

1993

Joseph Charles Jensen and Bessy T. Jensen v. Davis County, a body politic of the State of Utah : Brief of Respondent

Utah Court of Appeals

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Gerald Hess; Chief Civil Deputy; Davis County Attorney; Attorney for Defendant-Appellee.

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930180
IN THE COURT OF APPEALS OF THE STATE OF UTAH

JOSEPH CHARLES JENSEN and
BESSY T. JENSEN,
Plaintiffs/Appellants,

vs.

DAVIS COUNTY, a body politic
of the State of Utah,

Defendant/Appellee.

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Case No. 930180-CA

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Second Judicial Court, Davis County
Hon. Jon M. Memmott

JOSEPH C. JENSEN
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Argument Priority Classification: 15

FILED
Utah Court of Appeals

AUG 03 1993


Mary T. Noonan
Clerk of the Court

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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BESSY T. JENSEN,	:	
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Plaintiffs/Appellants,	:	
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
DAVIS COUNTY, a body politic	:	
of the State of Utah,	:	Case No. 930180-CA
	:	
Defendant/Appellee.	:	

BRIEF OF APPELLEE

JURISDICTION OF THIS COURT

1. Appellants filed their appeal in the Supreme Court of Utah. Thereafter, the Supreme Court under date of March 25, 1993, directed that the case be transferred to the Court of Appeals for disposition. Appellants appeal from the judgment entered in their favor granting Appellants damages and specific performance.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

It is Appellee's position that Appellants raise no issues to be decided by this Court and, consequently, the judgment of the lower Court should be affirmed. The Brief of Appellants is so muddled and flawed that Appellee will not attempt to interpret the issues raised by it. Rather, the issues which Appellee addresses are as follows:

1. Appellants' failure to provide a record transcript of all evidence relevant to their contested Findings of Fact or

Conclusions of Law requires the presumption that the verdict was supported by admissible and competent evidence. Sampson v. Richins, 770 P.2d 998 (Utah Ct.App. 1989) cert. denied, 776 P.2d 916 (Utah 1989). Accord Smith v. Vuicich, 699 P.2d 763 (Utah 1985) and Bevan v. J.H. Construction Co., 669 P.2d 442 (Utah 1983).

2. Appellants' failure to demonstrate that marshalled evidence viewed in the light most favorable to the trial court is legally insufficient to support the findings of fact requires the decision of the lower court to be affirmed. Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct.App. 1990).

3. Unless Appellants can show that the trial court's Findings of Fact are clearly erroneous, the appellate court must not disturb the trial court's findings. State v. Martinez, 811 P.2d 205 (Utah Ct.App. 1991).

4. The trial court correctly applied the proper measure of damages for a breach of contract. Alexander v. Brown, 646 P.2d 692 (Utah 1982), Young Electric Sign Company v. United Standard West, 755 P.2d 162 (Utah 1988), and Keller v. Deseret Mortuary Company, 455 P.2d 197 (Utah 1969).

5. Appellants' claims of constitutional rights violations were not raised at the trial court, or anywhere for that matter, and, therefore, cannot be raised on appeal. Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991). Accord, Johnson v. Department of Employment Security, 782 P.2d 965 (Utah Ct.App. 1989) and Pratt v. City Council of City of Riverton, 639 P.2d 172 (Utah 1981).

6. Appellants' acceptance of the benefits of the judgment estops Appellants from attacking the judgment on appeal. Cingolni v. Utah Power & Light Co., 790 P.2d 1219 (Utah Ct.App. 1990).

7. Appellants' brief fails to comply with Rule 24 of the Utah Rules of Appellate Procedure and their appeal should be dismissed. State v. Price, 827 P.2d 247 (Utah Ct.App. 1992).

8. Appellants are not entitled to an award of attorney's fees.

APPLICABLE STATUTES AND RULES

The applicable rule which disposes of Appellants' Appeal is Rule 24 of the Utah Rules of Appellate Procedure. A copy of the Rule is included as Exhibit A in the Addendum to Appellee's brief.

Also, Section 78-27-56.5, Utah Code Ann., (1953) as amended, disposes of the Appellants' claim for attorney's fees.

STATEMENT OF THE CASE

On January 17, 1991, Appellants filed their Complaint in the Second Judicial District Court of Davis County claiming a breach of contract. Appellee answered the Complaint asserting various defenses, including impossibility of performance of the contract.

