1967

Western Engineers, Inc., - Edwards And Kelcey v. State of Utah, By And Through Its Road Commission : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN ENGINEERS, INC.-
EDWARDS AND KELCEY,
Plaintiffs and Appellants,

vs.

STATE OF UTAH, by and through
its ROAD COMMISSION,
Defendant and Respondent.

Case No.
10919

RESPONDENT'S BRIEF

**Appeal from a Judgment of the District Court of Salt Lake County
State of Utah
Honorable Leonard W. Elton**

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NATURE OF CASE

Appellants' action originally included a number of claims for extra compensation under a written "Agreement for Engineering Services". Before pretrial all had been settled except a claim for damages on account of delays during performance of the contract.

At the pretrial conference, held three and one-half years after commencement of the action, respondent orally moved for summary judgment, and thereafter both parties filed formal motions and affidavits. On

April 25, 1967, the trial court denied appellants' motion for summary judgment, granted respondent's, and entered judgment dismissing the action.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment.

STATEMENT OF FACTS

Appellants Western Engineers, Inc., a Utah corporation, and Edwards and Kelcey, a New Jersey partnership, entered into a joint venture arrangement (R. 80) and will be referred to herein as the "joint venture." By letter dated November 18, 1957, they sent respondent (hereinafter called the "Road Commission") a proposal for the performance of engineering services for 18.6 miles of Highway Interstate 15, the services to include surveys, preliminary design, subsurface investigations, final design, preparation of contract plans and specifications, right-of-way maps and shop drawings, and field consultations during construction (R. 75-77). The proposal contained, among others, the following undertakings:

> "After approval of preliminary design by the Commission and U. S. Bureau of Public Roads, complete final design and prepare plans, specifications and contract documents for four construction contracts to be let by the Commission. * * * "

"Final design will be in accordance with Road Commission standards and design criteria for interstate highways approved by U. S. Bureau of Public Roads" (R. 76).

"We will complete all contract plans and specifications within 9 months after notice to proceed, provided that there is not more than a two-week interval between submission of the various phases of the design to the Commission and approval of the above designs by the Commission and the Bureau of Public Roads. A time schedule showing completion time for each phase of the work is attached." (R. 77).

"The final fee will be three and forty-five hundredths percent (3.45%) of the total cost of construction. For the purpose of the progress payments, the fee is estimated to be 3.45% of an estimated construction cost of $19,000,000" (R. 77).

With the letter the joint venture sent detailed information on the qualifications of its principals. The biographical data makes it clear that the joint venturers, their "associated" corporations, and their managers were experienced and knowledgeable, having performed a wide variety of services in the field of civil engineering on federal and state highways, bridges and other structures; toll turnpikes and facilities; traffic problems and parking facilities; flood control and drainage; water supply and sanitation; dams, reservoirs; foundation and soils; transit; railroads; subways and tunnels. During the five years preceding submission of the proposal, Edwards and Kelcey had processed preliminary design on highway projects with an estimated construction

cost of $750,000,000, and had prepared final design and contract plans for highway projects totaling $120,000,000. Other highway design had been done by the associated corporations, Engineering Service Corporation and Morrison-Maierle, Inc. (R. 80-89).

As a result of the proposal, the joint venture and the Road Commission entered into an "Agreement for Engineering Services" dated February 21, 1967 (Ex. D-1, R. 60-70).

The contract recited that the Road Commission "in cooperation with the U. S. Bureau of Public Roads" proposed to construct a portion of the Interstate 15 under three separate project designations totalling 18.6 miles, and that the Road Commission "does not have and cannot recruit an adequate engineering staff to design said project within the specified time limit, and at the same time design, construct, and maintain the other highways within the State of Utah which the Road Commission is required to design, construct, and maintain." Among the contract provisions were the following:

> "This project is part of the Federal-Aid system, and as such, it is understood that the plans and designs must be approved by the Bureau of Public Roads in accordance with the usual procedure. The consulting engineer will cooperate with the Bureau of Public Roads at all times through the Road Commission, and will furnish such data, estimates, plans, breakdown of quantities, etc., as may be required from time to time by the Bureau of Public Roads which

will transmit such requests through the Road Commission" (R. 62, Item 1c).

Contract Item 11 (R. 62) required the joint venture to prepare general and detailed features of the location of the project together with standard drawings, standard specifications and other similar data furnished or to be furnished by the Road Commission, "or as may be modified from time to time and all in accordance with the approved methods of AASMO design criteria and the standards the Bureau of Public Roads shall apply."

> "All surveys, designs, plans, schedules, progress and supervision will be subject to the approval of the director of the highways of the Road Commission." (Item 11c, R. 63).

