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L. W. Flynn, Dba L. W. Flynn Construction Company v. W. P. Harlin Construction Company, Et Al. : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

L. W. FLYNN, dba L. W. FLYNN CONSTRUCTION COMPANY,
Plaintiff-Appellant-Cross Respondent

v.

W. P. HARLIN CONSTRUCTION COMPANY, ET AL.,
Defendants-Respondents-Cross Appellants

Case No. 12855

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action to recover (1) lost profits (2) damages for wrongful conversion of certain materials owned by the plaintiff, (3) interest on said amounts and (4) attorney's fees which the plaintiff Loyal Flynn alleges he sustained when the defendants W. P. Harlin Construction Company and M. Morrin & Son Company, Inc. wrongfully breached their subcontract with the plaintiff in which the plaintiff was to install certain concrete floors at the University of Utah Biological Science Building in Salt Lake City, Utah. [R. 1-7] This is also an action to recover relief

under the Utah Bonding Statutes dealing with construction of public buildings pursuant to Section 14-1-1 et sequel UCA - 1953 as amended. [R. 4-5] A counterclaim was filed asking for certain monies which the defendants claimed they spent "over and above" the subcontract price to complete the plaintiff's work. [R. 10-12]

DISPOSITION IN THE LOWER COURT

This case was tried before a jury of eight (8) members for five (5) days and seven (7) members for two (2) days presided over by the Honorable Bryant H. Croft on January 24, 25, 26, 27, 28 and 31st and February 1, 1972. [R. 61-70] At the conclusion of the fifth day of trial one of the Jurors, Norman N. Suaza, asked to be excused from service for economic reasons. [R. 68, 187] Based upon this request and upon stipulation by the parties, the court ordered the trial to continue with seven members. [R. 187] This jury unanimously [R. 922-924] returned specal verdicts finding: (1) the defendants had wrongfully breached their subcontract with the plaintiff Loyal Flynn and the defendants were not justified in ousting Mr. Flynn from the Biological Science Building job site; (2) the plaintiff Loyal W. Flynn was entitled to twenty thousand dollars ($20,000) damages for lost profits which he would have realized had he been allowed to complete his subcontract and (3) the plaintiff was entitled to $5,000 damages for the reasonable market value of the materials (plywood, 2 x 4's, etc.) which he

brought to the job site; but which were never returned to him by the defandants nor paid for when they finished the work. [R. 146-147] The jury found against the defendants on all aspects of their counterclaim. [R. 146, 147, ¶ 1 and 3] The plaintiff Joe Flynn's claim was settled during the trial; and he was dismissed from the lawsuit for all practical purposes. [R. 126] Thereafter on February 4, 1972, the Honorable Bryant H. Croft called the parties and counsel to his court where he granted defendants' motion for a directed verdict on the jury findings of lost profits in the amount of twenty thousand dollars ($20,000); but denied the defendants' motion for a directed verdict on the jury's findings of (1) wrongful termination of the subcontract and (2) the award of $5,000 for the defendants' wrongful conversion of the plaintiff's materials. [R. 926-951] The trial judge refused to award attorney's fees to either party. [R. 160, 163 ¶ 4] The plaintiff then filed his notice of appeal appealing from ¶s 2 and 4 of the judgment on verdict [R. 171-172] and the defendants filed their cross-appeal from ¶s 1 and 3 of the said judgment. [R. 175]

RELIEF SOUGHT ON APPEAL

The appellant seeks to reverse the decision of the Honorable Bryant H. Croft granting the defendants' motion for a directed verdict as to the lost profits in the amount of $20,000 and asks this Honorable Court to either enter its judgment or direct that judgment be entered by the trial court in accordance with

the jury verdict; together with interest at the rate of 6% per annum from August 25, 1966 [the date the defendants admit they completed the plaintiff's subcontract work]; together with a reasonable attorney's fees pursuant to Section 14-1-8 UCA - 1953.

STATEMENT OF FACTS

The facts will be presented in a light most favorable to the plaintiff since the jury found for the plaintiff. It is recognized there is a dispute on some of the facts and defendants' brief will probably present the evidence differently on those matters. The pertinent facts are presented under the following argument headings which discuss both those issues raised in the defendant's cross-appeal [R. 175] as well as those in the plaintiff's appeal. [R. 171-172]

I

THE TRIAL JUDGE WAS CORRECT IN SUSTAINING THE JURY'S VERDICT WHICH FOUND THE DEFENDANTS' TERMINATION OF LOYAL FLYNN'S SUBCONTRACT AND THE ACTION OF THE DEFENDANTS IN OUSTING MR. FLYNN FROM THE JOB WAS WRONGFUL AND COULD NOT BE JUSTIFIED UNDER THE CIRCUMSTANCES IN THIS CASE.

The trial judge instructed the jury in accordance with the respective claims of the parties as they related to the issue of wrongful termination of the subcontract and accurately set forth what the jury

would or would not have to find in order to agree with the parties' respective positions. [Ins. #12, 13 & 14; R. 129-133] These instructions clearly protected the defendants and are in accordance with the general law relating to wrongful breach of contract. [*Weyher Construction Company v. Cox Construction* Co., 22 U.2d 365, 453 P. 2d 161 (1969); 13 Am Jur 2d 44, *Building & Construction Contracts*, §41 et sequel "Substantial Performance"; 12 Am Jur, 961-962, *Contracts*, §386 "Prevention of Performance."]

In *Weyher, supra*, the Utah Supreme Court upheld the jury verdict for a subcontractor who was to contract a portion of a state road facility by June 30th. The actual work was not completed until two months later and the prime contractor refused to pay. The subcontractor then commenced a lawsuit for the balance due under the subcontract and also for damages incident to the prime contractor's preventing the subcontractor from proceeding on schedule. The evidence showed the steel contractor upon whom the subcontractor had to rely did not get his steel at the site on time thereby making it impossible for the subcontractor to complete his work on time. The Supreme Court cited from 16 ALR 3rd 1254 wherein it was stated: "It seems fairly well settled that a general contractor is under an implied obligation not to hinder or delay performance by his subcontractor and may incur liability for the latter's damage if he does not take all the reasonable steps to insure the job site is ready and that work proceeds without undue delay."

Based upon the evidence and the instructions from the court, the jury in the instant case, returned its special verdict #1 finding the defendants Harlin-Morrin were not justified under the facts and circumstances of this case in terminating Flynn's participation in the work under the subcontract. [R. 146] This finding was amply supported by the record and as the trial judge said in denying the defendants' motion for a directed verdict on this special finding:

> "I also find that Harlin & Morrin with a larger crew, . . . completed the [3rd] floor and the roof in 60 additional working days. Four of the 38 working days that Flynn had, he spent in pouring cement on the 1st floor or at least part of them and so his performance in doing a substantial part of the second floor in 34 working days if we take out those 4 for the work on the 1st floor and the basement, is not so bad when compared to the fact that Harlin & Morrin's own working crew, when they took over, took about 30 days to complete each of the other two floors, the 3rd and the roof." [R. 934]

The record is replete with testimony showing Flynn had to wait upon the defendant's own employees as well as several other subcontractors who were behind in their schedules, thereby making it impossible for Flynn to proceed.

The subcontract on page 1-A provides Loyal would follow the schedule set by the general contractor. [Ex. 18-P] When Mr. Flynn submitted his bid on September 17, 1965, Mr. Dan McCann, super-

intendent for the joint venture referred to a bar graph located in his office showing the progress expected of the various subcontractors. This bar graph was introduced into evidence as Exhibit 21-P and items 5 [slab on grade] and 6 [suspended slabs] cover Flynn's subcontract work. This chart showed the basement and first floor being done by January 1, 1966, and the balance of the concrete work by November 1, 1966. [R. 400, 767-768, 1022-1028] As will be shown hereafter, the November, 1966, deadline was substantially accelerated by the defendants.