The case was tried to the bench with the Honorable Jon M. Memmott presiding on October 28th and October 29th, 1992. The Court issued a Memorandum Decision on December 4, 1992, declaring that Defendant/Appellee had not met its burden in establishing the defense of impossibility of contract and awarded to Plaintiff/Appellant judgment in the amount of \$4,165.03, together

with a Decree of Specific Performance requiring Defendant/Appellee to build a flood control channel and install field drains and a barbed wire fence. Findings of Fact and Conclusions of Law reflecting the Memorandum Decision were signed by the lower Court on January 20, 1993. Thereafter, Appellants filed their Notice of Appeal on February 16, 1993.

STATEMENT OF FACTS

Under the heading "Statement of Facts" Appellants have rambled on about the history of farming in Davis County but none of the information identified as facts was presented to the lower court. Except for the Memorandum Decision of the court and the Findings of Fact, Conclusions of Law and Judgment entered by the court, nothing in Appellants' addenda was introduced at trial. Nothing in Appellants' brief refers to the original record or any reporter's transcript as required by Subparagraph (e) of Rule 24 of the Utah Rules of Appellate Procedure.

Appellee's Statement of Facts is as follows:

1. Plaintiffs/Appellants through their attorney Richard W. Jones filed a Complaint in the District Court of Davis County asserting a breach of contract. (TR. 1-2).

2. Attached to the Complaint was a copy of the agreement between Appellants and Appellee dated December 30, 1987, wherein Davis County agreed to install by December 1988 a flood control channel on property which it had purchased from Appellants. (TR. 4-7).

3. On September 10, 1991, Steven E. Clyde, Appellants'

second attorney, made an Entry of Appearance in the matter. (TR. 51).

4. Steven E. Clyde filed a Notice of Withdrawal of Counsel dated January 9, 1992. (TR. 54).

5. Appellants' third attorney, Scott W. Holt, and the attorney who represented Appellants through trial, made an Entry of Appearance on April 10, 1992. (TR. 59).

6. At trial, the court found that Appellee had failed to carry its burden of proof to establish impossibility of performance. (TR. 78-90).

7. The court found that in order to make Appellants' ground productive it would be necessary for them to install interceptor drains on the east side of their property and rip the hard pan on their property. (TR. 91)

8. The court found that the Appellee by not cleaning the current drains that Appellants had dug on the property conveyed to Appellee caused limited damage to crop production in the amount of 10% of the production per year. (TR. 91).

9. Relying upon the expert testimony of Professor Lyman Willardson of Utah State University, the court found that failure to dig a deep drain of 11 feet deep would make very little difference in the productivity of Appellants' soil. The Court, therefore, found that Appellants would not suffer damage in crop production as a result of the County's failure to build the 11 foot deep channel. (TR. 91).

10. The court found that Appellants' damage was equal to

\$4,165.03. (TR. 92).

11. Findings of Fact and Conclusions of Law and Order were signed and entered by the court on January 21, 1993. (TR. 159-167).

12. Davis County issued its check made payable to Joseph Charles and Bessy T. Jensen in the amount of \$4,165.03 which check was endorsed by Appellants and presented for payment on January 19, 1993. (Exhibit B of the Addendum).

13. Scott W. Holt filed with the District Court a Withdrawal of Counsel dated January 14, 1993. (TR. 158).

SUMMARY OF ARGUMENT

1. Appellants have failed to provide a record transcript of all evidence relevant to any contested Findings of Fact or Conclusions of Law, so that a presumption exists that the verdict was supported by admissible and competent evidence.

2. Appellants have failed to marshal the evidence and demonstrate through the evidence that the trial court's Findings of Fact are legally insufficient.

3. Unless the Appellants can show that the trial court's Findings of Fact are clearly erroneous, the Appellate Court must not disturb them.

4. The trial court correctly applied the proper measure of damages for a breach of contract.

5. Appellants' claims of constitutional rights violations were not raised at the trial court or anywhere and, therefore, cannot be raised on appeal.

6. Appellants' acceptance of the benefits of the judgment estops Appellants from attacking the judgment on appeal.

7. Appellants are not entitled to attorney's fees.

ARGUMENT

POINT I

APPELLANTS' FAILURE TO PROVIDE A RECORD TRANSCRIPT OF ALL EVIDENCE RELEVANT TO ANY CONTESTED FINDINGS OF FACT OR CONCLUSIONS OF LAW REQUIRE THE PRESUMPTION THAT THE VERDICT WAS SUPPORTED BY ADMISSIBLE AND COMPETENT EVIDENCE.