In Item IV (R. 65) of the contract the Road Commission agreed to:

> "Furnish to the Consulting Engineer, department standards, specifications, and regulations of the Road Commission applying to projects of a similar nature and other available information including preliminary plans, survey data, photogrammetric maps, estimates, and other such data prepared for this project; * * * "

The Road Commission was also to guaranty access to lands deemed necessary for the performance of the consulting engineer's work; provide printing and reproduction of construction contract documents; provide cloth layout sheets for the preparation of final plans; give full consideration to all sketches, estimates,

working drawings, specifications, proposals, and other documents laid before it by the consulting engineer; and "inform the Consulting Engineer of its decision within a reasonable time so as not to interrupt or delay the work of the Consulting Engineer" (R. 65).

The consulting engineer agreed to accept as "Final compensation" for all services outlined in Paragraphs I through V a percentage fee equaling 3.45% of the total construction cost, but not exceeding $862,500.

Paragraph VIe provided for additional compensation for services "beyond the scope" of Item II, or "if the Consulting Engineer is required to perform extra services or make changes in work already satisfactorily performed in accordance with the direction of the Road Commission." But the paragraph contained no provision for additional compensation as a result of delays, and Paragraph IXd of the General Conditions (R. 69) provided:

> "The consulting engineer agrees to prosecute the work continuously and diligently, and that *no charges or claims for damages will be made by them for any delay or hindrances, of any cause whatsoever, during the progress of any portion of services specified in this agreement.* Such delays or hindrances, if any, shall be compensated for by an extension of time for such reasonable period that the Road Commission may decide." (Emphasis added.)

An examination of the contract makes it apparent that the work to be performed by the joint venture

required submission of numerous plans and drawings to the Road Commission, and its submission of them in turn to the Bureau of Public Roads. Approval could not be expected to be automatic; reworking and resubmission of plans and drawings must have been anticipated by the parties.

It took the joint venture three years to complete the contract, after which it claimed its increased time for performance was caused by the Road Commission's failure to process various preliminary designs, plans, and drawings within a reasonable time; its slowness in determining clearances of structures over railroads; and the inability of the Road Commission and Bureau of Public Roads to "come to decisions" (R. 152, 169-171).

The joint venture has recognized that there was no single, long-continued delay. The affidavit of Mr. J. R. Neville, annexed to the plaintiffs' motion for summary judgment set out at least four separate instances, and pointed out that there were various delays with respect to designs of the 37 structures included in the contract (R. 151-152). That the joint venture is relying upon a number of individual and unrelated delays, rather than a single one, is also borne out by the affidavit of Jack Leonard, annexed to the appellants' motion (R. 168-175).

There is a dispute with respect to responsibility for the various delays. A memorandum from David L. Sargent, the Road Commission's chief structural

engineer, with respect to approval of structure designs is annexed to Mr. Sargent's affidavit in support of respondent's motion for summary judgment (R. 102-105). It is apparent that there are disputes concerning a number of factual matters surrounding individual delays over a long period of time, some of which are claimed to be the responsibility of the joint venture and some of the Road Commission; and that the dispute sought to be litigated in this action is the very kind the parties sought to avoid by including a provision in the contract that the Consulting Engineer would not be entitled to charges or damages for delays *"from any cause whatsoever."*

After the case had been set for trial, it became apparent that the basis for appellants' claim for extra compensation for delays should be ascertained prior to trial. Accordingly, a pre-trial conference was held at which appellants conceded they had no evidence that the Road Commission had exercised any "fraud, malice or wilful intent to delay the plaintiff in the completion of the contract" (R. 53), which left for determination only the question of whether the various delays, added together, could be deemed to be so "unreasonable" that the "no damage" clause would not apply to them.

ARGUMENT

I

APPELLANTS' RECOVERY FOR DELAYS IS PRECLUDED BY THE "NO DAMAGE" CLAUSE.

The basic dispute between appellants and respondent is over construction of Paragraph IXd of the General Conditions of the contract:

> "The Consulting Engineer [appellants] agrees to prosecute the work continuously and diligently, and that *no charges or claims for damages will be made by them for any delay or hindrances, of any cause whatsoever,* during the progress of any portion of services specified in this agreement. Such *delays or hindrances, if any, shall be compensated for by an extension of time* for such reasonable period that the Road Commission may decide." (Emphasis added.)

Appellants contend that the paragraph is "ambiguous" and that a trial should be had at which a judge or jury could take evidence as to what the parties intended. Respondent takes the positon that the paragraph's meaning—though broad—is plain.

"No damage" clauses of varying breadth and severity have been used and litigated for many years. By far the greater number of courts hold them to be valid and enforceable, and to preclude recovery of extra compensation or damages for delays encountered during contract performance. Although a few jurisdictions

have held the provisions inapplicable in special types of cases, respondent has been unable to find a single case awarding damages under circumstances analogous to those relied upon by appellants.