The joint venture fell behind schedule from the beginning. Although Mr. Harlin asked the plaintiff to pour the cement on the basement and first floor by January 1, 1966, and told him he could commence work by December 1, 1965, on these projects, [R. 1023] it soon appeared the joint venture was having trouble with its own employees and with the other subcontractors whose work had to proceed Mr. Flynn's. Exhibit 79-D is the defendants' job journal for this project; and it reflects these other specialty trades and subcontractors having fights among themselves and delaying the job to such an extent they were not ready for Mr. Flynn to commence his work until February 3, 1966. [Ex. 79-D] On cross-examination Mr. Harlin goes through the job journal showing the problems his own employees and other subcontractors created for Flynn. [R. 249-277] Mr. Harlin admitted the job site was not ready for Loyal to commence his subcontract until February 3, 1966; [R. 290-291, 778-780] and further admitted Flynn was held up from

February 19, 1966, until March 25th because Harlin's own employees and the other subcontractors were not proceeding on schedule. [R. 352-353, 400-404, 799] These problems and delays were also testified to in substantial detail by Mr. Flynn. [R. 577-578, 627-630, 654, 891-892, 901, 1028-1033, 1037-1040, 1062-1064, 1085]

Mr. Austin Scott was called as a witness for the plaintiff. He had been Loyal Flynn's foreman and had remained in charge of the Flynn subcontract work after May 15, 1966, when Flynn was ousted from the job. He stated Mr. Flynn was continually plagued with delays and other problems caused by Harlin-Morrin employees and by the other subcontractors; that these problems existed from the outset of the job and continued during the time Loyal was there. [R. 690, 693] He testified Harlin never complained to him about Loyal's work not being satisfactory nor did anyone else either during the time Flynn was there or after he left. [R. 700, 721] He stated most of Loyal's crews remained after May 15th and continued to complete the work for Harlin-Morrin in the same manner as they had done for Mr. Flynn with no changes in design, procedure, etc. [R. 688], and this fact was admitted by Harlin [R. 339, 835], and Harlin's other subcontractors. [R. 431-432]

The delays caused by Harlin's employees and other subcontractors precipitated a meeting on April 18, 1966, in which the officers from the joint venture

as well as the other subcontractors were called together to try and work out a schedule that everybody could follow. [R. 672, 802] Mr. Ray Ward, chief estimator for the joint venture, was assigned the responsibility to coordinate the subcontractors' efforts and let them know what would be expected in the future. [R. 802] Mr. Ward took a set of the blueprints and in red pencil markings, he indicated the dates by which the various subcontractors were to have their jobs done. [Ex. 17-P, sheets S-2, S-3, etc., R. 190, 672, 1015, 1017, 1018, 1062-1064] At this meeting, Mr. Flynn agreed to pour an average of 7,000 sq ft of concrete each week and to complete the second floor by May 6, 1966, provided the excavating and column and wall subcontractors were sufficiently ahead of him so that he could do his work without interference. [Ex. 53-P] Each of the parties forwarded letters to the other setting forth their respective understandings reached at the April 18, 1966, meeting. [Ex. 52-P, 53-P]

Mr. Flynn testified he complied with these requirements and in fact poured approximately 7800 sq ft of concrete from the date of the meeting on April 18, 1966, until he was asked to leave the job on May 13, 1966. [Ex. 22-P, R. 1061] In addition to the amounts shown on Exhibit 22-P he testified he should be given credit for an additional 3,000 ft on the second floor perimeter beam which would increase the average weekly pour shown on the exhibit. [R. 648] The defendants' exhibits confirmed the plaintiff's figures. [Ex. 88-D]

Mr. Flynn stated he completed forming and shoring all of the second floor except for about 1400 sq ft by the time he left the job. [R. 603, 890-893] He stated he was unable to complete this 1400 sq ft because the other subcontractors were not sufficiently ahead of him. [R. 1060-1064] It is clear from the evidence the columns were not installed by the dates indicated on Exhibit 17-P, p. S-3, nor was the excavating done as required therein. [R. 891-892] One of the defendants' own photographs, Exhibit 74-D, shows a thirty foot deep hole around a portion of the building which made it impossible for Mr. Flynn to install his scaffolding materials to complete the construction of the perimeter beam on the second floor. This hole was still not filled in by the time Flynn left the job which is the date the photograph was taken. Mr. Ray Ward confirmed that Mr. Flynn would not be able to follow the schedule which he put on the blueprints unless the other subcontractors had completed their work by the time specified. [R. 190-191] All of the witnesses testified the other subcontractors did not complete their work as scheduled. [R. 249-277, 356, 400-410, 800-804] The job was also plagued with bad weather during this time which prompted the joint venture to extend Mr. Flynn's deadline for the second floor from May 6th to May 10th.

The plaintiff had a contractor's specialty license #7523 issued September 12, 1960, [R. 515-517, 527, 529, 1002] which authorized him to perform the work called for in the subcontract. He had been

doing concrete construction work for his father Joe Flynn, who had been in business for twenty-five years. [R. 533, 534, 550, Ex. 16-P] He testified in substantial detail how he computed his bid at $86,000, the suppliers he contacted, and introduced into evidence a design he created for the beam construction. [R. 593, 644-645, 1067, Ex. 64-P]

Mr. Flynn explained to the jury step by step just how he formed, shored and poured concrete. [R. 576, 1046-1060, 1067-1080] This testimony allowed the jury to determine for themselves whether or not Mr. Flynn knew what he was doing. He further stated all of his work was double-checked by Harlin-Morrin's superintendent and by either the project engineer, Morris Page; the architect, William Thomas, or the Utah State Building Board inspector, Wilson Harris; and he could not pour until these men were satisfied everything was ready. [R. 1051-1053] Consequently any errors in his pours were those of the joint venture and not Mr. Flynn. Other witnesses admitted Loyal's work was double-checked by these other people. [R. 386-387, 405-406, 692, 722, 852-854]

The plaintiff did admit two times when he felt his work was below what he would consider acceptable standards. One of these times involved a pour on the 2nd floor perimeter beam on April 14, 1966. He had ben told to prepare the said area because Harlin-Morrin needed the cement pump in Provo at 4:30 that afternoon. [R. 1097-1101] He told the general contractor the ground was not ready for the

pour, but the general contractor insisted; so Loyal completed the pour and still did a fairly good job. [R. 623, 1097-1101] The other problem involved a request by the superintendent to form a certain area one way whereas Loyal felt it should be done another way. The forming was done as required by the superintendent and it subsequently failed. The superintendent ordered it done the second time and it failed again. Finally the plaintiff came out on a Saturday and did the forming the way he felt it should be done and it held. [R. 622, 702, 900-901, 1100]

Mr. Harlin was president of the W. P. Harlin Construction Company. [R. 755] He stated his job was to "push" the people to get the job done. [R. 756] He said he knew Loyal Flynn could not post a surety bond as called for in paragraph 3 of the subcontract so they crossed out this requirement. [Ex. 18-P, paragraph 3, R. 759-760] Flynn testified he told Harlin he would be bringing materials to the job site from the Midvale Elementary and Trade Tech projects [R. 1092-1093] and would meet his payroll with funds he had coming from a construction job at Hill Air Force Base. [R. 1089-1090] This was conditioned on his being able to begin work by December 1, 1965 and being able to draw on his subcontract pursuant to paragraph 8 thereof after that time. [R. 1088-1090]. Mr. Harlin seemed satisfied with these arrangements. [R. 1092-1093]. Although Harlin had told Flynn he could commence work by December 1, 1965 [R. 1023], the joint venture was not ready

for Flynn to commence his subcontract until February 3, 1966. [R. 780] Consequently the money from the Hill Air Force Base job went for other purposes [R. 1089]; and Mr. Harlin agreed to pay Flynn's employees directly and to pick up his payroll after Flynn commenced working. [R. 760-761, 1089-1097] The plaintiff also denied he had ever poured on top of sawdust or wires. [R. 1114-1115]

Under the circumstances set forth above and pursuant to the court's instructions, it is submitted there was substantial, competent evidence to support the jury verdict on the issue of wrongful termination. Mr. Harlin himself stated it would take a reasonable concrete crew on this job site eleven days to form and pour 9,000 sq ft. [R. 282-283] When judged against this criterion, Mr. Flynn's record of pouring an average of more than 7800 sq ft per week—which consisted of only five working days — is superb! [Ex. 22-P] Furthermore Harlin admitted his only complaint over Flynn's work was his rate of progress on the second floor and he was not objecting to his work on the basement or first floor. [R. 785, 789, 800, 810, 839-840.] Clearly Mr. Flynn cannot be expected to do the impossible; and if his performance on finishing the 2nd floor was prevented by the joint venture's own employees or by other subcontractors, as it was in this case, the joint venture was certainty arbitrary in terminating the subcontract.

II

THE TRIAL JUDGE WAS CORRECT IN SUSTAINING THE JURY'S VERDICT OF $5,000.00 AS A REASONABLE MARKET VALUE OF THE MATERIALS WHICH LOYAL FLYNN OWNED AND WHICH HE FURNISHED TO THE JOB SITE, BUT WHICH WERE NEVER PAID FOR NOR RETURNED BY THE DEFENDANTS WHEN THE WORK WAS COMPLETED.

The jury returned a verdict awarding $5,000.00 as the reasonable fair market value of certain plywood and other lumber materials which Loyal Flynn brought to the Biological Science job site, but which were never returned to him nor paid for by the defendants when they completed the plaintiff's subcontract on or about August 25, 1966. [R. 147] Loyal produced Exhibits 48-P & 84-P showing the costs of new and used materials which he brought to the job site.

Exhibit 84-P reads as follows:

"Lumber material Flynn brought to job site"

B-B Form Plywood—	
Burton Lumber	35,000 sq. ft. (new)
Trade Tech & Midvale School	15,000 sq. ft. (used)
Plywood Cost Jan. - May, 1966	(new cost) 20 cents p/sq. ft.

2" X 10" — 2" X 4" Material—

Burton Lumber	35,00 brd. ft. (new)
Trade Tech. & Midvale School	15,000 brd. ft. (used) (new cost $105.00 p/1000 brd. ft.

