

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

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JUN 22 1967

IN THE SUPREME COURT
OF THE STATE OF UTAH

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

Plaintiff-Appellant,

v.

UTAH STATE ROAD COMMIS-
SION,
Defendant-Respondent.

Case No.
10773

BRIEF OF RESPONDENT

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

UNIVERSITY OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. P. HARLIN CONSTRUCTION COMPANY, a Utah corporation, <i>Plaintiff-Appellant,</i>	}	Case No. 10773
v.		
UTAH STATE ROAD COMMIS- SION, <i>Defendant-Respondent.</i>		

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

The appellant brought suit against the respondent, setting forth three separate causes of action, wherein it was alleged that the respondent had breached certain contracts between the parties, which contracts involved the construction of certain portions of Interstate 15 projects. The present appeal challenges only the validity of the pretrial court's dismissal of appellant's first cause of action.

DISPOSITION IN THE LOWER COURT

In a pretrial order (R. 70, 71, and 72), the pretrial court, the Honorable A. H. Ellett, dismissed appellant's first cause of action. A motion for reconsideration of the pretrial order (R. 73-81) was also denied by the pretrial court (R. 86). A petition for interlocutory appeal was subsequently denied by this court.

Prior to trial, appellant's motion to amend the pretrial order and to permit a trial of the first cause of action (R. 91, 92) was argued by the parties before the trial court, and this motion was also denied. Trial then proceeded on the second and third causes of action set forth in the appellant's complaint.

RELIEF SOUGHT ON APPEAL

Respondent submits that the dismissal of appellant's first cause of action should be affirmed.

STATEMENT OF FACTS

Because of the numerous references to the record that are intertwined into respondent's arguments, the following statement of facts will merely attempt to set forth those facts basic to the dispute.

The parties entered into a contract for the construction of certain Interstate 15 overpass structures at Second South and Eighth West, Salt Lake City, Salt Lake County, Utah (R. 1). As a prerequisite to

the construction of these structures, pilings to support the foundations of the structures were to be driven. The State of Utah Standard Specifications for Road and Bridge Construction, which were incorporated into and which constituted a part of the construction contract (R. 9), set forth in detail the manner and equipment to be used by the contractor when driving pile (R. 7, 9). A minimum energy rating of 18,000 pounds per blow was also established (R. 9).

Appellant attempted to use a combustion type hammer, known as a Del Mag D-12 on the project, and respondent refused to permit appellant the use of this hammer. This refusal constituted appellant's first cause of action which was dismissed at the pretrial stage of the proceedings.

ARGUMENT

POINT I.

THE DISMISSAL OF APPELLANT'S FIRST CAUSE OF ACTION AT THE PRETRIAL STAGE OF THE PROCEEDINGS WAS WITHIN THE AUTHORITY OF THE PRETRIAL COURT.

Because of the primary philosophy of Utah R. Civ. P. 16, i.e., the simplification and reduction to triable issues, only those issues which present a real controversy, it must be acknowledged that the pretrial court is vested with authority and also an obligation to dismiss a cause

of action where it is clear and apparent that the cause of action presents no real controversy. As stated in 1A Barron and Holtzoff, Federal Practice and Procedure § 471, at 830 (Rules ed. 1960):

[Two of the four general purposes of the pretrial rule are] 1. to identify, designate and clarify the true issues and eliminate the apparent issues which present no real controversy, [and,] 2. to offer a convenient opportunity for disposing of preliminary matters, such as dismissal . . . judgment. . . .

It is further stated in 1A Barron and Holtzoff, Federal Practice and Procedure § 483, at 846 (Rules ed. 1960):

A judgment of dismissal may be rendered where the admitted facts disclose fatal defects of jurisdiction or that there is no claim for relief upon which judgment can be granted.

The general rule also enunciated in 3 Moore, Federal Practice § 16.11, at 1115 (2d ed. 1966):

The pretrial conferences enable the parties, under the mediation of the court, to crystallize these issues and eliminate those which are not controverted or *which use of the deposition and discovery procedure has shown to be without merit.* [Emphasis added.]