In an early case this court held damages for delays were not recoverable under a contract providing only for an extension of time for delays, even though a "no damage" stipulation was not included. In a later case the court applied a "no damage" clause to prevent recovery of damages from delays resulting from actions of a third party.

The first case was *Russell v. Bothwell & Swaner Co., et al.*, 57 Utah 362, 194 Pac. 1109 (1920), involving an agreement between a subcontractor and a prime contractor which contained a provision that if the subcontractor was delayed in the completion or prosecution of the work:

> "By the act, neglect, or default of the owner or by any damage caused by fire or other casualty for which the [sub]contractor is not responsible, or by general strike or lockout caused by acts of employees, beyond the control of the [sub]contractor, then the time herein specified for the completion of the work may be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid * * * "

The trial court awarded damages to the subcontractor on the ground that the prime contractor, by itself delaying the work, had failed to perform the conditions of the contract.

This court reversed, taking the view that the parties intended the prescribed remedy to be the sole remedy for delay. The court said:

> "There is no testimony that the delay was the result of fraudulent, malicious, capricious, or unreasonable acts or conduct on the part of the defendant company to delay or harass the plaintiff in the prosecution of the work. On the contrary, the testimony tends to show that it was the earnest desire of defendant company that the work be prosecuted with all reasonable dispatch. The legal question therefore before this court for review is: can the plaintiff, by reason of the provisions of the contract, recover for the loss of time or delay caused by said defendant?"

The answer was "no." The decision is precedent in this case because the contract was construed as if it contained a "no damage" clause, and the limitation on recovery was held to be binding in the absence of fraud or wilful conduct for the *purpose* of delaying or hindering the other party, no such conduct having been claimed by the appellants in this case.

The second case, *Corporation of President of Church of Jesus Christ of Latter-day Saints v. Hartford Accident and indemnity Co., et al.,* 98 Utah 297, 95 P.2d 736 (1939), involved a contract provision that the church would not be held responsible for damage incurred through the fault of any other contractor employed by it and that should the contractor be delayed in the prosecution of the work by reason of the above cause, or through the owner, the time of completion

shall be extended for a period equivalent to the time lost.

The contractor sought damages from the church because of delays resulting from the failure of another contractor to provide materials as needed. In construing the "no damage" clause, this court did not question either the scope of the clause or length of the delay, but said:

> "As between Child & Co. and the Church these provisions constitute an agreement by Child & Co. not to sue the Church for damages due to delay caused by another contractor, its remedy being to secure an extension of time in order to avoid liability for failure timely to complete the work. In certain old decisions courts have held that an agreement not to sue could not be set up as a defense to an action for damages. If the party did sue and obtained damages, the party he agreed not to sue could only sue for the breach of the contract not to sue, and could recover back the damages and other costs incurred because of suit. But disregarding an agreement not to sue results in circuity and multiplicity of actions which we shall avoid by denying Child & Co.'s action against the Church. * * * "

A great majority of the courts in other jurisdictions have held "no damage" clauses to preclude recovery of damages for delays.

Psaty & Fuhrman, Inc., v. Housing Authority of the City of Providence, 76 R.I. 87, 68 A.2d 32, 10 A.L.R.2d 789 (1949), is a well-reasoned case pointing

out the anomaly of applying a "no damage" clause only to delays which may be said to be "reasonable." The action was brought by a contractor against the housing authority for damages resulting from authority's having unreasonably hindered or delayed the contractor's performance. The court did not regard the length of the delays or their effect on performance as material to its decision, saying:

> "The no damage clause in this contract expressly states that the contractor shall not recover damages because of hindrance or delay from any cause in the progress of the work 'whether such delay be avoidable or unavoidable.' The language of this provision, though broad in scope, is not ambiguous. As the contract provides for an extension of time if requested by the contractor, it is obvious that the object of the clause was to protect the Authority in an undertaking of such magnitude against the vexatious question, in perhaps innumerable instances, whether any particular delay could have been reasonably avoided by the Authority. Had there been no such provision in the contract, the Authority would have been liable on the principle of an implied covenant if unreasonable delay were proven, that is, delay that might reasonably have been avoided in carrying out its part of the contract. * * *
>
> "The contractor in effect argues that the clause under consideration means the Authority is excusable for reasonable delay only. This construction of the no damage clause would subject the Authority to the inquiry in all instances of delay whether a reasonable person would have

> acted differently, thus raising the very question that the clause intended to avoid. In the absence of any claim of concealment, misrepresentation or fraud, the contractor by such construction of the no damage clause cannot render meaningless an express condition of the contract which it knowingly and freely accepted. As was observed by the Supreme Court in *Wells Bros Co. v. United States,* 254 U.S. 83, at page 87, 41 S. Ct. 34, at page 35, 65 L.Ed. 148: 'men who take million dollar contracts for government buildings are neither unsophisticated nor careless.' "

