

1995

# M&E Construction v. Took Mechanical : Brief of Appellant

Utah Court of Appeals

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Victor Lawrence; Attorney for Defendant.

David K. Smith; Attorney for Plaintiff/Appellee.

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## Recommended Citation

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DOCKET NO. 950543-CA

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UTAH COURT OF APPEALS, STATE OF UTAH

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M&E CONSTRUCTION,	:	
Plaintiff/Appellee,	:	
vs.	:	Case No. 950543-CA
TOOK MECHANICAL,	:	
Defendant/Appellant.	:	Priority No. 15

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BRIEF OF THE APPELLANT  
APPEAL FROM THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT, THE  
HONORABLE ROBIN REESE PRESIDING

---

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UTAH COURT OF APPEALS, STATE OF UTAH

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M&E CONSTRUCTION,	:	
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### STATEMENT OF JURISDICTION

Rule 3 of the Utah Rules of Appellate Procedure confers jurisdiction with the above-entitled Court.

### STATEMENT OF ISSUES

#### Issue #1:

Did the lower court err in allowing judgment for Appellee in the absence of any "written" notice of Appellant's alleged breach of the applicable subcontract?

#### Issue #2:

Did the lower court err in finding that Appellant was not entitled to any offset for work performed per the applicable subcontract or under the theory of unjust enrichment?

#### Issue #3:

Did the lower court err in awarding Appellee its attorney fees incurred in the proceedings below?

All three of the aforementioned issues were addressed in the proceedings below. See Record at 352-3, 829, & 970.

## CONSTITUTIONAL PROVISIONS, STATUTES, ETC.,

### STATEMENT OF THE CASE

This case involved a contract dispute between a general contractor, the Appellee, and the subcontractor, the Appellant.

The contract involved remodelling jobs to be performed at both the Milton Bennion Hall site at the University of Utah and at the Frank E. Moss Federal Courthouse Building.

Appellee filed a complaint as Plaintiff in the lower court alleging a breach of the aforementioned contract. See Record 1-3. Appellant as Defendant in the lower court answered and filed its counterclaim, alleging not only a breach of contract but also claims under the theories of quantum meruit, promissory estoppel, and attorney fees. See Record 8-16.

The lower court ruled in favor of Appellee, finding that Appellant had breached the contract, finding that Appellant was awarded "no cause of action" under any theory for an offset, and finding that Plaintiff was entitled to attorney fees. See Record 1032-45.

#### **STATEMENT OF FACTS**

1. The Appellee and Appellant entered into a binding written subcontract agreement for certain remodelling jobs to be performed at both the Milton Bennion Hall site at the University of Utah and at the Frank E. Moss Federal Courthouse Building.

2. Although in dispute as to the amount, it is undisputed that Appellant performed certain work pursuant to the aforementioned subcontract.

3. The terms of the aforementioned subcontract required that Appellee provide written notice of any alleged breach of the contract. No such notice was provided. See Record 829 & 970-1.

4. Appellee was awarded judgment against Appellant, Appellant received no offset for any work performed, and Appellee was awarded attorney fees even though the court did not take evidence at trial and Appellant's counsel objected to the award of said attorney fees. See Record 1032-45, 952, & 351-53.

#### **SUMMARY OF ARGUMENTS**

In the lower court Appellee sued Appellant for a breach of a subcontract. However, that very subcontract required that Appellee first provide written notice before Appellee would be entitled to hire someone else to either correct or complete those duties required of Appellant. It is undisputed, there was no such notice provided.

Further, there was ample evidence to show that Appellant did in fact provide services for which it was not compensated. It is appropriate for Appellant to be, or to have been, awarded relief under alternate theories of breach of contract, quantum meruit, and/or promissory estoppel.

Finally, the only evidence as to attorney fees is in the form of an affidavit provided by Appellee's counsel. There has been no other evidence submitted for the record. The aforementioned affidavit was objected to, and yet such objection was completely ignored.

## ARGUMENTS

### **I. THE APPLICABLE SUBCONTRACT REQUIRED THAT APPELLEE PROVIDE WRITTEN NOTICE OF ANY ALLEGED BREACH BY APPELLANT**

The parties entered into a valid subcontract, a copy of which is included in the addendum and which was received by the lower court as Plaintiff's Exhibit #10. See Record 580. Said subcontract specifically states in relevant part in Article III as follows:

Article III: Time is the essence of this contract, and Subcontractor recognizes and acknowledges that the Contractor and the Owner will sustain monetary damages if the whole or any part of the job be delayed through the failure of the Subcontractor to perform the work required in accordance with the Principal Contract, Plans and Specifications. In case of such failure by the Subcontractor, the Contractor may, at his option, **upon three (3) days written notice to the Subcontractor**, take any steps the Contractor deems advisable to see that such job is promptly completed, including the right to secure necessary substitute labor, material, appliances . . . (Emphasis added)

Pursuant to the subcontract Appellant was to complete certain work pursuant to certain plans and specifications provided by Plaintiff, a copy of which is included in the addendum and which was received by the lower court as Defendant's Exhibit #2. See Record 217. The court found that the Appellant failed to install 8" duct work into new 8" diffusers as provided under the plans and specifications, but instead left 7" duct work in place. See Record 1040-1.