In *Wirtz v. Young's Electric Sign Co.*, 315 F.2d 326 (10th Cir. 1963), the court stated, 315 F.2d at 327:

Summary disposition of a cause may logically and properly follow a pretrial conference when the pretrial procedure has disclosed the lack of

a disputed issue of material fact and the fact so established indicate an unequivocal right to judgment favoring a party.

Also, in *Silvera v. Broadway Dep't Store, Inc.*, 35 F. Supp. 625 (S.D. Cal., 1940), the court stated, 35 F. Supp. at 627:

The court has power under pretrial rule No. 16 to dismiss when the facts submitted and proved show no cause of action.

Therefore, as a general proposition, a pretrial court may, when the record discloses an issue which presents no real controversy, dismiss the cause of action based on that issue.

However, the record in the instant case indicates that the dismissal of appellant's first cause of action at the pretrial hearing actually constituted a granting by the pretrial court of respondent's motion for summary judgment. The record discloses that the respondent filed a motion for summary judgment (R. 48) with supporting affidavits (R. 49, 50, 50A and 50B). Appellant also filed a motion for summary judgment and a traverse to defendant's motion for summary judgment (R. 51) with supporting affidavits (R. 53 and 54). Memoranda in support of the respective motions were submitted (R. 60-64 and 65-69). The record further disclosed that respondent served notice on the appellant that the respondent's motion for summary judgment would be made at the pretrial hearing (R. 47). Based on the record, it is apparent that the dismissal of appellant's

first cause of action was tantamount, if not in fact, a granting by the pretrial court of the respondent's motion for summary judgment.

The propriety of a pretrial court to grant a summary judgment was considered by the Supreme Court of New Jersey in *Sheild v. Welch*, 4 N.J. 563, 73 A.2d 536 (1950). The court stated, 4 N.J. at 566, 73 A.2d at 537:

It is further observed that at the pretrial conference memorandum of law were directed to be submitted to the court; that such memoranda in which the party stated their respective positions and their impressions of the applicable law were accordingly filed; that the memorandum filed by the defendant concluded with the following statement: *'We respectfully submit that plaintiff is not entitled to a judgment, but that her action should be dismissed and no cause entered, and that thereafter the court entered summary judgment in favor of the defendant.'* Thus it appears that the opportunity to fully argue the substantive question was availed of by the respective parties. The court concluded that the case resolve itself into a question of law and accordingly entered summary judgment for the defendant. [Emphasis added.]

The court concluded, 4 N.J. at 567, 73 A.2d at 538:

We agree with the county court, for reasons hereinafter stated, that the only questions involved in the pretrial conference was one of law. Under such circumstances and in view of the fact that the substantive question was fully presented to the court by the respective parties we find no

procedural impropriety in the court's hearing of a summary judgment.

It is respectfully submitted that the pretrial court's dismissal of plaintiff's first cause of action was in fact a granting of respondent's motion for summary judgment. Therefore, as stated in 6 Moore, Federal Practice § 56.27 (1), at 2973 (2d ed. 1966):

Where a timely appeal is taken from an appealable order granting summary judgment, the appellate court in reviewing must determine whether there is any genuine issue of material fact underlying the adjudication, and, if not, whether the substant of law was correctly applied.

Based on the following arguments, respondent respectfully submits that the dismissal of appellant's first cause of action by the pretrial court was proper because of the failure of that issue to present a real controversy and also because of the failure of that issue to present a disputed issue of material fact.

POINT II.

APPELLANT'S ALLEGATIONS SET FORTH TO ESTABLISH A BREACH OF CONTRACT ON THE PART OF THE RESPONDENT DO NOT, AS A MATTER OF LAW, CONSTITUTE A DISPUTED MATERIAL ISSUE OF FACT.

Appellant has relied on several theories and allegations to establish the existence of a disputed material

issue of fact. Each allegation will be rebutted by the respondent and the record.

EQUITABLE ESTOPPEL

Appellant alleges that the Del Mag D-12 combustion type hammer that appellant sought to use on the subject project was used and accepted by the respondent on a prior project identified as the 21st South project (R. 2, 10, 17, and 34). Because of this prior use, appellant contends that the respondent is now estopped from denying appellant the privilege of using the same hammer on the present project. The general rules governing the applications of the doctrines of estoppel as applied to a state or state agency are set forth in Annot. 1 A.L.R.2d 338, 360 (1948):

Generally speaking, the doctrine of estoppel will not be applied against any governmental agency such as a commission or a board acting in its public capacity.