Mr. Flynn's witnesses as well as those of the defendants' fixed the value of these materials in a used condition [which would exist after the subcontract work was completed] at anywhere from 30% of new cost prices to as high as 75%. The $5,000.00 special verdict returned by the jury indicates they used a figure less than 50% which was well within the evidence. Flynn testified none of the items on Ex. 48-P had ever been returned to him [R. 642] and this fact was admitted by Harlin. [R. 856]

The plaintiff testified the plywood described in his exhibit 84-P was 3/4 inch BB form plywood, some of which had come from Midvale Elementary School and the Trade Technical projects when he purchased it from his father Joe Flynn. [R. 530-545, 552-560, 587, 1002-1011, 1014] Both he and Joe stated the materials had been used only three times when Loyal took them to the Biological Science Building. [R. 535, 1004] The plaintiff also testified he purchased a substantial amount of new plywood, 2 X 4's and 2 X 10's from Burton Lumber Company for use with his subcontract. [Exs. 47-P, 48-P, 84-P, 88-D & 90-D] He said this Burton Lumber Company

plywood had been used only once on the 2nd floor when he left the job and would have been used only three or four more times in completing the subcontract. [R. 575, 1072-1073] Flynn testified he could have completed his subcontract work with the lumber and other materials he had on the job site on May 13, 1966; and it would not be necessary to order any more materials. [R. 744, 1080-1081]

The plaintiff testified he obtained the figures shown on Exhibit 84-P from the blueprints, the plans and specifications and other documents he had in his possesion [R. 355-356]; and he testified as to how he arrived at the new prices for the plywood and other lumber materials. [R. 370-373] The defendants had no objections to Exhibit 84-P being introduced into evidence nor to any of the information contained thereon. [R. 368, 747] Consequently any objection they might have had to the admissibility of this evidence was waived; and the jury had a right to use all of the figures in this exhibit in arriving at their special verdict #4.

Sterling Purser appeared as an expert witness for the plaintiff. [R. 747] Mr. Purser was the president and 50% owner of Apex Building Specialties, a business in Salt Lake County concerned with buying, selling and renting used and new building materials. He gave the reasons for his expert opinion that BB form plywood would be worth 75% of the new price if it had been used three or four times; and 50% of the new price if it had been used ten or fifteen times or more [R. 747-753]

Mr. Flynn stated he asked the defendants' own superintendent, Mr. Harold Anderson what a reasonable value of the used plywood materials would be so that he could agree on a price with his father Joe Flynn for the materials when he purchased them from the Trade Tech. and Midvale jobs. He said Mr. Anderson told him the value of used plywood would be 50% of the original new cost [R. 1010]; and this admission alone would justify the jury verdict.

Loyal Flynn further testified he had been in the concrete construction business since 1960 and had used BB form plywood in the past and that based upon his familiarity with this plywood, his experience in the concrete construction business, and other people he had talked to, it was his opinion the BB form plywood could be used 50 to 100 times [R. 1006], and the 2x4's and 2x10's more than a hundred times. [R. 373, 374]

Joe Flynn, the father of the plaintiff Loyal Flynn testified he had been in the concrete and cement business for 20 to 25 years; that he had used BB form plywood many times in his business and was using it at the Trade Tech. & Midvale jobs; that in his experience he's used it more than 50 times. [R. 533-545] On cross-examination he stated the Trade Tech. plywood had not been cut up in any way. [R. 522-557]

Austin Scott was called as a witness for the plaintiff. [R. 686] This fifty-nine year old man had been doing carpentry work for twenty years and most of

this time he had worked on jobs involving concrete and cement floors. [R. 687] He was one of Flynn's employees on the Biological Science job and was asked by the joint venture to remain on as foreman after Loyal left on May 13, 1966. [R. 687] He said he had helped Loyal unload several truck loads of 3/4 inch BB form plywood from the Midvale Elementary job and the Trade Tech. School and that if this plywood is taken care of properly it can be used twenty to thirty times. [R. 688-694] He emphasized Loyal Flynn oiled the plywood very carefully because it belonged to him and he wanted it to last through the job. [R. 701] He stated the plywood and other forming materials which Mr. Flynn brought to the job would have been adequate in his opinion to have completed the subcontract work if it was properly taken care of by Harlin's crews. [R. 701, 744] On cross-examination he stated even though the plywood was in a few cases cut up for the beam sides, it could be used over and over again after the first cut. [R. 719-720, 731-732] Finally, Mr. Scott testified Loyal Flynn's BB form plywood was used about ten times throughout the Biological Science Building while he was there. [R. 737] He said when he left the job after the building was completed, the plywood and shoring materials were still very useable and they could be used twenty to thirty times or even more than that. [R. 695, 737] Mr. Scott said the joint venture had used some of Loyal's materials for work outside the scope of Loyal's subcontract [R. 738] and had needlessly damaged other parts of the said materials. [R. 701-702]

Mr. Ray Ward was the chief estimator for the joint venture. [R. 657] He testified if the BB form plywood is properly oiled it would have a used value as high as 75% of its new cost. [R. 665-667] As the trial judge noted, the defendants' own job journal, Exhibit 79-D indicates the defendants purchased 55 gallons of preservative oil after May 15, 1966, to care for the plywood. [R. 937]

The defendants called Marion Tamb as a witness. [R. 411] It was his responsibility to install the concrete columns which were constructed between the floors. [R. 411-413] He said the BB form plywood he used was the same as Loyal Flynn used; that it served the same purposes in his columns as it did in Loyal's beams; and that he was able to use his plywood repeatedly throughout the construction of the Biological Science Building and it was still very usable when the job was finished. [R. 417-428] It follows Loyal's plywood would have been just as usable.

Exhibit 79-D is the defendant's job journal for the Biological Science Building project. The entry on August 23rd in this job journal states the joint venture rented a flat bed truck for a month to take the scaffolding and lumber to their yards. This clearly indicates there must have been a substantial amount of lumber materials left on that day. The general contractor stated Loyal Flynn's subcontract was completed by Harlin's crews about this same time. [R. 864] Since the defendants refused to pay for these materials or to return them to Flynn, it was

impossible for Flynn to gain access to them for appraisal purposes. It is interesting the defendants did not offer any evidence of the value of the lumber materials on the date of their conversion except Exhibit 90-D which Harlin stated was just a big guess to give Flynn the benefit of the doubt. [R. 314] Since the defendants had the materials in their possession throughout the job, why didn't they produce some evidence as to how much material remained after August 25, 1966 and what its appraised value was?

In Exhibit 90-D the defendants admitted the value of used plywood would be 30% of the new cost price. [R. 229] Mr. Harlin stated he was willing to give Loyal credit for this amount on materials Harlin purchased after Loyal left but not on the Burton Lumber Company invoices; even though he admitted the Burton Lumber Company material had been used on only one more floor than the Pat Harlin Company materials. [R. 315] This exhibit 90-D shows the plaintiff was entitled to some percentage credit for the lumber materials; and it was a simple matter for the jury to determine how much. [R. 856]

The court's instruction #18 was an accurate statement of the law pertaining to this matter. The court charged the jury to determine the fair market value of the property remaining at the conclusion of the subcontract work and any other material which had been needlessly wasted by Harlin-Morrin. [R. 139] This instruction accurately sets forth the proper measure of damages relating to the value of converted property which is the reasonable fair market value of

the property at the time of the conversion. *Lowe v. Rosenlof*, 12 U.2d 190, 364 P.2d 418 (1961)

Based on the testimony of the foregoing witnesses, the jury could reasonably find Loyal Flynn's lumber materials would have lasted throughout the entire contract job and could have been returned to him with only three to six uses depending on whether we are talking about the new lumber materials from Burton Lumber Co. or the used lumber from Joe Flynn's jobs. This being the case the reasonable market value at the end of the subcontract would have been equal to at least 50% of the new cost price. This means the 50,000 square feet of plywood materials shown on Exhibit 84-P would have ben worth one-half of their new cost or 10 cents per square foot. Consequently the plywood materials alone would have a reasonable fair market value of $5,000.00 as stated in the jury's special verdict. [R. 147]

In addition to the plywood, the 2 X 4's, 2 X 10's and other lumber material of 50,000 board feet would have had a used fair market value of $52.50 per 1,000 board feet or an additional $2,625.00.

III

THE TRIAL JUDGE ERRED IN GRANTING THE DEFENDANTS' MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF LOST PROFITS AND THEREBY TAKING THE CASE AWAY FROM THE JURY BECAUSE THE JURY VERDICT WAS BASED UPON SUBSTANTIAL, COMPETENT EVIDENCE IN THE RECORD PRESENTED DURING A SEVEN DAY TRIAL CONSUMING NINE HUNDRED (900) PAGES OF TESTIMONY WITH NEARLY ONE HUNDRED (100) EXHIBITS OFFERED AND TEN (10) WITNESSES APPEARING; AND BECAUSE THE TRIAL JUDGE'S ANALYSIS OF THE EVIDENC VIEWS IT IN A LIGHT MOST FAVORABLE TO THE DEFENDANTS RATHER THAN TO THE PLAINTIFF AND IS BASED UPON SEVERAL ERRONEOUS ASSUMPTIONS WHICH ARE NOT SUPPORTED BY THE EVIDENCE.