Once the mistake was realized the owner insisted that the 7" ducts be removed. Instead of removing the 7" duct work, however, the Appellee was able to negotiate with the owner to allow the 7"



duct work to remain in place and to perform certain other work at no charge to the owner. See Record 1041.

Appellee then entered into an agreement with a different subcontractor to perform the additional work. The Appellee's subcontractor performed the work at no charge to Appellee; however, the subcontractor owed the Appellee a debt and discharged the debt by doing this work for the Appellee at no charge. The work was determined to have a fair market value of \$2,742.00. Appellant was found to be liable for the value of the extra work performed by Appellee's other subcontractor in the amount of \$2,742.00. See Record 1041. Copies of the Amended Judgment and Findings of Fact & Conclusions of Law are included in the addendum.

The record is clear however that Appellee never gave Appellant the requisite three (3) days written notice before correcting an alleged problem itself or hiring another subcontractor to do so, as required by the express language of the subcontract. See Record 829 & 970-1. The record is absolutely devoid of any representation that the required written notice was ever given in regard to any alleged breach of the aforementioned subcontract.

The lower court erroneously found that Appellant was liable for the fair market value of the extra work performed by Appellee's other subcontractor in the amount of \$2,742.00. Further, Appellant was found to be liable to Appellee for its hiring of a third party to level an air conditioning system at a cost of \$55.00. See Record 1041-3.

Appellee should not have received the above awards when it has not complied with the very terms of the contract it is seeking to enforce.

**II. APPELLANT WAS ENTITLED TO AN OFFSET FOR WORK PERFORMED**

The record is replete with evidence that Appellant did do some work pursuant to the subcontract. Granted there was certainly a dispute as to how much he did or whether he completed his entire contractual obligations, but it is undisputed that he in fact did some of the work.

Unfortunately Appellant was never compensated for \$1,354.24 from the original contract price. He was never compensated for a change order amount for additional H.V.A.C. work in the amount of \$783.88, for which Appellee did receive from the owner. And he was never compensated for \$920.00 which was deducted and instead paid to somebody else. See Record 858-9.

Indeed, Appellant put on evidence that work was actually performed for which no compensation was received. And it is patently unfair and against the clear weight of the evidence for the lower court to have denied any offset whatsoever when it is undisputed that if there was a breach on Appellant's part, the subcontract required that he be given written notice of said breach.

**III. THE LOWER COURT ERRED IN AWARDING APPELLEE ITS ATTORNEY FEES**

No evidence was presented in the trial below in regard to attorney fees. See Record 952. The court specifically stated that

it was going to let the parties' submit affidavits. However, there was some ambiguity in its direction. The court actually said as follows:

THE COURT: Counsel, what I'll do is this, unless-- unless either of you object, the prevailing party may or may not be entitled to an attorney's fee. I'm going to let you submit--

MR. SMITH: Affidavits?

THE COURT: --affidavits. (See Record 952.)

It appears clear that no testimony or evidence was received regarding attorney fees, or at least the reasonableness of such attorney fees. What was contemplated by the court was the submission of affidavits subject to objections.

Appellee's counsel did in fact submit an affidavit with his proposed findings and judgment. See Record 342-6. That affidavit, or at least Appellee's claim for attorney fees was objected to by Appellant. See Record 351-4. There was some confusion however because Appellee's counsel submitted differing sets of documents to counsel and the court. See Appellee's Motion For Relief Under Rule 60(b), a copy of which is included in the addendum. See Record 379-82. Appellant has grave concerns about the purported reasonableness of Appellee's attorney fees submitted and there needs to be a hearing to address that claim.

#### CONCLUSION

It was error for the lower court to have awarded Appellee judgment for having to hire another subcontractor, other than Appellant, when it has failed to comply with the very terms of the

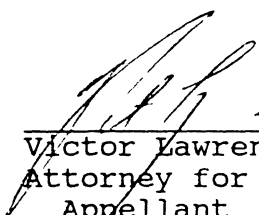
subcontract it is trying to enforce. Appellee was required to give Appellant three (3) days written notice of any alleged breach.

It was error for the lower court not to have allowed Appellant an offset for work actually performed pursuant to the subcontract and for which no compensation was received.

Finally, it was error for the lower court to award Appellee its attorney fees when there was no evidence presented at trial re such fees and the affidavit which was submitted was objected to by Appellant's counsel.

This Court should respectfully reverse the lower court's decision and deny Plaintiff its judgment for \$2,742.00 and its judgment for \$55.00. The Court should also remand this matter to have the lower court determine the amount of offset for which Appellant should have been entitled. Finally the Court should also remand the issue of attorney fees or the reasonableness thereof.

DATED this 24<sup>th</sup> day of January, 19 86.