After two full days of trial where numerous expert witnesses were examined and cross-examined, and exhibits were introduced, the court made Findings of Fact, Conclusions of Law and entered a judgment in favor of Appellants. A significant record was developed in the court below, yet Appellants have transcribed only the testimony of Sidney W. Smith, the Public Works Director of Davis County.

Appellants' brief makes only unintelligible references to the transcript or the record. Additionally, Appellants attempt to present to the court in their addenda hearsay evidence which was never presented in the trial court below and has nothing to do with the breach of contract claim asserted by Appellants in the lower court. The record in the trial court, therefore, becomes essential to understanding the facts presented to the judge which allowed him to make the ruling which he made. So important is the complete record that the court in Smith v. Vuicich, 669 P.2d 763 (Utah 1985), declared:

Where the record before us is incomplete, we are unable to review the evidence as a whole and must,

therefore, presume that the verdict was supported by admissible and competent evidence.

At page 765.

(See also Sampson v. Richins, 770 P.2d 998 (Utah Ct.App. 1989) cert denied, 776 P.2d 916 (Utah 1989)).

The court noted in Sampson that Rule 11(e)(2) of the Utah Rules of Appellate Procedure requires Appellants to provide the court with all evidence relevant to the issues raised on appeal. At page 1002 the court said:

Accordingly, because the entire record in this case is not before this court, we presume the trial court's findings are supported by competent and sufficient evidence...

The court went on to observe in Sampson that the findings must clearly indicate the mind of the court and resolve all issues of material fact necessary to justify the conclusions of law and the judgment entered. Without question, the Findings of Fact (Exhibit C) clearly indicate the mind of the court. The attention of the court is invited to paragraph 10 of the Findings of Fact where the judge acknowledges conflicting testimony from experts and indicates that he bases his findings upon the credibility and weight of the testimony of the experts. The court then specifically determined that the damage caused by Appellee's failure to clean the present storm drain was limited to 10% of the crop production per year. After hearing the evidence, the court specifically found that Appellants would not suffer damage from failure to dig the storm drain 11 feet deep. It is apparent from the findings of the court that the court was persuaded Appellants'

lack of crop production was substantially impacted by their failure to dig an interceptor drain on the northeast side of their property and to rip the hard pan on their property. The court found that \$4,165.03 was the amount of damage which resulted because Appellee Davis County failed to clean the present ditch. The Findings of Fact are clear and the inescapable conclusion is the court must affirm the lower court decision.

POINT II

APPELLANTS' FAILURE TO DEMONSTRATE THROUGH THE MARSHALLING OF EVIDENCE THAT THE TRIAL COURT'S FINDINGS WERE LEGALLY INSUFFICIENT REQUIRES THE DECISION OF THE LOWER COURT TO BE AFFIRMED.

A compelling reason why the Appellate Rules require a full transcript of the relevant evidence is noted in Doelle v. Bradley, 784 P.2d 1176 (Utah 1989):

To successfully attack the Findings of Fact, an appellant must first marshall all the evidence supporting the findings and then demonstrate that even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings.

At page 1178.

Appellants are, therefore, required to marshall the evidence to demonstrate that the trial court's findings were insufficient. There is no recognizable marshalling of the evidence in Appellants' brief.

Citing Doelle with approval, the court in Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct.App. 1990) said,

Findings of fact "should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

At page 941.

The clearly erroneous standard of Turnbaugh was also applied in State v. Martinez, 811 P.2d 205 (Utah App.Ct. 1991).

There is nothing in Appellants' brief or in the limited transcript of the record which even remotely rises to the level of "clearly erroneous." The trial court weighed the conflicting evidence and entered a judgment in Appellants' favor. It is apparent that Appellants are angry with the Army Corps of Engineers (not even a party) and Davis County and are not pleased with the ruling of the trial judge. Their brief is simply an attempt to retry the case to the Appellate Court using evidence that was not even introduced in the trial court rather than point out deficiencies in the facts upon which the trial court made its ruling. Such cannot be and this court must affirm the trial court below.

POINT III

THE TRIAL COURT CORRECTLY APPLIED THE PROPER
MEASURE OF DAMAGES FOR A BREACH OF CONTRACT.

It has long been established in Utah that the proper measure of damages for a breach of contract is to award an amount which is necessary to place the non-breaching party in as good a position as if the contract had been performed. Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982). The court in Young Electric Sign Company v. United Standard West, 755 P.2d 162 (Utah 1988), relied upon Alexander and said,

In general, contractual damages are measured by
the lost benefit of the bargain...

At page 164.