1. *Nature of a motion for directed verdict.* When the plaintiff rested his case in chief, the defendants made a motion to dismiss the plaintiff's complaint on the grounds there was insufficient evidence to let the case go to the jury. [R. 395] After counsel for the defendants had discussed the evidence he felt supported this motion, the trial judge denied the motion with these remarks:

> "THE COURT: Well I think that is a good argument to the jury but the position I am in, Mr. Pratt, is that there is a *dispute* in our interpretation of his testimony and *the figures as to the amount of work done* and if I were to take this from the jury, the Supreme Court would send it back for another trial, I think. So I think maybe *because of the disputes in*

> *the extent of the work he had completed when he left the job,* that there is a matter for the jury to decide and would be argument to the jury to make. . . . This case, as far as I am concerned, is going to the jury. We are not going to spend a week's time trying a jury case and not letting it go to the jury *when I think we have got disputed factual questions to be decided.*" [R. 398 line 16-24; 399, line 7-10] *Emphasis added.*

It is clear the trial judge acknowledged several disputed questions of fact which existed at the time the plaintiff rested. These questions were not cleared up by any of the defendants' witnesses.

The defendants then made a motion for a directed verdict at the end of the trial; [R. 914] and the trial judge stated he would reserve any ruling on this matter until after the jury returned its verdict. [R. 916]

The jury returned its special verdict on February 1, 1972, awarding to the plaintiff $20,000 as lost profits together with $5,000 as the reasonable market value of the lumber materials at the time they were converted by defendants. [R. 146-147] On February 4, 1972, the trial judge called both counsel and respective parties into his chambers and proceeded to rule on the defendants' motion for a directed verdict. [R. 927-951] Based upon his review of the evidence, the judge denied the defendants' motion for a directed verdict upon paragraphs 1 and 4 of the jury's special verdict. These paragraphs dealt with wrongful termination of the subcontract and with $5,000

damages for wrongful conversion of materials. [R. 146-147] The court then granted the defendants' motion for a directed verdict as to paragraph 2 of the special verdict and thereby took the case away from the jury insofar as the $20,000 damages for lost profits was concerned. [R. 163, 927-951]

As one reads pages 938-950 of the record, it becomes clear the court's decision as to the damages for lost profits was based solely on the fact the court felt (1) there were 5,740 sq ft of the second floor left to be formed and shored when Flynn was asked to leave the job on May 13, 1966, and (2) Flynn had done absolutely no work whatsoever on the third floor. [R. 940] The court admitted he had to use some assumptions in order to arrive at these two conclusions. [R. 942, 944-946, 948] Based upon the amount of work which the court felt Mr. Flynn had done, he concluded that had Mr. Flynn been permitted to remain on the job, he would have spent more money than his subcontract price entitled him to receive from the defendants; and therefore he had nothing coming from the defendants; and therefore he was not entitled to any damages for lost profits. [R. 941-948]

The plaintiff submits there is ample evidence in the record to support the jury verdict as will be pointed out hereinafter; and further submits that in substituting his judgment for that of the jury, the trial judge has done exactly what this Supreme Court stated should not be done in a case that was decided on February 10, 1972, or about the same time the

trial judge made his decision in the instant case. *Ewell and Son, Inc. v. Salt Lake City Corporation*, 27 U. 2d 188, 493 P.2d 1283 (1972)

In *Ewell*, the Supreme Court stated:

> "In preface to a discussion of the various contentions of the appellant, it should be said that they have indulged in a euphoric fallacy so common to losing litigants: a blight persistence in assuming that the facts are as they desire to see them, rather than as they were seen by the jury. It therefore seems necessary to reiterate the basic rule of review: that we are obliged to survey the evidence, and all reasonable inferences that could fairly be drawn therefrom in the light favorable to the verdict. . . ."

The plaintiff made a demand for a jury trial and a jury was duly empaneled in this case. [R. 40, 49-50, 71. See also Utah Constitution, Art. I, Sections 10 and 11, Rule 38 URCP.] Under these circumstances, one would naturally expect the jury would be the sole triers of the facts. However, after nine hundred pages of testimony, the court on R. 938-950 says his analysis of the evidence leads to a conclusion different from that reached by the jury; and although the jury unanimously found all issues in favor of the plaintiff, [R. 922-924] the trial judge said the evidence was so clear no reasonable persons could possibly disagree with his conclusion. [R. 947-948]

Rule 50 (a) of the Utah Rules of Civil Procedure as amended in 1965 specifies a motion for a directed

verdict shall state the specific grounds therefore, and it is clear the only ground raised by the defendants was the evidence was insufficient to justify the jury's findings. [R. 395] In this sense the motion for a directed verdict is substantially different from a motion for a new trial in which errors in instructions, rulings on admissibility of the evidence, and other errors are cited. In a motion for a directed verdict, the trial judge pits his judgment on findings of facts, credibility of witnesses, etc. against the minds of the jurors.

The Utah Supreme Court has held in deciding a motion for a directed verdict, the court must consider the evidence in the light most favorable to the party against whom the motion is directed and must resolve every contraverted fact in his favor. *Boshkovich v. Utah Const. Co.*, 123 U 387, 259 P. 2d 885, 887 (1953) The court has also held in directing a verdict the court must examine the evidence in a light most favorable to the party against whom the evidence is intended; and it is not province of the trial judge to weigh or determine the preponderance of the evidence. *Finlayson v. Brady*, 121 U. 204, 240 P. 2d 491 (1952).

Even a casual reading of the record, pp. 938-950, shows the trial judge in the instant case did in fact weigh or determine the preponderance of the evidence and he thereby substituted his judgment for that of the jury; notwithstanding he had instructed the jury they were the sole judges of the credibility of the witnesses and the weight to be given to the

evidence. [Inst. No.s 4 & 5, R. 121, 122] The trial judge said he had spent four nights and the weekend during the trial preparing these instructions [R. 915] and the plaintiff submits Instructions 4 and 5 are the law of this case insofar as the duty of the jury is concerned. It is a mystery to the plaintiff why the trial judge did not follow this law and why he considered the verdict of the jury as advisory only.

In the instant case, the trial judge stated he had not talked to any members of the jury so he had no way of knowing what evidence the jury was looking at to determine the $20,000.00 lost profit verdict. [R. 931] The trial judge seemed to be preoccupied with certain assumptions he made after reading the defendants' job journal; however as stated in *Scott v. Austin*, 47 Utah 248, 152 Pacific 1178 (1915), even the Supreme Court cannot pass upon the weight of the evidence regardless of whether it is presented to the trial court in oral or documentary form.

2. *Correct measure of damages.* The correct measure of damages in cases of wrongful breach of a construction contract is the contract price together with any change orders less the amount of money the person would have necessarily expended in fully performing his contract. *Ralph E. Keller v. Deseret Mortuary Company*, 23 Utah 2d 1, 455 P. 2d 197 (1969); *Flynn v. Shocker Construction Co.*, et al, 23 Utah 2d 140, 459 P. 2d 433 (1969); *Weyher Construction Company v. Cox Construction Co. Inc.*, 22 Utah 2d 365, 453 P. 2d 161 (1969); McCormick on Damages, *Hornbook Series*, Section 142.

In *Keller, supra,* the Utah Supreme Court allowed a subcontractor to collect damages for his lost profit when the general contractor had unlawfully prevented him from completing the job. The court said:

> "Under the circumstances here shown, where the plaintiff contractor had done the part of the work he had performed in a satisfactory and workmanlike manner, and was not himself at fault in the failure to complete it, we see no error or impropriety in the trial court's awarding him damages based upon the total amount promised for the project, less the reasonable costs of completing it."

In the instant case the jury found Loyal Flynn had performed his work in a satisfactory and workmanlike manner and there was no justification for the joint venture terminating his subcontract. Consequently the citation from *Keller* stating the correct measure of damages would apply with equal force to the instant case.

3. *Court's instructions to the jury as to measure of damages.* The trial judge instructed the jury in accordance with the proper measure of damages as set forth *supra.* [Inst. Nos. 13 & 16, R. 131, 136] Instruction No. 13 [R. 131] provides in part as follows:

> "For the work so contracted for, Harlin-Morrin agreed to pay Flynn $86,000, which by a subsequent change order for additional work, was increased to $88,377.44. Under such contract if Flynn had completed the work to

be done, and if he were able to complete the contract at a cost less than $88,377.44, the difference would have been his profit, while if his own cost to complete the work exceeded the contract amount, the loss would be his to bear. . . ."

4. *What the evidence shows regarding necessary costs to complete the plaintiff's subcontract.* Exhibit 48-P shows the cost of the materials Loyal Flynn brought to the job site to be $20,215.88. The plaintiff testified these materials would have been adequate to have completed the remaining portion of his subcontract and he would not have needed to purchase additional materials. [R. 1080-1081] This conclusion was confirmed by Mr. Austin Scott, one of Flynn's employees, who remained on as foreman of Harlin's crew after Flynn was ousted from the job. [R. 701, 744. See also discussion of materials under Argument II, *supra* in this brief.]