  
\_\_\_\_\_  
Victor Lawrence, Esq.,  
Attorney for Defendant/  
Appellant  
Took Mechanical

## **ADDENDUM**

HVAC  
TRADE

JOB NO. \_\_\_\_\_

NAME Moss U. S. Courthouse

THIS SUBCONTRACT entered into this 12th day of May, 19 92 by and between M & E Construction,  
a Utah corporation, 4792 Oak Terrace, Salt Lake City, Utah 84124, hereinafter known as

"Contractor" and William Lee, d.b.a. Took Mechanical Company, 1733 N. 725 W., W. Bountiful hereinafter known  
as "Subcontractor"

WHEREAS, the Contractor has entered into a contract, hereinafter called the "Principal Contract" with General Services Administration  
hereinafter called the "Owner" for the construction of space modification  
at Frank E. Moss U. S. Courthouse - Project XXX #7PX2UT04-92 and;

WHEREAS, it is to the mutual advantage of the parties hereto that certain phases of the work provided for in said Contract be performed by a Subcontractor:

NOW, THEREFORE, in consideration of the premises and the mutual promises, agreements and conditions hereinafter set forth, the parties hereto do mutually agree as follows:

ARTICLE I: The Subcontractor shall, for and on behalf of the Contractor, timely fulfill and perform such part of the work of said principal contract as is hereinafter set forth. The Subcontractor shall furnish at his expense all labor, materials, equipment, services, permits, licenses, assessments, fees, supervision, transportation, freight, repairs, supplies, taxes, insurances and everything else of any nature whatsoever necessary to complete his work under this Subcontract in accordance with the terms of the Principal Contract, Spec-

fications, General Conditions and Supplemental General Conditions prepared by General Services Administration  
Space Management Division, Region 8, Denver, Colorado and in accordance with good construction practices, the following:

1. Hvac work must be completed in accordance with the plans dated 1/14/92; the specifications, with specific reference to WORK REQUIREMENTS #6 HVAC.
2. Subcontractor shall complete its work per the superintendent's schedule.
3. Only the Project Manager, Bert P. Van Komen, is authorized to negotiate change orders with the owner and the subcontractor.
4. Subcontractor shall haul away its own debris weekly.
5. All on site storage shall be coordinated with the superintendent and the owner.
6. Subcontractor shall coordinate final placement of all finish items in its work with other trades, to avoid conflict.
7. Subcontractor shall comply with applicable provisions of General Conditions.

The Subcontractor shall receive for the performance of the above work the sum of Three Thousand Four Hundred Twenty  
and no/100--- Dollars (\$ 3,420.00 ).

ARTICLE II: The Subcontractor shall commence the work to be performed hereunder on May 17, 1991, and shall thereafter prosecute the same diligently and shall complete the work required in coordination with the other Subcontractors and good construction procedures, and strictly in accordance with the Contractor's construction schedule.

Without relieving Subcontractor of the above time requirements and responsibilities, and only upon prior written approval of the Contractor, Subcontractor may commence the work sooner than the above beginning date for its own convenience.

The Subcontractor shall keep himself informed at all times not only of the progress of his own work, but of the progress of the job as a whole and of the work of others which may affect or be affected by his own progress.

The Subcontractor shall have available a qualified representative on the project to coordinate the work of the Contractor and other Subcontractors and himself at all times, and any instructions given to said representative shall have the same force and effect as if given to the Subcontractor. That representative is Bill Lee, 792-8075  
or 560-0823 (Mobile), and any substitution for him shall be given by the Subcontractor in writing.

For the work covered by this Subcontract, the Subcontractor is bound by and will comply with the terms and conditions of the labor agreements to which the General Contractor is a party, in so far as said labor agreements lawfully required Subcontractors to be so bound.

No "breaks" or stoppages of work shall be allowed, including, but not limited to stoppages due to strikes, picketing authorized or not, or any other labor problems. Shop practices detrimental to job-site work are prohibited.

ARTICLE III: Time is the essence of this contract, and Subcontractor recognizes and acknowledges that the Contractor and the Owner will sustain monetary damages if the whole or any part of the job be delayed through the failure of the Subcontractor to perform the work required in accordance with the Principal Contract, Plans and Specifications. In case of such failure by the Subcontractor, the Contractor may, at his option, upon three (3) days written notice to the Subcontractor, take any steps the Contractor deems advisable to see that such job is promptly completed, including the right to secure necessary substitute labor, materials, appliances, or to utilize any of the same and other equipment belonging to the Subcontractor, wherever located, which the Contractor believes necessary to protect his interests in completing this portion of the Subcontractor's work, without, by so doing, waiving any right of action which the Contractor may have against the Subcontractor or his surety, and the Subcontractor or his sureties shall be liable to the Contractor for any liquidated or other damages assessed against the Contractor because of such failure of the Subcontractor and for any costs incurred by the Contractor in the settlement of claims against the Subcontractor or the Contractor, including a reasonable attorney's fee.

The Contractor shall have the right at any time to delay or suspend the whole or any part of the work therein contracted to be done without compensation to the Subcontractor, provided that additional time commensurate with the delay shall be allowed the Subcontractor for completing his work.

ARTICLE IV: The Subcontractor agrees that in making his bid, he has examined the Principal Contract, Plans and Specifications and the project site, and has not relied upon any representations by the Contractor.

The Subcontractor agrees to be bound to the Contractor by the terms of the Principal Contract, the General Conditions, the Plans and Specifications, and to assume toward the Contractor all of the obligations and responsibilities that the Contractor, by those documents, assumed toward the Owner.

The Subcontractor having thoroughly reviewed the Plans and Specifications is aware of no omissions and errors which might affect the costs of the work and/or materials to be performed. Should there be any claim by the Subcontractor for extras from alleged errors or omissions, the cost of the performance of such extra work or materials shall be borne by the Subcontractor, unless such cost is recognized and agreed to by the architect and/or the Owner in writing as a bona fide extra, and only then shall the costs of said extra work or material be borne by the Contractor; provided, however, the Subcontractor has complied with the following paragraph.