Cunningham Bros. Inc. v. The City of Waterloo, 254 Iowa 659, 117 N.W.2d 46 (1962), was an action brought by a contractor for additional compensation, part of which was based upon delays of the city. The contract contained two clauses relating to delay: first, that in event of specified delays the engineer would decide upon the time for completion which would compensate for the delay; second, that the contractor would have no right against the city on account of delay in prosecution of the work but would have extra time for completion. In holding that the contractor could not recover in the face of the "no damage" clause the Supreme Court of Iowa said:

> "Appellee also attempts to eliminate the 'no damage' clause by contending that such clause refers only to such delays as were contemplated by the parties and that the delay in making the site available was not so contemplated. Was the failure of the appellant to make the site available to the appellee on the commencing date

such as was contemplated by the parties? We think it was. It will be observed that the contract, and included documents, specifically provide that any delay upon the part of the appellant, or other contractors, shall entitle appellee to such extension of time as will compensate for such delay. Delays that are known or expected to happen would ordinarily be considered in the fixing of the dates for starting and completing of the work. It is for the purpose of providing for situations that may perchance arise that the provision for extension of time is included. We think it is clear that failure to make the site available, assuming such to be the case, comes within purview of the parties and entitled appellee to an extension of time. This it received; in fact, two of them. There was full compliance with the provisions of the contract in this respect. If the instant contract contained no further provision relative to delays we might hesitate to refuse appellee damages in addition to extension of time. * * *

"Paragraph 11, contract, goes further and provides, in addition to an allowance of additional time, that appellee shall have no right of action against appellant on account of delays in prosecution of the work. This provision was known and subscribed to by appellee. While the application of such restriction may appear harsh, such was the contract entered into by the parties and we see no valid reason why it should not be enforced."

In *Charles I. Hosmer, Inc. v. Commonwealth,* 302 Mass. 495, 19 N.E.2d 800 (1939), a contractor

had brought an action against Massachusetts to recover the balance due under a written contract for bridge construction and for damages for delays resulting from action of the Commonwealth. The Supreme Judicial Court of Massachusetts, in holding the contractor could not recover, said:

> "The article must be construed in reference to all the remaining provisions of the written contract of which it forms a part. * * * The article in question, must be read in connection with Clause 3 of the contract, which imposes upon the contractor the risk of 'all expenses incurred by or in consequence of the suspension, or discontinuance of the work.' It cannot be contended that these words were added heedlessly or with the intent that they be ignored. * * *
>
> "The contract was executed upon March 5, 1935. The work was to commence immediately upon the execution of the contract and was to continue without cessation until completed. The parties must have contemplated that there might be delay in commencement of the work and they agreed that in that event the petitioner should be given such additional time for completion as the engineers should determine was just, but it was specifically provided that the petitioner should have no claim for damages on account of such delay. Such a provision negatives any pecuniary compensation for delay. [Citing cases] * * *
>
> "The petitioner did not introduce any evidence showing the reasons or causes for any of the delays alleged in its petition. The characteriza-

tion of the action of the Department of Public Works as negligent, unreasonable, or due to indecision is not enough to avoid the pertinent provisions of the contract. The respondent or the officials in charge of the work are not charged with arbitrary, capricious, or fraudulent action, nor with acting in bad faith, or under such gross mistake as to be tantamount to fraud. * * *"

The *Hosmer* case was cited with approval in *Coleman Bros. Corp. v. Commonwealth,* 307 Mass. 205, 29 N.E.2d 832 (1940); and *Charles P. Main, Inc. v. Massachusetts Turnpike Authority,* 347 Mass. 118, 196 N.E.2d 821 (1964). The latter case dealt with a design contract under which engineers sought damages for delay. The contract contained a "no damage" clause, with respect to which the court said:

"A provision like Article 20 [no damage clause] seems less appropriate in an engineer's contract than in a construction contract. Nevertheless, the parties have included it and we must give it proper effect. We do not perceive any adequate basis for concluding that any other interpretation is more reasonable than the natural meaning of the language. * * *

"We do not find convincing Main's contention that the Hosmer case is distinguishable because the contract in that case contained the provision that the contractor would receive the specified compensation as 'total compensation for everything * * * done * * * under this contract.' The Main contract, read as a whole, to us has the same import. We also do not think that there is any basis in the language of Article 20 for

> saying that it applies only to the design phase of the work. If that had been the intention, it should have been so stated."