As far as total labor costs are concerned, Exhibit 63-P sets forth all amounts which had been paid by either Flynn or Harlin for labor costs through May 15, 1966. The total on this exhibit is $18,661.88. The figures set forth on this exhibit are taken from the actual daily time records for each of the men working as those time records are set forth in Exhibits 39-P and 40-P. [R. 1040-1042] Thus there can be no dispute as to the amounts that were paid by the defendants to the plaintiff's crews. The testimony is that the figures on Exhibit 40-P represent gross wages. [R. 1040] In addition to these figures there would

be an 11% add-on for public liability [2%], unemployment costs [2.5%], FICA [4.2%] and workman compensation [2.3%]. [R. 229] Eleven percent of $18,661.88 is $2,052.81 which when added to the former figures makes a pre-May 15th total cost for labor plus state charges of $20,714.69.

The total amount defendants owed Flynn if he had completed his subcontract would be the original price of $86,000 [Ex. 18-P] together with $2,377.44 for the change order [Ex. 41-P] or $88,3777.44. The pre-May 15th costs for materials [$20,215.88] and labor [$20,714.69] are $40,930.37. If we subtract these pre-May 15th figures from the total contract price including the charge order we have a balance of $47,446.87 left to complete the subcontract work. Therefore in order to justify a $20,000 jury verdict for lost profits, the plaintiff could still spend an additional $27,446.87 for labor costs after May 13, 1966, or some $7,000 more than he had already expended for labor when he was ousted from the job.

Mr. Flynn testified it would have cost less for labor to complete the subcontract after May 13, 1966, than he had already paid out. [R. 601, 614-618, 1080-1081] He stated this was true because the initial cost went into moving the materials from Trade Tech and the Midvale job, getting the forming and shoring materials cut up into the right sizes and organizing his crews to work efficiently. [R. 598-599, 1081] He also stated there were some instances prior to May 15th when his crews were not able to work even though they were on the job site and this increased

his labor costs. This condition was caused by the other subcontractors and Mr. Harlin's own men not being sufficiently far ahead for him to move forward. [R. 901] By May 15th, many of these problems had been overcome as pointed out in former arguments in this brief and the work was moving forward with greater efficiency. The fact that these initial costs are substantial and are expended early in the work is also admitted by the defendants' chief estimator, Mr. Ray Ward. [R. 675-676], and by Harlin himself. [R. 841-842].

The "Monthly Estimates of Work Done" which were submitted by the general contractor to the architect, reviewed by the architect and submitted to the owner also clearly show on May 13th, 1966, Flynn's subcontract was 50% complete. [R. 660, 1096, 1097, Ex. 51-P] Mr. Flynn's work is shown as items 5 and 6 on Exhibit 51-P. Page #6 of this exhibit shows that slabs on grade were 85% complete and the suspended slabs were 50% complete as of May 23, 1966. The superintendent arrived at this amount of completion by checking the actual work that had been done. The architect then conducted a second check before he sent the estimates to the owner. [R. 662-664] Even though the general contractor was receiving these progress payments from the owner, he never paid Loyal Flynn personally any amount whatsoever as required by paragraph 8 of the subcontract. [R. 1093-1094]. And although he paid Loyal's employees and lumber materials, it is clear these payments were less than what he received from the owner. These

monthly estimates compare favorably with Flynn's testimony that he had completed 50% of his subcontract work by May 13, 1966 and with Austin Scott's testimony that 40% was completed. [R. 704-705]

Loyal Flynn testified he had a meeting with the defendants chief estimator Ray Ward about the time Flynn left the job on May 13, 1966 at which time Mr. Ward programmed an additional $30,000 in labor costs for Flynn to complete his subcontract. [R. 1109-1110] Mr. Ward admitted sometime before Loyal left the job, Ward went to the Biological Science Building and estimated what work he felt remained to be done on Flynn's subcontract. [192, 477, 466, 674] He testified he did not have any records showing how much was done on the second [R. 205] or third floors [R. 207] but based on his analysis of the situation as it then existed, he estimated it would cost $30,000 for Flynn to complete the remaining portion of his subcontract work. [R. 201, 204-205] He then conceded if we used his figures of $30,000 together with what Flynn had already expended for labor and materials, an $18,000 profit would be justified. [R. 202] This testimony clearly shows that $27,446.87 [allowable labor costs to product a $20,000 profit, *supra*] was not out of line with Mr. Ward's $30,000 figure; and the said $20,000 profit would be justified from the testimony of defendants' own witness.

It is interesting the defendants did not produce any evidence dealing with their original estimate of what it would cost them to do the work specified in

the Flynn subcontract if they had done it themselves rather than subcontracting it out. The defendants admitted this information concerning their original estimates was in their office records. However when each of their witnesses was asked for this information, they stated they did not have the papers with them. [R. 280-281, 659, 683-684, 774-775, 830] If Mr. Flynn's $20,000 lost profit picture had been out of line, why didn't the defendants' introduce their own original estimate for this work or at least produce some evidence that in the building construction trade or industry a $20,000 profit would be out of line. The defendants' chief estimator testified Loyal Flynn's original bid was not out of line. [R. 664-665]

5. *Why the trial judge's analysis of the evidence is wrong.* The plaintiff submits the trial judge indulged in several erroneous assumptions which make it clear his cost analysis is faulty, and further, the trial judge reviewed the evidence in a light most favorable to the defendants instead of the plaintiff, as he was required to do.

The trial judge's first erroneous assumption is that Loyal Flynn did absolutely no work of any kind on the third floor, either scaffolding, forming, shoring or pouring. On page 940 of the record, the trial judge stated:

> "Now I think it is absolutely manifest that Flynn did not in fact frame and pour anything on the third floor while he was there, and if there is one thing in this case that I am

certain about, it is that, and in my opinion, Mr. Flynn is entitled to absolutely no credit in computations for anything done on the third floor."

On page 948 of the record, he says:

"There was no time spent in framing out anything on the third floor and there is no evidence in this record, gentlemen, that I can see and I have labored over it and I had no trial to try in the last two days and I have spent all of my time going through these records."

And on page 949, he said:

"I have sensed during the trial that there was no real proof without having examined the diary of any work having been done on the third floor."

Not only did Mr. Flynn [R. 581, 603-605, 650, 1102] and Mr. Austin Scott, [R. 699, 736] describe the work Loyal had done on the third floor; but even Mr. Harlin himself finally admitted on cross-examination that Flynn had done some work on the third floor. [R. 845, 847] Mr. Harlin initially said no work had been done on the third floor; however, after he looked at his own photographs, he admitted some work had been done, [R. 294, 297, 301-302, 851, 855] and further admitted he had no way of telling exactly how much was done on the third floor. Exhibit 78-D is a photograph taken by Mr. Harlin's superintendent, Dan McCann, on May 13, 1966, sometime during the day while Loyal was still on the job. Since the other photographs were taken

about 1:30 p. [Ex. 72-D, 80-D] it would be reasonable to assume Exhibit 78-D was also taken at that time.

Exhibit 78-D shows substantial scaffolding, forming and shoring materials between the second and third floors at the north end of the building and Mr. Harlin admitted all of this work was done by Flynn. Exactly how much work had been done was for the jury to decide. Flynn stated he formed and shored approximately one-fourth of the third floor which would be 7500 sq ft. [R. 581, 603-605, 650, 1102] Austin Scott who was there throughout the entire project and who worked as a foreman of the cement crew after Mr. Flynn left, testified Flynn had formed and shored 25%-33% of the third floor by the time he was ousted from the job on May 13th. [R. 699, 736] How the trial judge could say Flynn was entitled to absolutely no credit in computations for anything done on the third floor is a mystery to the plaintiff!

Loyal Flynn introduced some photographs he stated had been taken on May 17th, 1966, or the following Tuesday after he was ousted from the job on Friday. [R. 1036-1037] Exs. (24-38)-P Exhibits 26-P, 27-P, 28-P, 29-P, 30-P and 37-P clearly show scaffolding and forming and shoring materials up on the north end of the second floor to support the third floor. Loyal Flynn testified this represented work he had done while he was there. [R. 650, 1102] The trial judge said he felt all of the forming and shoring and scaffolding work shown in these photographs was done by Harlin-Morrin crews. However, the

journal entry clearly shows May 23rd was the first mention of any decking and beam work being done by Harlin's crews on the third floor. [Ex. 79-D] Furthermore Exhibit 78-D which is the photograph taken by Harlin's own superintendent the last day Loyal Flynn was on the job shows the same forming and shoring work on the third floor as it is shown on Loyal Flynn's photographs, Exhibits (26-30)-P and 37-P; and this makes it abundantly clear the work on the third floor as shown in the plaintiff's photographs was done by Flynn and not Harlin.

The next erroneous assumption indulged in by the trial judge deals with the amount of work which was completed on the second floor. All of the parties admit Loyal Flynn had formed, shored and poured 24,660 sq ft on the second floor. [Exs. 88-D, 91-D, 92-D] In addition, Flynn testified he had formed and shored the balance of the second floor except for two small areas totaling 800 sq ft and 600 sq ft, as shown in defendants' photographs Exhibits 74-D and 77-D. [R. 603, 890-893, 1060-1064] Since the second floor together with the perimeter beam totals 36,000 sq ft, [Ex. 91-D] it is clear from Flynn's testimony, he had completed 34,600 sq ft by the time he left on May 13th.