The Subcontractor agrees to make all claims for extras, for extensions of time, and for damages, delays or otherwise, if any, to the Contractor in the manner provided for in the General Conditions of the Principal Contract governing like claims by the Contractor upon the Owner; excepting that the time within which the Subcontractor shall make said claims shall be ten days. The Contractor shall not be liable to the Subcontractor for any change, modification or extra to the Subcontractor's work resulting from the Owner's actions or directions, unless and until the Owner pays the Contractor for said change, modification or extra.

DISTRIBUTION OF COPIES: White, Contractor—Canary, Subcontractor—Pink, Superintendent

EXHIBIT A 17

should the Subcontractor fail promptly pay those furnishing materials and/or labor at his direction on this project should the Subcontractor fail to perform and adequately the Subcontract work, the Contractor may notify the Subcontractor in writing of any such failure requesting the Subcontractor to remedy such failure within three (3) days. If the Subcontractor fails to remedy such failure within three (3) days the Contractor may withhold all monies presently owing or to become due the Subcontractor thereafter, and may use said monies to pay the unpaid laborers, materials, suppliers and subcontractors, if any. The Contractor may also complete or have completed unfinished Subcontract work and may withhold monies owing to the Subcontractor or to be due the Subcontractor thereafter and may apply said monies toward payment of said unfinished work. The Contractor may charge to the Subcontractor all costs, including overhead and profit necessary to complete the Subcontract work. The foregoing shall be in addition to any other remedies for breach of contract which the Contractor may have by reason of any failure of Subcontractor.

The Contractor shall have a lien upon all of the Subcontractor's materials and equipment on the job to secure payment of all of the Subcontractor's unpaid labor, materials, or his subcontractors. Subcontractor shall pay a reasonable attorney's fee, together with any costs incurred by the Contractor in the event of default in or breach of any of the terms or provisions of this agreement.

ARTICLE V(a) In the event the parties hereto have one or more other subcontracts between them, the Contractor may withhold monies owing on any subcontract as an offset against any breach by the subcontractor of any other subcontract between them.

ARTICLE VI Payment by the Contractor to the Subcontractor shall be made out of funds received by the Contractor from the Owner as the work progresses and pursuant to requests for payment received from the Subcontractor at the end of each month. Said application for payment shall be accompanied by properly executed lien waivers or other evidence satisfactory to the Contractor that all labor and materials furnished by or through the Subcontractor to that date have been paid for. Payment shall then be made by the Contractor for work covered in said application as it is approved by the Contractor within ten (10) days after receipt of payment for said work from the Owner. However, the Contractor shall not be liable to pay the Subcontractor for any work performed pursuant to the Subcontract for which the Contractor has not been paid by the Owner. The Subcontractor's application for payment shall be submitted on the last day of each month. The payments made pursuant to said requests shall be deemed partial payments, but shall not include 10% which shall be retained out of each payment until final completion, acceptance and payment by the Owner. Until such final payment by the Owner, the work and contract of the Subcontractor shall not be deemed completed. At final payment, the Subcontractor shall furnish a full release, releasing the Contractor and the Owner from any and all claims whatsoever arising out of and in connection with the performance of the work covered under this Subcontract and indemnifying and agreeing to save the Contractor and Owner harmless from any such claims.

ARTICLE VII No additions, deletions to or modification of the Subcontract shall be valid unless in writing and signed by the Contractor. No extra compensations shall be paid to nor credits allowed the Subcontractor, except as may be agreed upon in writing by the Contractor and Subcontractor prior to the performance of the work for which the extras or credits are claimed.

The Subcontractor, notwithstanding any disagreement as to the amount of payment for any additional work or change in the Plans and Specifications properly ordered by the Contractor or by the Owner through the Contractor, shall proceed with the performance of the work required, and may make a claim for extra compensation in accordance with the appropriate Article set forth above. The Contractor shall not be liable for any such work or materials rendered in good faith by the Subcontractor, unless it has been properly authorized in writing in accordance with the above provisions by authorized officers of the contracting corporation and in accordance with the above provisions. A list of the authorized officers shall be submitted to the Subcontractor with the fully executed Subcontract.

ARTICLE VIII The Subcontractor will remedy immediately upon demand by the Contractor, any defects in the Subcontractor's work. The Subcontractor will be obligated upon demand by the Contractor to remedy any defects in his work or pay any damage to other work resulting from said defects appearing within one (1) year from date of final acceptance of the Principal Contract. However, it is understood and agreed that where the Plans, Specifications or General Conditions require a longer period of guarantee, said longer guarantee shall continue for such longer period.

ARTICLE IX The Subcontractor will comply with all applicable safety laws and regulations, with all federal, state and local laws applicable to the work hereunder, including Workmen's Compensation Insurance, Unemployment, Social Security Laws, tax requirements and all permits and requirements. The Subcontractor will furnish to the Contractor immediately upon execution of this Contract, certificates from the Subcontractor's insurance carrier, showing that the Subcontractor is covered by Workmen's Compensation Insurance, as required by law, Public Liability Insurance and Property Damage Insurance, all insurance to be in accordance with the attached transmittal letter and within the limits as stated in this attachment and/or specifications. Subcontractor's Certificate of Insurance shall include a 10 day notice of cancellation clause. If the Subcontractor fails to submit such documents, the Contractor may, in its discretion, take such steps as it deems necessary to provide the proper protection and charge all costs incurred thereby to the Subcontractor.