In Keller v. Deseret Mortuary Company, 455 P.2d 197 (Utah 1969),
In Keller v. Deseret Mortuary Company, 455 P.2d 197 (Utah 1969),
the court instructed that when the claim is based upon a definite
contract the appropriate assessment of damages is:

...that a non-beaching party should receive an
award which will put him in as good a position as
he would have been had there been no breach.

At page 198.

In applying the law to the facts the trial court in this
case determined that Appellee breached the contract when it failed
to construct an 11 foot deep channel. However, the court also
found that a 6 foot deep channel would have drained Appellants'
property sufficiently to allow it to yield the same crop that it
would have if an 11 foot deep ditch had been dug. The 6 foot deep
ditch already in existence would have been cleaned if Appellee had
performed under the contract. Because the existing ditch was not
cleaned, Appellee caused some limited damage to Appellants' crop
production which the court specifically found was 10% of the
production per year for three and one half years. Therefore, if
Appellee had fully performed under the contract, Appellants would
have received \$4,165.03 in increased income from crop production.
Consequently, the damages awarded to Appellants places them in the
same position they would have been in if Appellee had fully
performed under the contract. The trial court's application of the
law to the facts is consistent with the standard set by the Supreme
Court and should be upheld on appeal.

POINT IV

APPELLANTS' CLAIMS OF CONSTITUTIONAL RIGHTS VIOLATIONS WERE NOT RAISED AT THE TRIAL COURT OR ANYWHERE AND, THEREFORE, CANNOT BE RAISED ON APPEAL.

The Complaint of Appellants filed by their first attorney and not modified by any of their subsequent attorneys asserted a breach of contract claim. The record is entirely devoid of any assertion that Appellants' constitutional rights were violated. Not before the trial court or anywhere else have Appellants raised constitutional issues until Appellants in their brief assert a constitutional taking of their property. Had Appellants raised the issue below, it would have been challenged because Appellee believed it paid Appellants fair market value for their property. However, it has long been recognized that issues not raised at trial cannot be raised on appeal.

In Pratt v. City Council of the City of Riverton, 639 P.2d 172 (1981), the court squarely addressed the issue. Responding to a constitutional claim for the first time on appeal the court said,

Issues not raised at trial cannot be raised on appeal. This general rule applies equally to constitutional issues, with the limited exception of where a person's liberty is at stake. Inasmuch as the constitutionality of the act was never raised at trial, plaintiffs are, therefore, precluded from raising it on appeal.

At page 173-174.

In Johnson v. Department of Employment Security, 782 P.2d 965 (Utah Ct.App. 1989), the court declined to address the issue of violation of constitutional guarantees of equal protection when Johnson raised the issue for the first time on appeal. The court

instructed,

...We do not consider issues raised for the first time on appeal. Rekward v. Industrial Commission, 755 P.2d 166, 168 (Utah Ct.App. 1988). This general rule applies to constitutional issues first raised on appeal as well as to other issues, unless a person's liberty is at stake. Pratt v. City Council of the City of Riverton, 639 P.2d 172, 173-174 (Utah 1981); see Pease v. Industrial Commission, 694 P.2d 613, 616 (Utah 1984) (petitioner has the responsibility to raise all issues that could be presented at the time, including constitutional issues, for the issues to be presented for appeal).

At page 972.

The foregoing are in accord with Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991), where the claim was that an award of compensatory punitive damages violated the ban on excessive fines and the due process provisions of the Utah Constitution. However, the claims were first argued on appeal. The Supreme Court declared,

Fire insurance did not, however, raise these arguments before the trial court and has, therefore, waived any right to present them on appeal....

At page 800.

Simply stated, Appellants cannot now raise claims of constitutional depravation for the first time on appeal.

POINT V

APPELLANTS ACCEPTANCE OF THE BENEFITS OF THE JUDGMENT ESTOPS APPELLANTS FROM ATTACKING THE JUDGMENT ON APPEAL.

Included as an addendum to this brief is a copy of the check issued by Davis County to Appellants Joseph Charles and Bessy T. Jensen in the amount of \$4,165.03 which is the same amount as

the judgment rendered by the court. The check was endorsed and presented for payment on January 19, 1993. Appellants have, therefore, accepted the benefits of the judgment while at the same time they are pursuing the appeal before this court. In Cingolani v. Utah Power and Light Company, 790 P.2d 1219 (Utah Ct.App. 1990), the court described the doctrine of acceptance of the benefits as follows:

Under the general acceptance-of-the-benefits doctrine, one who accepts a benefit under a judgment is estopped from later attacking the judgment on appeal, and one who acquiesces in the judgment cannot later attack. Tree v. Lewis, 738 P.2d 612, 613 (Utah 1987);...