Even though Harlin had his superintendent take photographs of Flynn's completed work on May 13, 1966, he admitted he could not show any part of the second floor which Loyal had not completed other than the 1400 sq ft shown in Exhibits 74-D and 77-D [R. 351-352] And although Harlin took his own job

journal, Exhibit 79-D, home one night during the trial [R. 356] he admitted it did not state how much of the second floor Flynn had completed by May 13, 1966. [R. 356] He further stated the small area which Flynn had not yet completed as shown in Ex. 77-D did not exceed 1,000 sq ft. [R. 346]

Although Harlin refused to concede Flynn had done any work on the second floor other than the actual 24,660 sq ft which had been poured upon, [Ex. 88-D, 91-D, 92-D], his own photographs show a substantial amount of forming and shoring work which Mr. Flynn had completed on the second floor and which had not been poured on when the photographs were taken on May 13, 1966. [Exs. 72-D, 74-D, 77-D, 78-D, 80-D] Harlin admitted these photographs showed a substantial amount of decking and forming and shoring Flynn had done that he was not given credit for [R. 301-302]. These photographs show Mr. Flynn's work in a fully completed state and show better than anything else how biased and prejudiced Harlin was against Flynn in his testimony about work completed on the second floor.

Austin Scott, foreman for the cement work both for Mr. Flynn and the defendants, testified Flynn had completed substantially all of the second floor and 25%-33% of the forming and shoring of the third floor when he was ousted from the job. [R. 699, 735, 736] His testimony was confirmed by one of the defendants' own witnesses, Marion Tamb, who was building the columns for this project. Mr. Tamb testified Flynn had done substantially all the forming

and shoring of the second floor and the part he had not done was only negligible. [R. 421]

The trial judge refused to accept this testimony of the plaintiff's witnesses and some of the defendants' own witnesses and seemed to be more pursuaded by Harlin's job journal than by all of the other evidence even though Harlin himself admitted none of the entries in the job journal were in his handwriting, he didn't recall if he had been present when the entries were made, and he could not pick out any entry in the diary he had either verified or not verified. [R.782-783] Judge Croft said he was convinced Mr. Flynn had only formed and shored 5,740 sq ft more than he had poured on the second floor. The court admits on page 942 of the record that in arriving at the 5,740 figure he "assumed" only one-half of the remaining (part that was not poured on) 11,480 sq ft on the second floor was done by Loyal Flynn by May 13th. It is clear there is absolutely no basis in the record for the court to make this assumption and he makes it arbitrarily. Based on this assumption he then goes on to assume Harlin-Morrin's crews would have 5740 sq ft of the second floor to complete, the entire third floor of 30,000 sq ft and the roof area of 36,000 sq ft. [R. 942] As stated above, these "assumptions' are contrary to all of the testimony and the photographs.

The only basis the court used in "assuming" there were 5740 sq ft remaining on the second floor to form and shore is one journal entry for the date, Tuesday, May 24, 1966 in Exhibit 79-D. The first

paragraph on this page reads as follows:

> "poured 140 yards on second floor, south end. This is the center section. This finishes the second floor slabs and beams."

Based upon that one entry, the court stated on page 940 of the record that it took Harlin-Morrin seven working days with an increased crew to complete shoring and pouring of the second floor. [R. 940 lines 18-20] He obviously meant May 16, 17, 18, 19, 20, 23, and 24. However, since this is the first entry on May 24th, there is no showing it took the full day of the 24th. It appears clear the *pouring* took place on the 24th but the *forming and shoring* [which is what we are concerned with in computing cost per sq ft to complete the subcontract] would have had to be completed prior to that time.

Another erroneous assumption is that the Harlin-Morrin crews worked each and every day for the seven days in question. The court can find no justification for this conclusion in the Job Journal or any of the other evidence. The diary entries do not show any work being one by the defendants on the second floor on May 16, 17, 23, 24th, which are four of the seven days. The only entry on May 18th is: "We are forming the southwest end of the second floor." This must refer to the perimeter beam which Loyal admitted had not been done for an area of about 600 sq ft, because the blueprints [Ex. 17-p, sheet S-3] clearly indicate the entire southwest area of the main deck of the second floor was completely poured on May 11th or two days before Loyal left the job. This

is further admitted by defendants' Exhibit 88-D which shows that on May 12th, 4,000 sq ft were poured on the second floor by Loyal Flynn between lines 9-15 and columns H-L. This is the southwest end of the said second floor as can be seen from pages S-3 of Exhibit 17-P. Furthermore the entry on May 6th of the job journal Exhibit 79-D indicates on that date Loyal Flynn was framing the southwest corner of the second floor. Consequently any work done by Harlin-Morrin on the southwest area of the second floor on May 18th, 1966, would be only a small portion of the perimeter beam.

The entry on May 19th indicates the Morrin crews were working on framing the second floor, but it does not say where they were working. Since the May 18th entry talks about the southwest area which is the perimeter beam, it could be assumed they were working in this same area on May 19th. Mr. Flynn admitted it would have taken his crews two days to have completed this portion of the perimeter beam. [R. 891] Mr. Flynn also admitted the perimeter beam shown on Exhibit 74-D was not completed when he left because of the large thirty foot (30 ft.) excavation hole which made it impossible to set scaffolding material under the perimeter beam. [R. 1060-1064] Defendant's own photographs show this hole was still present when Mr. Flynn left the job May 13, 1966, [Ex. 74-D] and so it is possible the Harlin-Morrin crews were working on this 600 sq ft area on May 19th since it was obviously completed after Flynn left. The only comment about

the second floor on Friday, May 20, 1966, is a statement that the Morrin crews were stripping the second floor.

Consequently the only statements in the defendants' own job journal for the seven day period the trial judge said the Harlin crews were working on forming and shoring the second floor, are found on Wednesday, May 18th, and Thursday, May 19th, when the journal indicates there was some framing being done on the southwest end of the said floor. From this meager evidence, the trial court indulges in an assumption that the beefed up crews were working every minute of all seven days on forming and shoring. Such a conclusion is clearly speculation and conjecture and cannot be documented by any of the evidence. Harlin himself admits there was much other work in the building these crews were doing after Flynn was ousted.

Another substantial erroneous assumption indulged in by the trial judge begins on page 941 of the record where he states ". . . the cost to form and shore 24,660 sq ft of the second floor as disclosed on Exhibit 93-P was $16,880 according to the computation." This shows the trial judge used the figure of $16,880 for all his computations which he set forth on his own charts. The $16,880 appears on the upper left hand corner of the first sheet of Exhibit 93-P. This figure was taken from the bottom line of Exhibit 91-D which had been introduced by the defendants. Exhibit 93-P was merely the answers to a hypothetical question varying some of the figures on

Exhibits 91-D and 92-D. [R. 298-308] This hypothetical question was based upon facts presented earlier during the trial by plaintiff's witnesses without any objections at that time by the defendants.

However, Exhibit 93-D was never intended to change all of the erroneous figures on Exhibits 91-D and 92-D. Only the figures dealing with the amount of square foot area completed by Loyal Flynn were changed to show what different results would be reached if the jury used the testimony of Flynn's witnesses rather than defendants. Since these changes as to total area justified a $20,000 profit on Exhibit 93-D, there was no need to change the other erroneous figures such as the $16,880, the 9 cents per sq ft to pour, etc. These other errors could easily be pointed out in closing argument.

It should be clearly stated plaintiff never admitted the $16,880 figure was accurate as the cost to form and pour 24,660 sq ft of the second floor. Such a result cannot be justified if we view the evidence most favorably to the plaintiff. This is true because Exhibit 91-D arrives at the $16,880 figure after deducting $4,152 from $21,032. This latter figure is set forth on Exhibit 91-D to be the labor expended by Flynn and Harlin prior to May 15, 1966. Exhibit 91-D shows the $21,032 is made up of $1211.00 spent by Flynn plus $19,821 which Harlin testified he had paid out for Flynn's payroll. This figure of $19,821 is Harlin's figure [R. 312-313] and not Flynn's and is denied by Flynn as being accurate.

Flynn's evidence on Exhibit 63-P shows the total labor costs were $18,661.88 and not $21,032.00 as Mr. Harlin set forth on Exhibit 91-D. Mr. Flynn's figures on Exhibit 63-P are taken from the actual daily time record sheets made out by Mr. Flynn each day on forms submitted to him by Mr. Harlin. [Ex. 39-P, 40-P; R. 637, 1040-1043] These records were there for the jury to use and are the best evidence as to the amounts paid by Harlin. This $2500 difference in total labor costs makes a substantial difference in the result which the trial judge would reach had he used the plaintiff's figures and reviewed the evidence in a light most favorable to the plaintiff rather than viewing it in a light most favorable to the defendants as he did when he used defendants Exhibits 91-D and the figures thereon.