The court's later statement that the contractor "at least" could not recover for delays "not caused by the Authority or not unreasonable in length", is not a holding, since the court was reviewing findings of an auditor that the delays were not in fact caused by the Authority, and were not unreasonable. There is no suggestion that the court meant to modify *Hosmer.*

In *Manerud v. City of Eugene,* 62 Ore. 196, 124 Pac. 662 (1912), the plaintiff sought to recover, despite a "no damage" clause, for delays resulting from a number of causes, among them failure to obtain rights of way, furnish suitable plans or specifications, set stakes, and have an engineer on the ground to give the contractor information and direction from time to time; ordering frequent changes; mistakes in lines and grades; neglect in furnishing estimates; and failure to pay. Plaintiffs contended that cited acts of the city delayed canal work until mid-November, after which a flood rendered it impossible to proceed until mid-April of the next year, but the court denied recovery, saying:

> "The essence of plaintiffs' grievance, as stated, is that the city entirely failed to comply with part of its contract and was dilatory in what it did perform. Without going into elaborate detail which would be necessary in a minute consideration of the plaintiffs' numerous objections,

we must content ourself with some general observations upon the construction proper to be given to the contract involved.

"Under its terms mere delay of the city constitutes no ground for damage. It only extends the time for the plaintiff to complete the work within the discretion of the engineer, for the contract itself stipulates thus: 'The Contractor shall not be entitled to damages on account of delay, but if such delay be occasioned by the city, the Contractor shall be entitled to an extension of time in which to complete the work, to be determined by the engineer.' "

In *Ericksen v. Edmonds School Dist. No.* 15, *Snohomish County,* 13 Wash.2d 398, 125 P.2d 275 (1942), a contractor sought damages arising out of construction on a high school building. The trial court ruled in favor of the school district and the contractor appealed. The contract under which action was brought contained a provision, similar to the one in the present case, that "the contractor shall not be entitled to any claim for damages on account of hindrances or delays from any cause whatsoever," but would not be entitled to an extension of time where delays were caused by an act of God or any act or omission on the part of the owner. In construing the "no damage" provision, the Supreme Court of Washington said:

"The decisive question in this case, therefore, is whether, under a contract containing such a provision, the contractor should nevertheless be permitted to maintain an action against the

owner for breach of contract, upon a showing that the work was retarded and rendered more difficult and expensive because of failure on the part of the supervising architect to make necessary corrections in the plans and specifications in a timely manner; or whether, on the contrary, the contractor's sole remedy is to seek an extension of time for the completion of the work * * * "

The court recognized the general rule that where one party delays another in the performance of a contract, there is a breach of an implied agreement, but added that where

> "the contract expressly precludes the recovery of damages by the contractor for delay caused by the default of the owner, that provision will be given effect. [Citing numerous cases.] * * *
>
> "The language of such preclusive provision is, however, usually given a strict construction because of the harsh results which may flow from the enforcement thereof. But when it is clear that a given result comes within the terms of such a provision, the mere fact that the result is a harsh one will not prevent the application of the rule. Whether a given contract provision precludes the recovery of damages in accordance with the rule just announced depends upon the particular language in which it is cast, the nature of the default involved, and the various other circumstances of the case.
>
> "*The specific provision here in question states positively that the contractor shall not be entitled*

to any claim for damages on account of hindrances or delays from any cause whatsoever. * * *

"Wholly aside from his failure [to give notices), he was in any event precluded by the express terms of his contract from maintaining an action for damages resulting from hindrances and delays. * * *

"The probability of the occurrence of delays was clearly foreseen by the parties to this action, as the language of the contract repeatedly discloses, and they specifically provided that the contractor's remedy therefore should take the form of an extension of time. * * * " (Emphasis added.)

Humphreys v. J. B. Michael & Co., Inc, 341 S.W.2d 229 (Ky. 1960), involved a contract in which there were a number of provisions relating to delay. The contractor claimed there was "active interference" on the part of the owner, but the Court of Appeals of Kentucky held that active interference could not be established in the absence of an order from the owner directing the contractor to keep men and equipment on the job during periods of delay. There is nothing in the present case to suggest "active interference" such as in *Humphreys* and in *American Bridge Co. v. State,* 245 App. Div. 535, 283 N.Y.S. 577 (1935).

Housing Authority of City of Dallas v. Hubbell, 325 S.W.2d 880, (Tex. Civ. App. 1959), was a prolix case in which the contractor sought damages for a great number of delays. The court held that in order

to recover for delays in the face of a general "no damage" clause, it is necessary to show intentional and wilful acts calculated to cause harm, done with an unlawful purpose of causing harm, and without right or justifiable cause. It allowed some claims for damages where the wilfulness issue was properly submitted to the jury, but reversed others where it was not.

In addition to supporting the other precedents, the case illustrates the complexity of the problems sought to be avoided by "no damage" clauses, and points out that in proving damages for delays a contractor must offer proof with respect to each delay, its cause, and the damage resulting from it, not package all the separate delays together as appellants have tried to do in this case.