The rule is further stated in 28 Am. Jur. 2d, *Estoppel and Waiver*, § 123, at 784 (1966):

Thus, as a general rule, the doctrine of estoppel will not be applied against the state in its governmental, public, or sovereign capacity. . . .

It is elementary that the construction, maintenance, and repair of a highway system is a governmental function. *Villages of Eden and Hazelton v. Idaho Bd. of Highway Directors*, 83 Idaho 554, 367 P.2d 294 (1961); *State v. State Comm'n of Revenue and Taxation*, 163

Kan. 240, 181 P.2d 532 (1947); *Almond v. Gilmer*, 188 Va. 822, 51 S.E.2d 272 (1949); *Yarrow v. State*, 348 P.2d 687 (Cal. 1960); 40 C.J.S., *Highways*, § 177 (1945).

Equally well established is the doctrine that the state, when acting in its governmental capacity, cannot be estopped notwithstanding the unauthorized acts of its agent. *State v. Jacobi*, 73 Ariz. 193, 239 P.2d 1081 (1952); *Wheeler v. Santa Ana*, 181 P.2d 373 (Cal. 1947).

In *Main v. Dep't of Highways*, 206 Va. 143, 142 S.E.2d 524 (1965), plaintiffs contended that during the preparation of their bid, representatives of the defendant had assured them that a number of sources of select material located within the roadway limits would be of sufficient "CBR value" and of suitable quality to be employed for the select material requirements of the contract. Relying on the representations, the plaintiffs submitted a bid totalling a certain amount. Subsequently, defendant notified plaintiffs that the material was unsuitable and that plaintiffs would be obligated to secure select material outside the designated area. To do this, the plaintiffs incurred additional costs not reflected in the original bid submitted to the defendant. The plaintiff alleged that the defendant had waived and was estopped to invoke those certain contractual provisions which authorized the defendant to direct the plaintiffs to obtain a new source of select material. The court held, 206 Va. at 150, 142 S.E.2d at 529:

But, aside from this, it is well settled that the doctrine of estoppel does not apply to the rights of a state when acting in its sovereign or governmental capacity.

'The plaintiffs' complaint was accordingly dismissed.

In the instant case, appellant alleges that respondent is estopped because of appellant's use of the combustion type hammer on a prior project, to presently insist on compliance with the contractual provision that requires a mutual agreement between the contractor and respondent's chief structural engineer for the use of a combustion type hammer on a project prior to the actual use of this type hammer. As supported by the authorities, such an argument is untenable as a matter of law.

In addition to the general principles stated above, it must be noted that, even assuming *arguendo* that appellant's combustion type hammer was used on a prior project, the record reveals that this prior use was not accomplished or pursuant to the contractual provisions. The State of Utah Standard Specifications for Road and Bridge Construction, § 5-10.2, provide:

Combustion type pile hammers may be used in lieu of air or steam hammers, provided a rating (energy per blow) *mutually agreed upon by the contractor and the chief structural engineer is established prior to use.* [Emphasis added.]

In response to respondent's interrogatories, appellant answered (R. 34):

The acceptance was oral and occurred by reason of the fact that the defendant was informed of the use of the Del Mag D-12 hammer. . . .

This answer conclusively establishes that a mutual agreement was not effectuated between the contractor and respondent's chief structural engineer prior to the use of the Del Mag D-12 combustion type hammer on the prior project. Rather, respondent was merely "informed of the use."

A further indication of the noncompliance with the above-quoted section of the State of Utah Standard Specifications for Road and Bridge Construction is appellant's further answer to respondent's interrogatory that, "Maurice Anderson and Ray Behling, employees of the defendant, approved this use" (R. 34). The above-quoted section specifically requires that the agreement be between the contractor and the respondent's chief structural engineer. Nowhere is it alleged in the record that the prior use of appellant's combustion type hammer was pursuant to a mutual agreement with respondent's chief structural engineer prior to the actual use of the hammer. Neither of the two employees alleged by appellant to have approved the use of appellant's hammer on the prior project occupied the position of chief structural engineer of respondent at the time the alleged approval was given. This court may take judicial notice of the official records of the Utah State Road Commission and conclude neither employee, in fact, occupied the position of respondent's chief structural engineer. *Borrson v. Missouri-Kansas-Texas R.R.*, 172

S.W.2d 835 (Mo. 1943); *State v. Fischer*, 17 Wis.2d 141, 115 N.W. at 553 (1962); *American Fork Irr. v. Linke*, 121 Utah 90, 239 P.2d 188 (1951).