If we use the labor costs found in Exhibits 39-P, 40-P and 63-P of $18,661.88, and if we further assume everything the trial judge said was corect about the amount of work Flynn had completed on the second and third floors, the trial judge still should have awarded $6,510.19 to Loyal Flynn for lost profits. This conclusion is arrived at as follows:

(1) Judge Croft said 24,660 sq ft were formed, shored and poured on the second floor. He also stated he would allow Loyal 5740 sq ft as an area that had been formed and shored but not poured on on the second floor.	30,360 sq ft

(2) Loyal's labor costs to May 15, 1966 per Exhibits 39-P, 40-P and 63-P $18,661.88

(3) Labor costs to pour one-half of the basement and the entire first floor per Exhibit 91-D. This exhibit used 9 cents per sq ft which was determined by the defendants to be an accurate figure. Plaintiff disputes this figure because part of the $1211 cost which he paid as shown on Exhibit 91-D were used by his crews to bring lumber materials from Trade Tech and Midvale Elementary School and to begin setting these upon the second floor. [R. 902] All the parties agreed the initial cost to get the crews going would be greater until they reach their maximum efficiency. However, the plaintiff will use the 9 cents per sq ft here because the trial judge did. $4,152.66

(4) Labor costs to pour 24,660 sq ft of the second floor at 9 cents per sq ft $2,219.40

(5) Labor costs to form and shore [but not pour] whatever area Loyal Flynn had done on the second floor by May 15, 1966 (2) – [(3) + (4)] $12,290.42

(6) Using Judge Croft's figure of 30,360 sq ft which Loyal Flynn had formed and shored [24,660 + 5740] and the labor costs of

$12,290.42 as determined in (5) above, we obtain the cost to form and shore (get the deck ready to pour) a sq ft of floor space while Loyal was on the job	$.40
(7) Total floor space left to form and shore according to Judge Croft: Second floor, 5740 sq ft; third floor, 30,000 sq ft; roof and perimeter beam on roof, 36,000 sq ft	71,700 sq ft
(8) Labor costs to form and shore 71,700 sq ft at .40 cents per sq ft	$28,680.00
(9) Remaining floor area to pour: basement, 13,770 sq ft [Ex. 91-D]; First floor, none; second floor, 11,340 [36,000 less 24,460]; third floor, 30,000; roof and perimeter beam, 36,000	91,110 sq ft
(10) Cost to pour 91,110 sq ft at 9 cents per sq ft	$8,199.90
(11) Labor costs to complete the subcontract after May 15th [(8) + (10)].	$36,879.90
(12) Labor costs to perform subcontract [(2) + (11)]	$55,541.78
(13) Eleven per cent of (12) for workman compensation, FICA, liability insurance, and unemployment compensation	$6,109.59
(14) Total labor plus state charges [(12) + (13)] according to Judge Croft's analysis	$61,651.37

(15) Total materials needed on the job according to Loyal's witnesses and Exhibit 48-P	$20,215.88
(16) Total labor and materials cost to complete all work required by the subcontract	$81,867.25
(17) Subcontract price [Ex. 18-P]	$86,000.00
(18) Change order [Ex. 41-P]	$2,377.44
(19) Total subcontract and change order	$88,377.44
(20) Profit Loyal Flynn would have realized [(19) – (16)]	$6,510.19

If instead of looking at the evidence most favorably to defendants, we look at the evidence in a light most favorable to the plaintiff, the profit figure is substantially increased and we see the jury's verdict of $20,000 was justified:

(1) Area formed and shored on the 2nd floor according to plaintiff's witnesses	34,500 sq ft
(2) Amount of floor space formed and shored on the third floor – 25% of 30,000 sq ft	7,500 sq ft
(3) Total area formed and shored (prepare deck for pour) by May 13, 1966	42,000 sq ft
(4) Loyal's labor costs to May 15, 1966 per Ex. 39-P, 40-P and 63-P	$18,661.88

(5) Labor costs to pour one-half of the basement and the entire first floor per defendant's Exhibit 91-D at 9 cents per sq ft	$4,152.06
(6) Labor costs to pour 24,660 sq ft of the second floor which everybody admits was poured when Loyal left	$2,219.40
(7) Total cost to pour the area that was poured by May 13, 1966 [(5) + (6)]	$6,371.46
(8) Labor costs to form and shore 42,000 sq ft [(4) – (7)]	$12,290.42
(9) Cost to form and shore a sq ft of floor space with Loyal's crews [(8) divided by (3)]. This compares favorably with Mr. Flynn's estimate it would take him approximately 30 cents per sq ft to complete the forming and shoring after May 13, 1966 [R. 903]	.29 cents
(10) Total floor space left to form and shore: second floor, 1,500; third floor, 22,500; roof and perimeter beams, 36,000	60,000 sq ft
(11) The cost to form and shore the balance of the building [(10) × (9)]	$17,400.00
(12) Remaining floor area to pour: basement, 13,770; first floor, none; second floor, 11,340; third floor, 30,000; roof and perimeter beam, 36,000	91,110 sq ft

(13) The cost to pour the balance of the building at 9 cents per sq ft	$8,199.90
(14) Labor costs to complete subcontract by forming, shoring and pouring remainder of the building after May 15, 1966 [(11) + (13)]	$25,599.90
(15) Labor costs for all of subcontract work [(4) + (14)]	$44,261.78
(16) Eleven percent of (15) for state charges	$4,868.80
(17) Total labor plus state charges	$49,130.58
(18) Total material needed on job according to Loyal's witnesses and Exhibit 48-P.	$20,215.88
(19) Total cost for labor and material to fully perform the subcontract [(17) + (18)]	$69,346.46
(20) Subcontract price	$86,000.00
(21) Change order	$2,377.44
(22) Total subcontract and change order	$88,377.44
(23) Profit allowable [(22) − (19)]	$19,030.98

From the foregoing analysis, it appears clear the $20,000 special jury verdict was based upon substan-

tial competent evidence, if we look at the evidence in a light most favorable to the plaintiff. If we use Mr. Scott's testimony that one-third of the third floor had been completed instead of twenty-five percent (25%), the allowable profit would be even greater. [Ex. 93-D] The plaintiff has used the lower figure of twenty-five percent (25%) to show the jury's verdict was still within the lower limits of the plaintiff's testimony.

Moreover, the plaintiff has presented the above analysis using the defendants' labor cost of 9 cents per sq ft to pour which as pointed out, *supra,* is too high because it is based upon the defendants' erroneous assumption that all of the $1211 payroll in February and March went to *pouring* activities by Mr. Flynn. [Ex. 91-D] Mr. Flynn's witnesses testified they spent much of the time in February and March bringing truck loads of material from the Trade Tech and Midvale Elementary School sites and getting the materials cut up and prepared [R. 688-694, 902]; and the defendants' own job Journal confirms this [Ex. 79-D, entry for March 10, 1966, R. 308-309] Consequently a large portion of the $1211 would have gone for non-pouring activities; and the 9 cents per sq ft figure for pouring would be reduced accordingly. This would change all of the other figures in the cost analysis set forth above; and would result in a profit greater than $20,000.

IV

THE PLAINTIFF IS ENTITLED TO INTEREST ON THE AMOUNT WHICH THE JURY AWARDED TO THE PLAINTIFF AS DAMAGES BECAUSE THE SAID DAMAGES WERE ASCERTAINABLE AS OF A DATE CERTAIN.

In Count I of his complaint, the plaintiff asks for $25,000 damages for his lost profits together with interest on the said award. [R. 2] It was stipulated by the parties the issue of interest would be reserved and be decided by the trial judge after the jury verdict was returned; and this issue would not go to the jury. [R. 914] The trial judge said he thought the matter of interest was merely a mathematical computation that we ought not to burden the jury with. [R. 914-915] After the jury returned its verdict in the amount of $5,000 for the wrongful conversion of the plaintiff's materials, the court added interest to this amount at the rate of 6% per annum from August 25, 1966 to the date the judgment was entered. [See paragraph 3 of Judgment on Verdict, R. 163] The August 25, 1966, date was used by the trial court, because this is the date Mr. Harlin said his crews completed the work specified in Loyal's subcontract. [R. 864]

Obviously since the trial judge took the case away from the jury on lost profits there would be no award upon which to add interest. However as pointed out above in this brief, the jury verdict should be reinstated and the plaintiff submits he is entitled

to interest on the said $20,000 at the rate of 6% per annum from August 25, 1966 through February 1, 1972, the date the jury returned the verdict and interest at the rate of 8% from February 1, 1972, until the verdict is paid.

Since the evidence shows what Mr. Flynn's labor and materials costs would have been had he completed the job, it is clear the jury could ascertain the damages as of August 25, 1966. Under these circumstances the rule of law in Utah is that interest should be computed from that date. *Fell v. Union Pacific RR Co.*, 32 Utah 101, 88 Pac. 1003 (1907); *Ralph E. Keller v. Deseret Mortuary Company*, 23 Utah 2d 1, 455 P. 2d 197 (1969); *Bingham Coal & Lumber Co. v. Board of Education of Jordan School Dist.*, 61 U.149, 211 Pac. 981; 13 Am Jur 2d 85 § 83 *Interest as Damages;* 36 ALR 2d 337 "Interest on Damages for Period before Judgment for Injury to, or Detention, Loss or Destruction of, Property".