At page 1221.

It is, therefore, clear that Appellants have accepted the benefit of the judgment and are estopped from attacking the judgment on appeal.

POINT VI

APPELLANTS ARE NOT ENTITLED TO ATTORNEY'S FEES.

Appellants seem to claim in their brief that the court erred by not awarding them attorney's fees. The trial court addressed the issue in its Conclusions of Law as follows:

Because the contract has no provision which allows at least one party to recover attorney's fees as required in Section 78-27-56.5 and because the court finds the defense was with merit and brought in good faith, the court does not award any costs or attorney's fees.

Section 78-27-56.5, Utah Code Ann. (1953) as amended, which was referenced by the court states the following:

A court may award costs and attorney's fees to either party that prevails in a civil action based

upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allowed at least one party to recover attorney's fees.

The contract which gives rise to Appellants claim was signed on December 30, 1987. The contract has no provision about attorney's fees. The statute, therefore, precludes the court from awarding attorney's fees to either party.

The statutory provision is consistent with prior Utah case law. In Carr v. Enoch Smith Co., 781 P.2d 1292 (Utah Ct.App. 1989), the court said,

We do, however, find error in awarding attorney's fees in favor of Smith. "The general rule in Utah is that attorney fees cannot be recovered absent statutory authorization or contract." Cooper v. Deseret Federal Savings and Loan Association, 757 P.2d 483, 486 (Utah Ct.App. 1988). See also Mecham v. Benson, 590 P.2d 304, 309 (Utah 1979)....

At page 1296.


There is no provision in the contract between the parties for an award of attorney's fees, therefore, the ruling of the trial court about attorney's fees is proper and should be affirmed.

CONCLUSIONS

The Appellee respectfully submits that based upon the foregoing this court must dismiss the appeal and affirm the judgment of the lower court.

RESPECTFULLY SUBMITTED this 3rd day of August,

1993.



Gerald E. Hess
Chief Civil Deputy
Davis County Attorney's Office
Attorney for Defendant/Appellee

ADDENDUM

EXHIBIT A - Rule 24 Utah Rules of Appellate Procedure

EXHIBIT B - Copy of Check

EXHIBIT C - Findings of Fact, Conclusions of Law and Order

EXHIBIT A

counsel of record or by a party who is not represented by counsel.

Rule 22. Computation and enlargement of time.

(a) **Computation of time.** In computing any period of time prescribed by these rules, by an order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state or federal governments.

(b) **Enlargement of time.** The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, but the court may not enlarge the time for filing a notice of appeal or a petition for review from an order of an administrative agency, except as specifically authorized by law. A motion for an enlargement of time shall be filed prior to the expiration of the time for which the enlargement is sought. A motion for enlargement of time shall:

- (1) State with particularity the reasons for granting the motion;
- (2) State whether the movant has previously been granted an enlargement of time and, if so, the number and duration of such enlargements;
- (3) State when the time will expire for doing the act for which the enlargement of time is sought; and
- (4) State the date on which the act for which the enlargement of time is sought will be completed.

(c) **Ex parte motion.** Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this rule.

(d) **Additional time after service by mail.** Whenever a party is required or permitted to do an act within a prescribed period after service of a paper and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 23. Motions.

(a) **Content of motion; response; reply.** Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by the following:

- (1) A specific and clear statement of the relief sought;
- (2) A particular statement of the factual grounds;
- (3) If the motion is for other than an enlargement of time, a memorandum of points and authorities in support; and
- (4) Affidavits and papers, where appropriate.

Any party may file a response in opposition to a motion within 10 days after service of the motion; however, the court may, for good cause shown, dispense with, shorten or extend the time for responding to any motion.

(b) **Determination of motions for procedural orders.** Notwithstanding the provisions of paragraph (a) of this rule as to motions generally, motions for procedural orders which do not substantially affect the rights of the parties or the ultimate disposition of the appeal, including any motion under Rule 22(b), may be acted upon at any time, without awaiting a response. Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. The court may review a disposition by the clerk upon motion of a party or upon its own motion.

(c) **Power of a single justice or judge to entertain motions.** In addition to the authority expressly conferred by these rules or by law, a single justice or judge of the court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice or judge may not dismiss or otherwise determine an appeal or other proceeding, and except that the court may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single justice or judge may be reviewed by the court.