The Subcontractor shall indemnify and save harmless, and defend the Contractor and the Owner (including their agents and employees while acting in the course of their employment or scope of their duties as such) from all claims, suits, actions or every name, kind and description, brought for or on account of injuries to or death of any person or for damage to property during the progress of the work or at any time before the completion and final acceptance resulting from the construction of the work, or by or in consequence of any negligence in guarding the work, or use of improper materials in construction of the work, caused or claimed to be caused by any act, omission, fault or negligence which the Subcontractor, his employees or agents, are legally liable for arising out of the performance of the Subcontract.

The Subcontractor shall indemnify and save harmless, and defend the Contractor from any and all claims, suits, liability, expense or damage for any alleged or actual infringement or violation of any patent right arising in connection with this Subcontract and anything done thereunder.

The Subcontractor agrees to hold the Owner, Contractor and other Subcontractors on the above project harmless from any and all accidents, damages, liens, suits, judgments and any and all matters of action resulting from the Subcontractor's breach of the said Subcontract, and from the Subcontractor's negligence or failure fully to perform said Subcontract work.

ARTICLE X During the performance of this Subcontract, the Subcontractor agrees to not discriminate against any employee because of race, color, creed or national origin, as outlined in the Equal Opportunity Clause of the Regulations of Executive Order 11246 of September 24, 1965, as amended by subsequent Executive Order. These executive orders and their regulations are hereby made a part of this Subcontract by reference. However, if any employee discriminates against another or conducts himself in such a manner as to interfere with or harass the program at the job site or uses words to the detriment of the success of this contract, he shall promptly be removed from the job.

ARTICLE XI Shop drawings shall be furnished strictly in accordance with the applicable Sections of the General Conditions and Special Conditions, the first submittal to be made on or before May 15, 1992, and thereafter in sufficient advance time so as to permit submittal to the Owner, approval by the Owner and return to the Subcontractor in order that the Subcontractor's work shall proceed according to the requirements of this Subcontract. All submittals of shop drawings together with all other correspondence relating to the job shall be made to the Contractor and in no event shall be made directly to the Architect or Owner.

ARTICLE XII Subcontractor within seven (7) days after the date of this contract, as shown on the face hereof, shall order all materials required to complete this contract and submit complete material list to Contractor, including the following information: Date each item ordered, names, addresses, amounts of each order, telephone numbers of suppliers, and names and routing of carriers and promised delivery dates. The Subcontractor agrees to air freight at his own expense, any item which regular freight would deliver too late to meet the General Contractor's construction schedule if said Subcontractor failed to order materials promptly.

ARTICLE XIII Any incidental work which is necessary to complete this Contract and is not explicitly covered in any other craft will be promptly executed by this Subcontractor at his own expense so as not to delay the job.

ARTICLE XIV The Subcontractor agrees that he will not pledge, assign or otherwise transfer any part or all of this Subcontract, or any monies payable to Subcontractor hereunder, without advance written permissions and approval of the Contractor, and the approval of such assignment shall in no way relieve or release this Subcontractor from full compliance and responsibility for execution of all the obligations and requirements of this Subcontract.

ARTICLE XV The Subcontractor agrees to do all cleaning up, policing and housekeeping in the area of his Subcontract work and in connection with all Subcontract work performed hereunder. He agrees to protect said work from the work of other subcontractors and third parties, and should his work be damaged before final acceptance by the Owner, said Subcontractor agrees to repair said damage at no cost to the Contractor, provided that if said damage is caused by the Contractor said Subcontractor shall not be obligated to repair such damage.

The foregoing shall also attach to all gate merchandise supplied by others and delivered to Subcontractor. The Subcontractor shall make a record of such merchandise received by him, both as to the condition and the quantity, and shall advise the Contractor of this information promptly.

ARTICLE XVI The Subcontractor agrees to furnish a Performance and/or Payment Bond in such amounts as the Contractor may require and with an acceptable surety to the Contractor. The cost of any bond so required by the Contractor will be paid by the Contractor providing it does not exceed the rates published by the Surety Association of America at the time the bonds are requested.

It is agreed that Subcontractor is an independent contractor and is not the agent of Contractor. Subcontractor agrees that he will not pledge, or attempt to pledge, the credit of Contractor or in any way bind or obligate Contractor in any way whatsoever.

IN WITNESS WHEREOF, the parties hereto have executed this Subcontract as of the day and year first above written.

Witness or Attest

CONTRACTOR

(Secretary if Corporation)

By \_\_\_\_\_  
Its \_\_\_\_\_

SUBCONTRACTOR

(Secretary if Corporation)

By \_\_\_\_\_  
Its \_\_\_\_\_

# SPECIFICATION AND BID FORMS

PROJECT

Provide all labor, supervision,  
materials and equipment to per-  
form a space modification at the  
Frank E. Moss U.S. Courthouse,  
350 S. Main St., Salt Lake City,  
Utah.

PROJECT NO.

7PX2UT04-92

VOLUME

I OF I

BID OPENING  
TIME AND DATE

April 14, 1992  
1:00 P.M., Local Time

CONTRACT NO.