V

THE PLAINTIFF IS ENTITLED TO ATTORNEY'S FEES AS THE PREVAILING PARTY ON EACH SEPARATE CAUSE OF ACTION IN HIS COMPLAINT AND ALSO AS THE PREVAILING PARTY ON ALL ASPECTS OF THE DEFENDANTS' COUNTERCLAIM BECAUSE THE DEFENDANTS EXECUTED A PAYMENT BOND IN THIS CASE; THE PLAINTIFF BROUGHT THIS ACTION AGAINST THE BONDING COMPANY AND BECAUSE SECTION 14-1-8 UCA — 1953 DIRECTS ATTORNEYS FEES TO BE AWARDED.

Section 14-1-1 UCA—1953 as amended provides certain bonds are required when any public construction projects are undertaken. One of the bonds so required is a payment bond in an amount to be fixed by the contracting body solely for the protection of persons supplying labor or materials to the contractor or his subcontractors in the prosecution of the work provided for in the contract. [14-1-5 (2) UCA - 1953] Exhibit 66-P is the contract between the Utah State Building Board and the joint venture for the construction of the Biological Science Building. Article 3 of this contract provides the joint venture will furnish to the owner a 100% payment bond; and a copy of the payment bond executed in this case is attached to the complaint as Exhibit 2 and is by reference incorporated herein and made a part hereof at this time. A blank copy of the payment bond called for in the plans and specifications was admitted into evidence as Exhibit 94-P [R. 910]

The last labor was done by Loyal Flynn and the last materials furnished by him on May 13, 1966. Ninety days thereafter or on August 13, 1966 he had not been paid for his labor. Ten days later or on August 23, 1966, he filed his complaint in the District Court of Salt Lake County naming as one of the defendants therein, the bonding company, General Insurance Company of America, a Washington corporation. [R. 1] Count IV of the plaintiff's complaint is a cause of action against the bonding company for recovery of the amounts due pursuant to the terms of the bond together with attorney's fees pursuant to Section 14-1-8 UCA - 1953 [R. 4-6]

Although Section 14-1-6 does not require a formal written notice of claim by a subcontractor who has a direct contractual relationship with the general contractor, Mr. Flynn did in fact give a written notice of his claim and his intention to commence a lawsuit if this matter could not be amicably settled. This written claim was in the form of a letter dated May 19, 1966 from Mr. Flynn's counsel to defendants' counsel; and was admitted into evidence as Exhibit 60-P. In this letter Mr. Flynn asked to be reinstated in his job and further stated if a lawsuit was necessary, his estimate of lost profits would be between $25,000 and $30,000.

Under the circumstances set forth above, the plaintiff alleges he is entitled to the protection of the Utah bonding statute and is entitled to judgment against the bonding company, General Insurance

Company of America, on the fourth count or cause of action set forth in his complaint.

Section 14-1-8 UCA - 1953 as amended provides as follows:

> "14-1-8 *Attorney's fees allowed* — In any action brought upon either of the bonds provided herein, . . . the prevailing party upon each separate cause of action, *shall* recover a reasonable attorney's fees to be taxed as costs."

The plaintiff submits every condition precedent necessary to fulfill the operation of this section has been completed by him in the instant case and he is entitled to a reasonable attorney's fee. The jury clearly returned a verdict in favor of the plaintiff on every count in the plaintiff's complaint and found against the defendant insofar as the allegations of the counterclaim were concerned. [R. 146-147]

Section 14-1-8 does not make attorney's fees a discretionary matter with the trial judge. It uses the word "shall" instead of the word "may." The plaintiff submits this provision makes it mandatory upon a trial court to award attorney's fees upon each separate cause of action to the prevailing party thereon.

After the trial, the plaintiff made a motion to have attorney's fees awarded pursuant to Section 14-1-8 [R. 149] and, as required by Section 14-1-8, the plaintiff included attorney's fees as one of the costs of this action in his memorandum of costs and disbursements. [R. 166]

The parties stipulated the issue of attorney's fees could be decided by the trial judge instead of the jury and the said issue would be decided after the jury returned its verdict. [R. 914-915] At a separate hearing held on February 9, 1972, pursuant to formal notice [R. 150] for the purpose of submitting evidence bearing on the issue of attorney's fees, three practicing Salt Lake Community attorneys appeared in support of the plaintiff's request to have attorney's fees awarded. These three attorneys were James A. McIntosh, attorney for the plaintiff, Clayton D. Fairbourn and Ronald L. Spratling, Jr. [R. 953-978] Mr. Fairbourn and Mr. Spratling testified they devoted a substantial part of their practice to handling cases for general contractors and subcontractors. The testimony of these witnesses was that $7500.00 would be a reasonable attorney's fee based upon the amount of time which had been spent on this case, the size of the recovery, the defense of the counterclaim, etc. The services rendered by plaintiff's counsel were set forth in Exhibit 1-M which was presented at the said hearing and which was reviewed by the attorneys. [R. 157-160]

The plaintiff submits the award of $7500 for attorney's fees is reasonable based upon the evidence submitted at the hearing before Judge Croft on February 9, 1972. [R. 953-980] The defendants alleged in their counterclaim $5000 would be a reasonable attorney's fees for bringing their counterclaim alone. [R. 11, ¶7] If $5,000 is a reasonable attorney's fees for prosecuting the counterclaim, certainly $7500 is

a reasonable attorney's fees for not only defending the counterclaim but prosecuting all four counts of the plaintiff's complaint as well.

Under these circumstances the plaintiff submits he is entitled to be awarded $7500 as a reasonable attorneys fees together with such further amounts as would be reasonable for services rendered from the date of the special hearing on attorney's fees on February 9, 1972 through the prosecution of this appeal and for any services rendered for any post-appeal services, motions, hearings, etc.

The defendants did not cross-appeal from paragraph 4 of the judgment requiring them to pay their own attorney's fees [R. 175] Consequently no issue can be raised in this case as to whether the defendants' might be entitled to an attorney's fee either as a primary award or as an offsetting award against judgment rendered to the plaintiff.

VI

THE TRIAL JUDGE DID NOT ERR IN HIS INSTRUCTIONS TO THE JURY, NOR DID HE ERR IN REFUSING TO GIVE CERTAIN OF THE DEFENDANTS' REQUESTED INSTRUCTIONS BECAUSE THE TRIAL JUDGE'S INSTRUCTIONS TAKEN AS A WHOLE CORRECTLY STATE THE LAW PERTAINING TO THIS CASE.

In his instructions to the jury, the trial judge stated:

> "You are to consider all of these instructions as a whole and are to regard each instruction in the light of all the others. The order in which the instructions are given has no significance as to their relative importance." [Instruction No. 1, R. 118]

Not only must the instructions be read together as a whole, but the law is clear the trial judge will not be reversed for either the failure to give instructions or the giving of instructions unless he has (1) committed error and (2) the error is prejudicial to one of the parties.

In the instant case the plaintiff submits there is no prejudicial error committed in any of the instructions. The various laws pertaining to the instructions have already been set forth hereinabove in this brief under each separate argument heading and they will not be repeated at this time.

The defendants objected to the court's Instructions 11, 14, 17 and 18. [R. 917-918] The defendants' objection to Instruction No. 11 is simply that it gave undue emphasis to the plaintiff's position, which a reading of the instruction shows it clearly does not do. The defendants further allege Instruction No. 11 should not be given because there is no evidence from which a jury can determine the value of labor and materials Loyal Flynn put on the project for which he has not been paid. As pointed out above, the $20,000 lost profits verdict returned by the jury was well within the evidence and shows the value of labor could be determined.

The defendants also objected to the court's refusal to give their requested Instructions No. 4 and 5 [R. 919] These instructions appear at R. 110-111. Their proposed Instruction No. 4 deals with the plaintiff's claim against the bonding company. This instruction pertains to matters connected with issues raised by Joe Flynn who was ultimately dismissed from the action. Insofar as it pertains to matters dealing with Loyal Flynn's work, the general law was clearly covered in the court's other instructions. The defendants' proposed Instruction No. 5 dealt with the defendants' rights to take over Flynn's work if there had been a breach of the subcontract by Flynn. These matters were amply covered in the court's general instructions to the jury dealing with these same issues.

CONCLUSION

For the reasons set forth above, it is respectfully requested this Honorable Court decide the issues herein as follows:

1. To enter its order or direct the trial court to enter an order awarding judgment in favor of the plaintiff L. W. Flynn and against the defendants and each of them in the amount of $20,000 in accordance with the jury verdict; together with interest thereon at the rate of 6% per annum from August 25, 1966, through February 1, 1972, together with further interest on those amounts at the rate of 8% per anum from February 1, 1972, to the date the judgment is paid.

2. To enter its order or to instruct the trial court to enter its order awarding judgment to the plaintiff L. W. Flynn and against the defendant General Insurance Company of America for the amount of $7500 as a reasonable attorney's fees for services rendered by the plaintiff's attorney through the filing of the notice of appeal; and to award additional attorney's fees for the services plaintiff's attorney rendered in connection with prosecuting this appeal and any post-appeal services which might be necessary.

3. To award costs of this appeal to the plaintiff.

4. To dismiss the defendants' cross-appeal and all issues raised therein.

5. To award such other relief as the court deems appropriate.

Respectfully submitted,

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