For half a century the United States Supreme Court has been considering cases involving contract clauses tending to protect the government against claims of damages for delays, and quite consistently has been rejecting contentions that the contract provisions, for one reason or another should not be applied. In an early case, *Wells Bros. Co. of New York vs. United States,* 254 U.S. 83, 41 S.Ct. 34, 65 L.Ed. 148 (1920), a contractor claimed damages for delays resulting from a change made by the government in type of construction material, and suspension of the work pending adoption of legislation which would affect the final design of the building. The contract contained the clause:

> " * * * No claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

In holding the contractor could not recover damages for delay, the court said:

> "Such language, disassociated as it is from provisions relating to 'omissions from,' the work to be done, or 'materials' to be used, cannot be treated as meaningless and futile and read out of the contract. Given its plain meaning, it is fatal to the appellant's claim."

In *H. E. Crook Co., Inc. v. United States,* 270 U.S. 4, 70 L.Ed. 348, 46 S. Ct. 194 (1926), a contractual provision for an extension of time was construed to be the contractor's only remedy for delays. Moreover the court held that even though the contract fixed the contractor's time for performance "very strictly", this did not impose an obligation on the government with respect to times for performance.

In *United States v. Rice,* 317 U.S. 61, 87 L.Ed. 53, 63 S.Ct. 120 (1942), the court's examination of various contract clauses led it to the conclusion that performance dates set out in the contract were tentative and subject to modification.

In *United States v. Howard P. Foley Co.,* 329 U.S. 64, 91 L.Ed. 44, 67 S. Ct. 154, (1946), the court again was asked to construe a contract as not prohibiting damages for delays, but it refused, noting that the question in all of the cases was whether the government had obligated itself to pay damages to a contractor

because of delay in making the work available, and held again that it had not "for the reasons elaborated in the *Crook* and *Rice* decisions." The court also held that the obligation placed upon the contractor to perform within a certain time could not be inverted into a warranty that areas would be available in time to permit the contractor to so perform.

In none of the above decisions were "the specific delays" contemplated by the parties any more than in the instant case, and they cannot be distinguished on that ground.

Other cases upholding "no damage" clauses are *McDaniel v. Ashton-Mardian Co.*, 357 F.2d 511, (9 Cir. 1966); *American Pipe & Const. Co. v. Harbor Const. Co.*, 51 Wash. 2d 258, 317 P2d 521 (1958) and *Gherardi v. Board of Education*, 53 N.J. Super 349, 147 A.2d 535 (1958).

Some courts have held "no damage" clauses, even some stated in rather broad terms, not to apply to particular fact situations. The New York courts appear to have gone further than any other jurisdiction permitting recovery despite "no damage" clauses. In addition to permitting recovery, like other courts if there has been "active interference," a number of decisions by New York's lower and intermediate courts have permitted recovery where work has been suspended for so long a time that a contractor would have been justified in abandoning the contract. The idea came from *People ex rel. Wells & Newton Co. of New York*

v. Craig, 232 N.Y. 125, 133 N.E. 419 (1921), which didn't involve a dispute between the contractor and the "owner." It was a mandamus action to compel the controller of New York City to pay a claim under a contract with the Board of Education, the Board having agreed with the contractor, after a three-year delay attributable to the Board, to take steps toward payment of the contractor for delays and have him complete the contract. The Board's delay was found to have been so unreasonable as to constitute an abandonment of the contract, thereby authorizing the Board to enter into a new contract under which it could agree to pay at a different rate than provided in the old contract.

The later New York cases have retained the rationale of the *Wells & Newton Co.* case and have not allowed recovery for delays merely because they were "unreasonable"; the delay must have been so long that the contractor would have been justified in abandoning the contract. And this concept implies a long-continued interruption of work—when substantial contract performance was not going on—not an accumulation of relatively minor periods converted into an "unreasonable" delay by the use of an adding machine.

Ace Stone, Inc. v. Wayne Township, 47 N.J. 431, 221 A.2d 515 (1966), and *McGuire & Hester v. City & County of San Francisco,* 113 Cal.App.2d 186, 247 P.2d 934 (1952), proceeded on yet another theory, that the delays for which damages were sought were

not the kinds of delays contemplated by the "no damage" clause. But in each of these cases there were special facts which motivated the decision.

In *Ace Stone,* negotiations leading to the contract were important inasmuch as during them the Township's engineer had represented that easements would be acquired *before* notice to proceed was given, and that the contractor should start with sufficient equipment to keep three crews busy at three separate sites. In light of these negotiations and a contract clause which reasonably could be interpreted as referring only to delays occurring *after* the work had begun, the court held that there was a fact issue as to whether the "no damage" clause was meant to apply to delays resulting from an antecedent failure to obtain easements.

In the California case of *McGuire & Hester v. City & County of San Francisco,* supra, 113 Cal. App. 2d 186, 247 P.2d 934 (1952), the decision limiting application of the "no damage" clause was based upon a technical construction of portions of the contract. The "no damage" clause referred to delays, "whether unavoidable or avoidable," and another paragraph of the contract defined those terms in such a way that the delay for which damages were sought did not seem to be included in either of them.