(d) **Form of papers; number of copies.**

(1) Except for motions to enlarge time, five copies shall be filed with the original in the Supreme Court, and four copies shall be filed with the original in the Court of Appeals, but the court may require that additional copies be furnished. Only the original of a motion to enlarge time shall be filed.

(2) Motions and other papers shall be type-written on opaque, unglazed paper 8½ by 11 inches in size. The text shall be in type not smaller than ten characters per inch. Lines of text shall be double spaced and shall be upon one side of the paper only. Consecutive sheets shall be attached at the upper left margin.

(3) A motion or other paper shall contain a caption setting forth the name of the court, the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper. The attorney shall sign all papers filed with the court with his or her individual name. The attorney shall give his or her business address, telephone number, and Utah State Bar number in the upper left hand corner of the first page of every paper filed with the court except briefs. A party who is not represented by an attorney shall sign any paper filed with the court and state the party's address and telephone number.

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules,

statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review for each issue with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record (see paragraph (e)).

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of opinions, statutes, rules, regulations, documents, etc.**

(1) Any opinion, memorandum of decision, findings of fact, conclusions of law, or order pertaining to the issues on appeal and any jury instructions or other part of the record of central importance to the determination of the appeal shall be reproduced in the brief or in an addendum to the brief.

(2) If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except

EXHIBIT B

County Auditors Office

To the Treasurer of Davis County
Farmington, Utah

First Security Bank of Utah, N A
Farmington, Utah
31-1/1240

CHECK NO. -
052318

DATE 12/11/92

CHECK AMOUNT

*****4,165.03

PAY ***FOUR THOUSAND ONE HUNDRED SIXTY FIVE Dollars and 03 Cents***

TO THE
ORDER
OF

JOSEPH CHARLES & BESS/ I. JENSEN
3242 SOUTH 1000 WEST
SYRACUSE, UT

0000-000

840/5-

Margene Isom
Mark Altom

⑈052318⑈ ⑆124000012⑆127 08009 13⑈

⑈0000416503⑈

010131102510

01 11/15/92

12/11/92

01/20/93
1240-00012

12406987

2706 55311

Joseph C. Jensen
Becky Jensen

EXHIBIT C

SCOTT W. HOLT, #1532
Attorney at Law
44 North Main
Layton, Utah 84041
Telephone: (801) 546-1264

FILED IN CLERK'S OFFICE

JAN 21 12 38 PM '93

CLERK'S OFFICE

RECEIVED

JAN 21 1993

DAVIS COUNTY ATTORNEY

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

JOSEPH CHARLES JENSEN and BESSY T. JENSEN)	
Plaintiff,)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
vs.)	
DAVIS COUNTY,)	
Defendant.)	Civil No. 9107 49203 CV

THIS MATTER having come on regularly for Trial on the 28th and 29th day of October, 1992 before the Honorable Jon M. Memmott, one of the Judges of the above entitled Court, Plaintiff was present and represented by SCOTT W. HOLT and Defendants were represented by Counsel GERALD HESS.

THE COURT, after having heard testimony of the parties and the witnesses and the arguments of Counsel, after review of the evidence presented and legal memorandums filed and being further advised, does hereby makes the following Findings of Fact, and Conclusions of Law:

FINDINGS OF FACT

1. The parties entered a contract under which Plaintiff sold a portion of his farm ground to Davis County for the construction of a flood control channel. The pertinent parts of the contract provided:

- A. The flood control channel was to be 11 feet deep; and
- B. The flood control channel was to be completed on or before

December, 1988.

JUDGMENT ENTERED
BY *K.M.*

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FILMED

2. At the time the contract was entered that it was not foreseeable that Plaintiffs' property would be subject to "Wetlands Act." Both parties to the contract, Plaintiff and the project director for the County, Mr. Sid Smith, indicated that at the time of the contract they had no idea or previous indication that the Plaintiffs' irrigated farmland would be considered wetlands.

3. The fact that an environmental expert, Mr. Oliver Graw, testified at Trial that from looking at a 1987 or 1988 photograph of the Plaintiffs' property that certain areas could be potential "wetlands" does not establish that the issue of "wetlands" was foreseeable by the parties at the time of contract.

4. That Plaintiff negotiated for the sale of his land based upon the construction of the 11 foot deep drainage channel. The Plaintiff sold his land at a lower price than he believed was the fair market value. Plaintiff believed the flood control channel would act as a field drain which would benefit Plaintiffs' land substantially by leaching the ground and removing an alkali problem. He believed crop production would double. This was based on Plaintiffs' extensive research, prior experience with field drains, other properties in the area and discussions with Utah State University Professors.