Therefore, the appellant may not rely on the alleged prior approval of respondent as a basis for presently estopping respondent from permitting appellant to use the hammer on the present project because the contractual provisions in force at the time were not complied with when the prior approval was allegedly given.

Appellant cites the dissent in *State v. Northwest Magnesite Co.*, 28 Wash.2d 1, 182 P.2d 643 (1947), as establishing the general rule. However, respondent submits the rule is more accurately stated by the majority, 28 Wash.2d at 28, 182 P.2d at 657:

The doctrine of estoppel cannot be invoked to enforce the promise of an officer or agent against a corporation or government, if such representative person had no legal capacity or power to enter into such an obligation.

Appellant also fails to recognize that the legal entity which was the recipient of the alleged prior approval is not the same legal entity that is presently attempting to gain the benefits of the alleged prior approval. A more flagrant shortcoming of appellant's argument is that the argument fails to recognize the obvious possibility, and in fact the probability, that the actual construction sites and conditions, such as subterranean conditions, would vary greatly between the two projects. Therefore, appellant cannot claim a justifi-

fied reliance on the alleged prior approval of the use of the combustion type hammer as being tantamount to and a basis for estopping the respondent from subsequently refusing to allow the use of the combustion type hammer on the present project.

It must also be noted that the cases cited by appellant do not support his position. In *Tanner v. Provo Reservoir Co.*, 76 Utah 335, 289 Pac. 151 (1930); *I. X. L. Stores v. Success Mkt.*, 98 Utah 160, 97 P.2d 577 (1939); *Kelly v. Richards*, 95 Utah 560, 83 P.2d 731 (1938) and *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101, 387 P.2d 1000 (1964), appellant must concede that the issue of applying the doctrine of estoppel to governmental agencies is not discussed. The cases are, therefore, immaterial as to the present consideration.

It is, therefore, respectfully submitted, that appellant's allegation of equitable estoppel must be denied as a matter of law.

WAIVER

Respondent submits that the proposition that the state may waive a contractual condition is not applicable to the present factual situation. As stated in 28 Am. Jur., *Estoppel and Waiver*, § 157, at 840 (1966):

Voluntary choice is of the very essence of waiver. It is a voluntary act which implies the choice by the party to . . . forego some right or advantage which he might at his option have demanded and insisted on.

It is further stated in 28 Am.Jur., *Estoppel and Waiver*, § 158, at 842 (1966) :

Indeed, the essence of a waiver, as indicated by its definition, is *the voluntary and intentional relinquishment* of a known right. [Emphasis added.]

If appellant is attempting to apply the doctrine of waiver to the alleged prior approved use of appellant's combustion type hammer on the 21st South project, it must be noted that the alleged waiver was not executed by the only person authorized to waive the contractually established requirement. In any event, such a prior waiver of the contractual condition would not apply to the subsequent independent contract and project. A waiver does not relate forward to affect future agreements, and a present waiver of a certain contractual condition does not operate as a prospective waiver of all similar future conditions. 28 Am. Jur. 2d, *Estoppel and Waiver*, § 157 (1966).

To allege that the doctrine of waiver of the contractual condition applies to the present construction contract and project is to ignore the fact that the basis of the present controversy between appellant and respondent stems from the refusal of the respondent to allow appellant the use of the combustion type hammer on the present project.

Under all considerations, the doctrine of waiver must be denied as a matter of law.

PRIOR AGREEMENT OF THE STATE

Respondent submits that appellant's allegations concerning a prior agreement by respondent have been sufficiently answered in the considerations of appellant's contentions of equitable estoppel and waiver of conditions. However, it must be noted that nothing in the record indicates a prior agreement between appellant and respondent's chief structural engineer applicable to the present construction contract and project. The prior agreement alleged by appellant is obviously the alleged prior agreement given at the 21st South project. This contention, having previously been answered, must also fail as a matter of law.