In *Ace Stone* and *McGuire and Hester* there was room for interpretation, but the "no damage" clause used in the contract between the joint venture and the Road Commission is stated in the broadest pos-

sible terms. It says plainly, unequivocally, and without qualification that the contractor shall not be entitled to damages for delays "for any cause whatsoever," and such clauses have usually been applied as written. On the basis of their vast, well-documented experience, appellants and their engineers must have known what delays might be encountered in the design of a complicated interstate highway system. Nevertheless they agreed to a provision in which they were to be compensated for delays only by extensions of time—not money.

Many cases dealing with the problems are found in the annotation, "Validity, construction, and application of 'no damage' clause with respect to delay in construction contract," 10 ALR 2d 801 et seg. The cases deal with construction contracts, and those allowing recovery in certain situations might be distinguishable for the reason that contractors are precluded from utilizing their equipment on other projects during the delay, while design engineers should be able to shift their efforts without too many problems. But even without such a distinction, none of the cases has allowed recovery for a sum total of accumulated separate delays.

II

THERE WAS NO DISPUTE CONCERNING ANY MATERIAL FACT, AND THE SUMMARY JUDGMENT WAS PROPERLY ENTERED AGAINST THE APPELLANTS.

Respondent is in agreement with the rule, well recognized by this court, that a summary judgment should not be granted where there is any genuine issue as to any material fact. However, the trial court in this case decided what is essentially a law question: the meaning of a written contract which contains an integration clause to the effect that the writing constitutes the entire agreement (R. 70, Par IXk). Where the meaning of such a contract is clear, extrinsic facts are not needed to find the "intention of the parties".

As stated by this court in *Jensen's Used Cars v. Rice,* 7 Utah 2d 276, 323 P.2d 259 (1958):

> "Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances we should not be required to embosom any request that we ignore that very language. This is as it should be. The rule excluding matters outside the four corners

of a clear, understandable document, is a fair one, and one's contentions concerning his intent should extend no further than his own clear expression."

If there is any ambiguity in the contract, the ambiguity does not appear in the "no damage" clause itself, which purports to cover all delays, from whatever causes. Appellants, therefore, must claim an ambiguity arises out of other contractual provisions and the circumstances surrounding negotiation of the contract. But such a claim, because of the undisputed facts, cannot create a *genuine* issue as to any fact material to construction of the contract. Appellants have stipulated that their case does not have elements of fraud, malicious, or wilful acts stated by this court to be necessary in *Russell v. Bothwell & Swaner Co. et al.*, supra, 57 Utah 362, 194 Pac. 1109. Their main contentions are (1) that the delays, cumulatively, were "unreasonable," and (2) that the delays were not of the kind contemplated by the parties.

But there was no long interruption of work which would justify abandonment of the contract, as there must be even under the decisions of the courts of New York, which seems to be the only state embracing the doctrine of "reasonableness."

The parol evidence rule precludes appellants from proving by extrinsic evidence that the delays intended to be covered by the "no damage" clause were anything other than "any delay or hindrance, of any cause whatsoever." But assuming, for the sake of argument, that

extrinsic facts may be considered, appellants have not suggested the existence of any facts which would support the interpretation they espouse. The court would be required to look at the entire contract and the negotiations between the parties to determine the kinds of delays contemplated by the "no damage" clause.

The appellants' proposal, and the contract, establish that delays encountered were the result of problems the parties knew about and were concerned about.

Consider the following undisputed facts:

The joint venture was experienced and knowledgeable in the design and construction of interstate highway systems. It must have anticipated the kinds of delays that might affect its progress.

The proposal submitted by the joint venture promised to complete the project "within nine months after notice to proceed, *provided there is not more than a two-week interval between submission of the various phases of design and approval of the above designs by the Utah Road Commission and the Bureau of Public Roads.*" (Emphasis added.)

The final fee was stated to be 3.45% or the estimated construction cost, and there was not even a hint that the fee was conditional upon the speed of approval or the date of completion.

The agreement entered into by the parties referred to the inadequacy of the engineering staff of the Road Commission; and that the engineer was qualified, ready,

able, and willing to assist the Road Commission in designing the project.

The agreement expressly provided that decisions with respect to plans and designs would be subject to approval of the Bureau of Public Roads.

Modifications in the plans and specifications "from time to time" were contemplated by Item II of the contract, "Control of the Work."

All surveys, designs, plans, schedules, progress and supervision were to be subject to the approval of the Director of Highways.

The engineering fee provided in the contract was for "all services" and was to be "final compensation" for the services provided in the contract."