5. That Davis County did not complete the 11 foot flood control channel on or before December 1988 as required by the Contract.

6. That the Court found two separate reasons why Davis County did not complete the 11 foot flood control channel on or before December 1988 as required by the Contract and have not presently completed the project.

A. In the summer of 1988 the Davis County Commission directed Mr. Sid Smith that all the equipment and personnel of Davis County be assigned to the completion of the fill project for construction of the Davis

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County Jail and Court Complex. This project turned out to be larger than anticipated and as a result there were no County resources available to complete the flood control channel as originally planned. The County Commission and Mr. Smith were aware that the contract with the Plaintiff could not be completed if personnel and resources were diverted to the other project. Despite the contract agreement the County knowingly decided to assign resources to another project. Thus, the Court finds upon the facts that the County breached the terms of the contract by not completing the project on or before December 1988, for a reason separate than set forth in their defense of impossibility. The Court finds that the decision to transfer resources was prior to any knowledge of "wetland" issues, and that the County could not have completed the project on or before December 1988 because of the decision to transfer the resources.

B. Following the decision to divert the equipment and resources from the flood control channel project to the Jail Complex project the County learned in November of 1988 that there were "wetland" issues being raised on the related flood control project in Clinton. Following this discovery the County had several meetings and correspondence with the Army Corps of Engineers concerning the property involved in this lawsuit. The pertinent information the County received was as follows:

i. April 10, 1989 - Letter from Army Corps of Engineers to Sid Smith, Davis County Flood Control. This letter established that the County must obtain a 404 permit before they could proceed any further with the flood control channel.

ii. June 23, 1989 - Letter from Army Corps of Engineers to Mr. Sid Smith. This letter established the notice to the County that the Army Corps of Engineers considered that the proposed 11 foot channel would drain

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adjacent wetlands. As such, this was not the "less damaging alternative" as required to obtain the required permit. The Army Corps of Engineers recommended consideration of a wider canal only two to three feet deep.

iii. October 6, 1989 - Letter from Army Corps of Engineers to Mr. Sid Smith. This letter established again that the 11 foot deep channel as required under the contract was not acceptable to the Army Corps of Engineers. The letter also established that the permit application from the County was not complete and if the County provided a study the Corps would consider less damaging alternatives.

iv. January 26, 1990 - Letter from Army Corps of Engineers. This letter responded to several issues raised by the Plaintiff in which he indicated that the lands were not subject to the Wetlands Act and the County should therefore proceed on the project without a permit.

7. Based upon testimony of the witnesses and minutes of various Syracuse City and Davis County meetings the Court found that the facts establish that in addition to the problem with the 404 permits and wetland issue the County had difficulties with Syracuse City in obtaining approval for the flood control project as designed. As a result the County did not have sufficient funds to complete the closed pipe option approved by Syracuse. The Court specifically finds that it was a combination of the "wetlands" issues and permits, the lack of approval from Syracuse City and lack of adequate funding to complete the project that caused the County to not proceed to finish the project or proceed to begin the necessary studies to get permit approval for "less damaging alternatives." The Court is not able, based upon the evidence, to determine which was the primary factor for not proceeding with the permit application (for any alternative) and construction of the flood control channel. The Court does find that each issue was a significant factor in not

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proceeding with the permit application and project.

8. In 1992 Syracuse City obtained Community block grant funds which are being applied to this flood control project. With these additional funds and approval of Syracuse City, the County has retained consultants from Ekitone to complete the necessary environmental studies in order to submit a complete 404 application to receive the permit in order to complete the flood control channel.

9. The County is now developing "less damaging alternative plans" for the flood control channel. This is approximately 3-1/2 years after they received notice of an incomplete application from the Army Corps of Engineers.

10. As to damages that have resulted because the County has not constructed the 11 foot deep flood control channel the Court received conflicting testimony from the Plaintiff, Mr. Jensen, Plaintiff's expert - Prof. Gilbert Miller, PHD., and Defendant's expert - Prof. Lyman Willardson, PHD. Based upon the credibility and weight of the testimony the Court makes the following findings relating to the damages suffered by the Plaintiffs.

A. That the Plaintiff's farm land is in an area with significant ground water, alkali and hard pan problems.

B. That only by developing an extensive field drain system and ripping the hard pan would the Plaintiff be able to increase production beyond current levels.