BREACH OF CONTRACT

The State of Utah Standard Specifications for Road and Bridge Construction, §5-10.2, require a mutual agreement between the contractor and respondent's chief structural engineer establishing the energy rating of a combustion type hammer before that type hammer may be used on a project. In *Murphy v. Salt Lake City*, 65 Utah 295, 236 Pac. 680 (1925), the contractor alleged that the architect had arbitrarily and capriciously refused to inspect a certain type terra cotta proposed by the contractor to be utilized in the construction of the contract project. This court concluded that the facts fell within the category whereby a contractor may furnish or be allowed to use a substitute article of a similar nature to the particular articles specified in the contract,

provided that the substitution be approved by the owner or another designated person. On this basis, the court concluded, 65 Utah at 303, 236 Pac. at 683:

That under [this situation] the owner is entitled to the article stipulated for unless he or the person named approves a substitute, and in approving or in refusing to approve a substitute, *the judgment of the owner or person named must prevail unless he acts in bad faith*. A mere error of judgment in that regard is not sufficient to entitle the contractor to relief at the hands of a court of justice. [Emphasis added.]

In answer to respondent's interrogatory 1-C of set II (Supp. R. 147), appellant conceded that there was no "bad faith" on the part of the respondent's chief structural engineer in the rejection of appellant's combustion type hammer (R. 44). Therefore, by appellant's own admission that the respondent's chief structural engineer acted without "bad faith," appellant's alleged breach of contract must fail as a matter of law. This doctrine, that a contracting party is entitled to that which is contracted for, and that the refusal to allow a substitute will not give rise to a cause of action unless that refusal is grounded on bad faith, is well supported by the authorities. *McGrath v. Electrical Constr. Co.*, 370 P.2d 231 (Ore. 1962); *Benjamin Foster Co. v. Commonwealth*, 61 N.E.2d 147 (Mass. 1945).

This court, in *Campbell Bldg. Co. v. State Rd. Comm'n*, 92 Utah 242, 70 P.2d 857 (1937), stated, 95 Utah at 266, 70 P.2d at 868:

When the parties to a contract agree that the architect or engineer or other person shall exercise power of decision, the courts will uphold such as valid and the decision must stand unless shown to have been made arbitrarily or in bad faith.

As stated above, appellant admitted that the respondent's chief structural engineer did not act in a manner allowing a finding that the actions constituted bad faith. Generally, to act arbitrarily, includes the element of bad faith. As stated in *Goodrum v. State*, 158 S.W.2d 81, 86 (Tex. 1942):

The word 'arbitrary' has been used on numerous occasions by our courts in defining the type of conduct which would prevent the decision of an architect or engineer from becoming final *and has been expressly held to contemplate 'bad faith.'* It is defined as failure to exercise an honest judgment. [Emphasis added.]

The court further stated, 158 S.W. 2d at 87:

[arbitrary is further defined as] fixed or done capriciously or at pleasure; without adequate determining principle . . . nonrational; not done or acting according to reason or judgment . . . tyrannical; despotic.

It may not be said that the respondent's chief structural engineer acted in any manner that may be considered arbitrary. For example, the record indicates one reason why respondent's chief structural engineer did not accept the manufacturer's energy rating of appellant's combustion type hammer. This was because the California Division of Highways had rated appel-

lant's hammer at 16,500 foot pounds per blow or approximately 75 percent of the manufacturer's rating of 22,500 foot pounds (R. 50A). Appellant concedes that the energy rating requirement on the subject construction project was 18,000 foot pounds per blow (R. 10). To acknowledge respondent's chief structural engineer's awareness of the California Division of Highways' energy rating of plaintiff's combustion type hammer to be 75 percent of the manufacturer's rating, but to insist that respondent's chief structural engineer should have nonetheless authorized the use of appellant's combustion type hammer on the project, would be a prohibition against respondent's chief structural engineer utilizing his best judgment based on his experience, expertise and other known facts. In light of the respondent's chief structural engineer's knowledge, rejection of the appellant's combustion type hammer was not only an exercise of good judgment, but also mandatory by the terms of the contract which provided an energy rating of 18,000 foot pounds per blow. The statement found at page eleven of appellant's brief that, "Furthermore, the State admitted and recognized that the D-12 hammer had a proper rating," is completely erroneous. Respondent's chief structural engineer agreed that the manufacturer's rating was 22,500 foot pounds per blow, but disagreed with the manufacturer's rating in light of the rating given the combustion type hammer of appellant by the California Division of Highways (R. 50A).