GS-

GENERAL SERVICES ADMINISTRATION



enamel. Installation shall be in complete accordance with manufacturer's instructions. Suspended ceiling shall be installed with hangers supported only from building structural members. Locate hangers not less than 6" from each end and spaced 4'-0" along each carrying channel or direct hung runner, level and uniform within 1/8" in 12 feet.

- B. Acoustical panels shall be Type III mineral fiber composition with standard washable painted finish:
  - 1. Nodulated. Cast or Molded Units. Fissured: NRC 60, LR 1 or 2 (0.75 or 0.70), STC 30-34 or 35-39, White.
  - 2. Edge Detail Size: Tegulaar/24" x 48" x 5/8" with single kerf at center of panel to simulate 24" x 24" pattern.
- C. Hanger wire shall be galvanized steel wire, annealed, No. 12 Gauge minimum. Secure wire hangers by looping and wire-tying, either directly to structures or to inserts, eye-screws, or other devices which are secure and appropriate for substrate, and which will not deteriorate or fail with age or elevated temperatures.
- D. Edge moldings shall be installed at the perimeter of acoustical ceiling area and at locations where necessary to conceal edges of acoustical units.
- E. Contractor shall build a reveal of ceiling material around the windows in each office similar to that of the existing ceiling to be removed.
- F. Contractor shall measure ceiling area and establish layout to balance border widths, which may vary from reflected ceiling plan. Contractor shall also coordinate layout with other work supported by or penetrating through ceiling, including light fixtures, HVAC equipment, fire-suppression system components and partition system. It may be necessary to adjust the ceiling layout to accommodate these items. The ceiling height will vary from room to room and will be hung just above the ceiling rail in each office, ceiling or railing may have to be adjusted on a room by room basis.
- G. Contractor shall replace broken, damaged ceiling tiles with holes in them caused by the removal and relocation of the secure entry doors in the corridor. Tile to match existing.

6. HVAC:

- A. Contractor shall furnish and install new 8" supply air ceiling diffusers complete with a box ninety diffuser connection boot lined with 1" Acoustic insulation, (see supply diffuser W/ flex duct detail) as indicated on drawing. Contractor shall provide diffusers with border styles that are compatible with adjacent ceiling systems, and that are specifically manufactured to fit into ceiling module with accurate fit and adequate support. Refer to general construction drawings and specifications for types of ceiling systems which will contain ceiling air diffuser.
- B. The Contractor furnished and installed ceiling diffusers shall be of the type to follow:
1. Diffuser Face Square: square housing, core of square concentric louvers with round duct connection.
  2. Diffuser Mountings Lay-in: diffuser housing sized to fit between ceiling exposed suspension tee bars and rest on top surface of tee bar.
  3. Diffuser Pattern 4 Way: Fixed louver face for 4 direction air flow.
  4. Diffuser Dampers Opposed Blade: adjustable opposed blade damper assembly, key operated from face of diffuser. Keys shall be tools designed to fit through diffuser face and operate volume control device and/or pattern adjustment.
  5. Diffuser Finish White Enamel: semi-gloss white enamel prime finish.
- C. Contractor shall furnish and install ceiling air diffusers in accordance with manufacturer's written instructions and in accordance with recognized industry practices to insure that products serve intended functions. Coordinate with other work, including ductwork and duct accessories, as necessary to interface installation of air diffusers with other work. Locate ceiling air diffusers as indicated on general construction " Reflected Ceiling Plan".
- D. Contractor shall furnish and install new 8" round duct and all necessary fittings from the existing mixing box boot connection to the new contractor furnished and installed ceiling diffusers. Duct work shall be Galvanized sheet steel complying with ANSI/ASTM A 527 lockforming quality, with ANSI/ASTM A525 G690 zinc coating, mill phosphatized, 8" round 28 ga. minimum, with foil wrapped fiber insulation.

- E. Contractor shall furnish and install a flex duct 3' long connecting the 8" hard round duct to the new box diffuser connection boot. Flexible duct shall be 8" AL Stand 151 ThemaFlex GKM or approved equal.
  - F. Fabricate duct fittings to match adjoining ducts, and to comply with duct requirements as applicable to fittings. Fabricate elbows with center-line radius equal to associated duct width; and fabricate to include turning vanes in elbows where shorter radius is necessary. Limit angular tapers to 30% for contracting tapers and 20% for expanding tapers.
  - G. Contractor shall assemble and install ductwork in accordance with recognized industry practices which will achieve air tight (5% leakage) and noiseless systems, capable of performing each indicated service. Install each run with minimum of joints. Align ductwork accurately at connections, within 1/8" misalignment tolerance and with internal surfaces smooth. Support ducts rigidly with suitable ties, braces, hangers and anchors of type which will hold ducts true-to-shape and to prevent buckling.
  - H. Contractor shall be responsible to remove and relocate two (2) thermostats one each in the mail room and the reception area to control the temperature in those room after the new walls are built.
7. Electrical: (See drawings for locations).
- A. Contractor shall furnish and install sixteen (16) duplex and one (1) fourplex outlet in the new partition walls at locations indicated on drawings.
  - B. Contractor shall remove and relocate all existing alarms, electric strikes and door release systems, and combination key pads and lock release system, to the new locations as indicated on drawings.
  - C. Contractor shall remove all existing power poles in the contract area when the ceiling is removed. Contractor shall reinstall the existing power poles noted on the drawing. Contractor shall also furnish and install approx. six (6) new poles at locations indicated on drawing.
    - 1. Power poles shall be metal pole assemblies extending vertically from above accessible tile ceilings to the floor below for the purpose of providing electrical power and/or raceway space for telephone of communication cables. Poles