Contractual provision for extra payments related only to work "beyond the scope" of the contract work, and to changes in connection with work already satisfactorily performed, without mention of delays.

Finally, if contemporaneous construction is relevant, the joint venture asked for and received extensions of time for performance, the last request having been made on June 29, 1960, (R. 98), more than 18 months later than date by which appellants now claim the contract should have been completed.

Despite its own proposal and the express contract provisions the joint venture now contends that there are some facts, somewhere, to establish that the delays

were "unreasonable" and not contemplated by the parties. We admit the contract took much longer to perform than contract schedule provided. But appellants have not pointed to anything that occurred during the negotiations, such as was referred to in the *Ace Stone,* case, which misled the joint venture; or to any unusual circumstances; nor to any contemporaneous construction by the parties that would help them. There is nothing in any of the affidavits submitted by the appellants, nothing in the memorandum itself (many of the assertions in which are supported by affidavits) which would bring the case within the operation of any of the cases relied upon by appellants.

The parties contracted specifically with reference to the duties of the Road Commission, among which was the duty to see that plans and drawings were returned to the joint venture within a reasonable time "so as not to interrupt or delay the work" of the joint venture. The possibility of delay from such a cause was anticipated in the contract, yet the joint venture also agreed that in event of delays, from any cause whatsoever, a claim for damages would not be made. Delay problems described in the contract must have been understood by the parties to be within the realm of possibility.

III

THE STATE OF UTAH IS NOT OBLIGATED TO PAY INTEREST ON ANY AMOUNTS FOUND TO BE DUE.

Inasmuch as the trial court disposed of the case on the ground that there was no valid claim against the Road Commission, the obligation of the State of Utah to pay interest on a claim such as this was not ruled upon by the trial court. It may be hypothetical here.

That a state's obligation to pay interest is limited is well-recognized. As stated in 49 Am. Jur., *States, Territories and Dependencies,* § 75, p. 286:

> "It is a well settled rule that a state is not liable for a payment of interest on its debts unless so bound by an act of the legislature or by a lawful contract of its administrator or executive officers made within the scope of their duly constituted authority. The state is liable to pay interest only as it has bound itself by contract to do so. * * * The rule applies to all kinds of obligations of and claims against the state. * * * "

And in § 15 of the same article:

> "Since the state is not liable for the payment of interest on claims against it unless it has assumed such a liability, it does not become bound for a payment of interest under a general statute imposing liability for interest."

Utah seems never to have passed directly on the question of the obligation to pay interest under a general statute.

Only once has a case involving interest payment by the State of Utah faced our Supreme Court. How-

ever, in *State v. Danielson,* 247 P.2d 900, 122 Utah 220, the question of liability of the State for interest was not the issue, the parties having agreed that the defendant was entitled to recover interest in a condemnation action. The court cited *Oregon S.L.R. Company v. Jones et al.,* 29 Utah 147, 80 P. 732, and *Salt Lake and U. R. v. Schramm,* 56 Utah 53, 189 Pac. 90, as a basis for this liability. These latter cases established liability for interest in condemnation actions but did not involve the State or a public agency.

The closest cases which might favor plaintiff in its claim for interest herein are *Baker Lumber Company v. A. A. Clark Company, et al.,* 53 Utah 336, 178 Pac. 764, and *Auerbach v. Salt Lake County,* 23 Utah 103, 63 Pac. 907. These cases involved a school district and a county. However, in both instances they also involved interest-bearing warrants in which the school district and county agreed to pay interest to the obligees.

As suggested in appellants' brief, some decisions have held the state to be liable for interest. But most do not. One such case is *Culver v. Commonwealth,* 348 Pa. 472, 35 A.2d 64 (1944), in which a general interest statute was held not to apply to the state in a condemnation proceeding.

CONCLUSION

Appellants' desire to obtain additional revenue is understandable, but it shouldn't be fulfilled in such a way as to make scriveners psychotic. If various specific causes of delay had been catalogued in an appendix to the contract, appellants no doubt would have been able to find some delay that wasn't on the list. The contract having referred to *all delays,* "of any cause whatsoever," appellants contend that it should only apply to delays "contemplated by the parties", and should not be held to mean what it plainly says.

If "no damage" clauses are valid (which they are uniformly held to be), and in a given case the parties want to provide the exclusive remedy with respect tc *all delays,* some language should be available by which they can do. Must they add an "absolutely"?

There is no rule of law, morality, or public policy that requires appellants to be paid for delays in performance, when they had solemnly agreed that such delays were to be compensated for solely by an extension of time. This is particularly true where their proposal to the Road Commission, by its own express terms, made delays material only to appellants' time of performance.

The contract is written. It is not ambiguous. There is no genuine issue as to any material fact. And the

contract precludes recovery by the appellants of any damages for delays. The judgment of the District Court of Salt Lake County should be affirmed.

Respectfully submitted,

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