The issues to whether respondent's chief structural engineer acted arbitrarily must be examined not only in

light of the chief structural engineer's knowledge and expertise, but also in light of the total circumstance that surrounded the rejection of appellant's combustion type hammer.

Appellant, in response to respondent's interrogatory 1(A) (Supp. R. 146), answered:

The very facts surrounding the test indicated that they were inaccurate, speculative and immaterial. All of those present could see or should have realized that the tests were inaccurate, speculative and immaterial. (R. 44.)

However, appellant also answered respondent's interrogatory 3 (Supp. R. 147) :

Nothing was presented at that particular time, other than the fact that the defendant had approved the use on another job and the fact that the manufacturer had made this particular rating. (R. 45.)

Where the pretrial court concluded that, although appellant alleged various inconsistencies in the conduct of the test of appellant's combustion type hammer, the admitted fact that nothing was done by appellant at that time, either in the form of proffered facts, evidence, suggestions, or proposed tests, appellant's allegation of arbitrary action must fail as a matter of law, such conclusion is not only logically mandatory, but also legally required. Although appellant now screams arbitrary unfairness, appellant took no such position at the vital time of the consideration of the fitness of appellant's combustion type hammer. To presently allege arbitrary

action, but to admit that at the time the alleged arbitrary action occurred, nothing was pursued by appellant to illustrate the arbitrary nature of the action is entirely inconsistent. The failure of appellant to object to the proposed test or in any manner present additional evidence or proposals bars appellant from presently recovering on the basis of such a claim. 3 McBride and Wachtel, *Government Contract*, § 27.40(12) (1966).

Further recognition must be given to the fact that before the energy rating of appellant's combustion type hammer is to be consistent with that of other type of hammers, the combustion type hammer must be able to drive piling to an equivalent depth as an air or steam hammer which has the same energy rating, i.e., the ability of the diesel hammer to penetrate the ground at critical depths of the construction site must be equivalent to that of the other type of pile hammers. If the ability of the combustion type hammer to penetrate the soil were less, the contract provision requiring a pile to be driven until it offers a specified resistance to the blow of the pile hammer would be complied with, but the pile would be at a more shallow depth with resulting less bearing capacity. As the record indicates (R. 50A) :

The specifications for pile driving equipment furnished on the west Salt Lake freeway projects require a pile hammer capacity of not less than 18,000 foot pounds per blow. In addition, a minimum blow count is required which exceeds the blow count required by the standard pile driving formulas for a given capacity. The intent of these requirements is to insure pile penetration of

dense but thin lenses of sand which are interspersed in soft material. These sand lenses might support a pile driven with a pile hammer of lesser capacity, or where lesser blow count is required, but would not properly support a cluster of piles.

Appellant may contend that these statement by the respondent's chief structural engineer may be rebutted at a trial of this issue on the merits. However, such an argument totally fails to recognize that the critical determination to be made is whether respondent's chief structural engineer acted in bad faith or arbitrarily. Therefore, the knowledge and expertise of respondent's chief structural engineer is precisely what that determination depends on. The record is clear that the actions taken by respondent's chief structural engineer in refusing appellant the use of the combustion type hammer on the subject project must be held to be as a matter of law, reasonable and free from all allegations of arbitrariness.

Appellant submits that *Midgley v. Campbell Bldg. Co.*, 38 Utah 293, 112 Pac. 820 (1911), supports his position. However, in that case, the articles furnished by a subcontractor and which were rejected by the supervising architects, 38 Utah at 299, 112 Pac. at 822:

. . . were in accordance with the plans, details, and specifications prepared by the supervising architect, and were in quality and character in every way equal to the requirements of the plans, details, and specifications, and that they fell short in the circumstance only that they were supplied by and purchased from Crane and Company instead of Clowe & Sons. . . .