DAVID K. SMITH, ESQ.  
Utah State Bar No. 2993  
Attorney for Plaintiff  
M&E CONSTRUCTION  
Suite 600  
6925 Union Park Center  
Midvale, Utah 84047  
Telephone: (801) 566-3373

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IN THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH, SALT LAKE DEPARTMENT

---

M&E CONSTRUCTION,	)	
	)	
Plaintiff,	)	AMENDED JUDGMENT
vs.	)	
	)	Civil No. 930001171 CV
TOOK MECHANICAL,	)	Honorable Robin W. Reese
	)	
Defendant.	)	
	)	

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Pursuant to the Findings of Fact and Conclusions of  
Law heretofore entered in the above-captioned proceedings,  
and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Plaintiff, M&E CONSTRUCTION, is awarded a  
personal money judgment against the Defendant, TOOK  
MECHANICAL, in the sum of \$363.66, representing the costs of

repairs to the Milton Bennion Hall for which Plaintiff was back-charged by the University of Utah.

2. The Plaintiff, M&E CONSTRUCTION, is awarded a judgment from the Defendant, TOOK MECHANICAL, in the sum of \$2,742.00 for work not completed by it on the subcontract agreement on the Frank E. Moss remodeling project and for an additional \$50.00 in leveling the air conditioning system.

3. The Defendant, TOOK MECHANICAL, is awarded "No Cause of Action" against the Plaintiff, M&E CONSTRUCTION on its Counterclaim for offsets on the various theories presented, including unjust enrichment and/or promissory estoppel.

4. The Plaintiff is awarded interest on the sums stated in paragraphs one and two above at the legal rate from August 27, 1992 to the date of entry of judgment herein.

5. The Plaintiff, M&E CONSTRUCTION, is entitled to a reasonable attorney's fee from the Defendant, TOOK MECHANICAL, in prosecuting this claim, in the sum of \$6,810.00.

6. The Court finds that the Plaintiff is entitled to its costs of \$60.00 incurred in this action.

7. It is further ordered, pursuant to Rule 4-505,

Utah Rules of Judicial Administration, that this judgment shall be augmented in the amount of reasonable costs and attorney fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

DATED this 3 day of ~~October~~<sup>Nov.</sup>, 1995.


BY THE COURT:

  
ROBIN W. REESE  
Circuit Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing AMENDED JUDGMENT to counsel for the Defendant this 17th day of October, 1995, postage prepaid, addressed as follows:

VICTOR LAWRENCE  
JOHNSON & LAWRENCE  
10 West Broadway, Suite 311  
Salt Lake City, UT 84101



DAVID K. SMITH, ESQ.  
Utah State Bar No. 2993  
Attorney for Plaintiff  
M&E CONSTRUCTION  
Suite 600  
6925 Union Park Center  
Midvale, Utah 84047  
Telephone: (801) 566-3373

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IN THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH, SALT LAKE DEPARTMENT

---

M&E CONSTRUCTION,	)	
	)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
vs.	)	
	)	Civil No. 930001171 CV
TOOK MECHANICAL,	)	Honorable Robin W. Reese
	)	
	)	
Defendant.	)	

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The above-captioned matter having come on regularly for non-jury trial before the above court commencing Friday, March 10, 1995 at 9:00 a.m., and continued thereafter for further hearing on Monday, March 13, 1995 at 10:30 a.m., then on Friday, May 21, 1995 at 10:00 a.m., then on Friday, June 16, 1995 at 9:00 a.m., and finally on Monday, June 19, 1995 at 9:00 a.m. At trial were present the Plaintiff's

representative, Bert P. Van Komen, and his counsel, David K. Smith, and the Defendant's representative, and his counsel, Victor Lawrence. The court having taken testimony from the respective parties, and their witnesses, and having received exhibits in this case, and having heard the argument of counsel, and now being fully advised in the premises, does now make the following:

FINDINGS OF FACT

1. The court finds that there was a valid and binding written subcontract agreement between the Plaintiff, M&E Construction and the Defendant, Took Mechanical for remodeling jobs to be performed at both the Milton Bennion Hall site at the University of Utah and at the Frank E. Moss Federal Courthouse Building (Plaintiff's Exhibits 8 and 10).

2. The court finds that the Defendant received the written subcontract agreements which were a form agreement prepared by the Plaintiff, that he subsequently signed them and that he that he returned them to the Plaintiff, expecting to be bound by them.

3. The court finds that the Plaintiff also expected to be bound by the subcontract agreements. (Plaintiff's Exhibits 8 and 10)

4. The court finds that the subcontract agreement



provides for the payment of attorney fees in the event a lawsuit became necessary to settle the claims between the parties to be awarded to the prevailing party.

5. The court finds that the subcontract agreement specifically provides that the Plaintiff give the Defendant a three-day written notice outlining the breaches claimed to have been incurred and a demand to complete or correct work to be performed by the Defendant prior to the time the Plaintiff is permitted under the subcontract agreement to step in and take over Defendant's work.