C. That the County by not cleaning the current drains that Plaintiffs had dug on the land he conveyed that the County caused some limited damage to crop production. The Court finds that damage to be 10% of production per year.

D. That as established by Prof. Lyman Willardson a deep drain

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on the west side of the property would have very little impact for two reasons:

- (1) The ground water comes from the Northeast and therefore an interceptor drain is needed on the Northeast side of the property rather than the West; and
- (2) Below a depth of six feet on Plaintiffs' property is clay soil which does not allow for permeability. Therefore, there would be very little difference in productivity between an 11 foot channel or a six foot channel.

E. The Court finds therefore, that the Plaintiff would not suffer damage in crop production for failure of the County in building an 11 foot deep channel if they build as a "less damaging alternative" a five to six foot flood control channel.

F. The Court finds the damage to Plaintiff for Defendants' failure to clean the current drains and proceed to build "less damaging alternative drains" at 5'-6' for the last 3-1/2 years is:

1989 - 4.5 bushels (10% of production) x 123 acres x \$2.21 =

\$ 1,223.24

1990 - 3.78 bushels (10% of production) x 123 acres x \$2.16 =

\$ 1,004.27

1991 - No damage - crop lost

1992 - 6.97 bushels (10% of production) x 123 acres x \$2.26 =

\$ 1,937.52

TOTAL: \$4,165.03

CONCLUSIONS OF LAW

In this case, the Court finds that in order for the Defendant to establish the contractual defense of impossibility and for the obligation to be deemed discharged, they must establish (1) an unforeseen event occurring after formation of the contract, (2) that they are without fault in relation to the Plaintiff under the contract; and (3) the unforeseen event makes performance

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of the contract impossible or highly impracticable.

In the facts established at trial:

1. The requirement of a 404 permit was an unforeseen event occurring after the formation of the contract.

2. The Defendants are not without fault in relation to the contract. The Defendants breached the contract for other reasons prior to learning of the 404 permit requirement. The Defendants did not clean and maintain the drain on the property they acquired while this dispute continued. The Defendants did not proceed to complete the permit application because of other reasons, in addition, to the normal 404 permit process. Defendants' own expert said a six foot drain would benefit Plaintiff as much as an 11 foot drain, but they did not proceed for 3-1/2 years on that permit process.

3. The performance of the 11 foot drain is highly impracticable or impossible if there is a less damaging alternative. However, the performance of a permit for a six foot channel or providing other drains on the Northeast of the property or other reasonable alternatives were not pursued by the Defendant because of other problems with the project with Syracuse City.

Because of these findings the Court concludes that the Defendant has not met its burden in establishing the defense of impossibility.

The Court would, therefore, grant Plaintiff specific performance limited to the County proceeding to build the flood control channel utilizing a "less damaging alternative" of five to six foot depth if approved by the Army Corps of Engineers. The Court would grant Plaintiff specific performance as to the installation of three field drains and the barbed wire fence along the west boundary of the property after the construction is completed.

Because the contract has no provision which allows at least one party to recover attorney's fees as required in Section 78-27-56.5 and because the Court

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finds the defense was with merit and brought in good faith the Court does not award any costs or attorney's fees.


ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law the Court hereby

ORDERS:

1. That Plaintiff be awarded damages in the amount of \$4,165.03.
2. That Plaintiff be awarded specific performance limited to the County proceeding to build the flood control channel utilizing a "less damaging alternative" of five to six foot depth if approved by the Army Corps of Engineers.
3. That Plaintiff be awarded specific performance as to the installation of three field drains and the barbed wire fence along the west boundary of the property after the construction is completed.
4. Each party should assume and pay their own attorney's fees and costs incurred herein.

DATED this 20th day of January, 1993.


JON M. MEMMOTT
District Judge

APPROVED AS TO FORM AND CONTENT:


GERALD HESS, Attorney for Defendant

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was mailed to the Attorney for Defendant, GERALD HESS, at the Davis County Attorney's Office, at P O Box 769, Farmington, Utah 84025 this 6 day of January, 1993 by depositing same in the U.S. Mail, postage prepaid.

Gayle Hansen_____

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CERTIFICATE OF DELIVERY AND MAILING


I hereby certify that I delivered an original and ten true and correct copies of the foregoing Appellee's Brief to:

The Clerk of the Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City UT 84102

and two true and correct copies of the foregoing Appellee's Brief to:

Joseph C. Jensen
Attorney Pro Se for Appellants
P.O. Box 73
Clearfield UT 84015

postage prepaid this 300 day of August, 1993.



Gerald E. Hess

jensen2.bri