The fact situation in *Midgley v. Campbell Blg. Co., supra*, is completely opposite to the fact situation of the instant case. The instant case is not concerned with the proposition that appellant's combustion type hammer admittedly complied in every manner with the specifications. Rather, the record is clear that the reasonable concern of respondent's chief structural engineer was that the combustion type hammer would not, in fact, comply with the specifications of the contract. Therefore, the cited case is not authority for appellant's position. Appellant also cites *Davies v. Kahn*, 251 F.2d 324, 328 (1958), for the proposition that "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." Again, this case does not support appellant's position because of respondent's chief structural engineer's conclusion that the appellant's combustion type hammer did not respond to the contract specifications.

The primary consideration in determining whether respondent breached the subject contract by and through the refusal of respondent's chief structural engineer to mutually agree to the use by appellant of the combustion type hammer on the project is whether respondent's chief structural engineer acted in bad faith or arbitrarily. Recognition must be given to respondent's chief structural engineer's admitted knowledge and expertise. The record is clear that respondent's chief structural engineer was aware of an official state energy rating that was in fact 75 percent that of the manufacturer of appel-

lant's combustion type hammer energy rating. It may not be said that, in light of this knowledge and expertise, respondent's chief structural engineer acted arbitrarily. Appellant's contention must fail as a matter of law.

POINT III.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND AMENDMENT OF THE PRETRIAL ORDER.

Respondent agrees that in certain instances, modification of a pretrial order should be allowed to prevent a manifest injustice. However, such was not the case in the instant matter. Appellant fails to recognize that no issue or contention in addition to the issues and contentions considered by the pretrial court were presented to the court in motion for reconsideration. In other words, the pretrial court was merely asked to reconsider the issues and contentions that it had previously considered at the pretrial hearing and reverse its conclusion. No authority is cited by appellant, and indeed no authority could be cited by appellant, sustaining the proposition that once a pretrial order has been entered, a motion by an allegedly aggrieved party to the pretrial court merely asking the court to reconsider its conclusions, automatically works as a basis on which the pretrial order may be reversed. In light of the fact that no new issue or contention was presented to the pretrial court at the motion for reconsideration, the pretrial court

merely adhered to the conclusions that had previously been reached. This does not constitute error.

Appellant's brief, at page 27, states, "The pretrial court and trial court [have] thus effectively prevented any amendments to the pleadings, and turned the pretrial into a summary judgment proceeding without proper notice, or legal factual basis." However, the record clearly establishes that respondent gave notice to appellant that respondent's motion for summary judgment would be made before the court at the time of pretrial (R. 47).

POINT IV.

DISMISSAL OF PLAINTIFF'S FIRST CAUSE OF ACTION AT THE PRETRIAL STAGE OF THE PROCEEDINGS DID NOT CONSTITUTE A DENIAL OF APPELLANT'S RIGHT TO TRIAL BY JURY.

Appellant's argument totally disregards the nature of a dismissal of a cause of action for the failure of the issues presented to present a real controversy or a disputed material issue of fact. As stated in 6 Moore *Federal Practice*, § 56.06 (2), at 2080:

If the only question involved in the litigation is one of law and there is no dispute as to material issues of fact, there is no room for a contention by the losing party that the granting of the motion for summary judgment deprives it of a jury trial.

The above-quoted proposition is supported by the great weight of authority. To support appellant's contention would be to completely hold void such rules of procedure as Utah R. Civ. P. 12(b), 12(c), and 56. The entire philosophy on which the Utah Rules of Civil Procedure is based is to allow, "... the just, speedy and inexpensive determination of every action." Utah R. Civ. P. 1. When the record discloses that the issues are not meritoriously presented, i.e., the issues fail to raise a disputed material issue of fact, it becomes the court's obligation to dismiss the cause of action based on those issues.

It is, therefore, respectfully submitted that the dismissal of appellant's first cause of action was proper and in accord with the Utah Rules of Civil Procedure and appellant's arguments must be denied as a matter of law.

CONCLUSION

Respondent submits that each allegation relied on by appellant to justify a trial of appellant's first cause of action on the merits has been rebutted. Each and every allegation must be denied as a matter of law and under no theory could appellant recover against the respondent at a trial on the merits. It is, therefore, respectfully submitted that the dismissal of appellant's first cause of action should be affirmed.

Respectfully submitted,

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