6. The court finds that the subcontract agreement provides that the Defendant is to hold the Plaintiff harmless from any damage caused by the Defendant in the performance of Defendant's work, and for which the Plaintiff may thereafter become liable.

7. The court finds that the subcontract agreement provides that the Defendant must hold the Plaintiff harmless for defects in work or workmanship from any and all claims brought against the Plaintiff by the property owner or others which causes the Plaintiff to be placed at risk, and the Defendant must either correct said defects or pay Plaintiff any damages sustained by the Plaintiff as a result.

8. the court finds that in the event of a breach by the Defendant under Section VIII of the subcontract agreements, the Defendant must either correct said defects in his workmanship or pay the reasonable value of making the corrections in damages to the Plaintiff.

9. The court finds that the Defendant, in the process of doing its work at the Milton Bennion Hall project, damaged a portion of the wall while installing pneumatic tubing, and that said wall had to be repaired.

10. The court finds that the Defendant refused to properly repair the wall in question when asked by the Plaintiff.

11. As a direct result thereof, the Plaintiff was back-charged the sum of \$198.66 by the University of Utah for repair of the wall, for which the Defendant should be liable.

12. The court finds that the Defendant cut a hole in the roof of the Milton Bennion Hall for the purpose of installing a fan and grill.

13. The court finds that the defendant failed to properly secure said hole from the elements, and that there was sufficient concern about a pending storm, that the University of Utah personnel asked the Defendant to make

necessary precautions, and the Defendant refused, forcing University of Utah personnel to protect the building from possible water damage by securing the hole.

14. The court finds that the Plaintiff was back-charged by the University of Utah for the sum of \$165.00 to repair the hole, and that there was sufficient urgency to repair of the hole that the three-day waiting period was waived, and the Defendant is liable to the Plaintiff under the hold harmless provisions of the contract.

15. As a result the court finds that the Defendant should be liable to the Plaintiff for repairs at Milton Bennion Hall for which the Plaintiff was back-charged by the University of Utah in the total sum of \$363.66.

16. The court finds that the Plaintiff did not show by a preponderance of the evidence the amount, if any, of damages sustained by it for cleaning up the ceiling tiles, or water damage, or otherwise cleaning up after the Defendant at the Milton Bennion Hall, and is thus not entitled to any damages for this work.

17. With respect to the work performed under the subcontract agreement at the Frank E. Moss building, the court finds that the contract (Plaintiff's Exhibit 10) required that the Defendant complete all work in accordance

with the plans and specifications provided to it by the Plaintiff (Defendant's Exhibit D2)

18. The plans and specifications provide that the Defendant install new 8" diffusers as well as new 8" round duct work, as well as connecting the new ducting to the existing mixing boxes and the new diffusers. (See paragraphs 6A and 6D of Defendant's Exhibit D2)

19. The court finds that before work under the subcontract agreement began, the property owner requested the Plaintiff to make certain changes to the original contract. The Plaintiff agreed to these changes and provided a bid to the property owner. Estimates given the Plaintiff by the Defendant were used in making the that portion of the bid dealing with HVAC work.

20. The court finds that the Defendant failed to install the 8" duct work into new 8" diffusers as provided under the plans and specifications, but instead, left the 7" duct work in place. The Defendant was not told by anyone that he could make these modifications to the plans and specifications. Furthermore, no written permission was obtained by the Defendant to do so, and such amounts to a breach of the subcontract agreement.

21. Once the mistake was noticed by the property

owner, it insisted that the 7" ducts be removed.

22. Instead of removing the 7" duct work, the Plaintiff was able to negotiate with the government to allow the 7" duct work to remain in place and to perform other work at no charge to the government.

23. The Plaintiff then entered into an agreement with Bowen Electric, one of its other subcontractors, to perform the additional work, including electrical work, required by the government at no additional charge.

24. The Plaintiff's subcontractor performed the work at no charge to the Plaintiff; however, the subcontractor owed the Plaintiff a debt and discharged the debt by doing this work for the Plaintiff at no charge; the work was determined to have a fair market value of \$2,742.00.

25. The court finds that the Defendant is liable to the Plaintiff for the fair market value of the extra work performed by Plaintiff's other subcontractor in the amount of \$2,742.00.

26. During the course of the remodeling work on the Frank E. Moss building, the Plaintiff hired third parties to perform some of the work the Defendant was required to perform under his subcontract agreement with the Plaintiff, to enable to entire job to be completed within the time

frame of the general contract agreement with the government.

27. The Plaintiff was forced to removed the refrigeration system and peform other work, but the court finds that the Plaintiff could have given the Defendant three-days' notice to perform the work within the three week period prior to the deadline, but failed to do so. There is nothing in the testimony or exhibits which tends to show that a written three day notice was given to the defendant to complete the work prior to the Plaintiff's having hired Mr. Hoopes and Mr. Jeff Van Komen, third parties, to do that work; hence the Plaintiff is found to forfeit any recovery from monies paid to third parties to perform work the Defendant was otherwise required to perform under the Frank E. Moss subcontract, except as outlined above in paragraph 24.

28. The court finds that the Defendant failed to report to complete the work and to complete the HVAC work in a timely manner. The Defendant, therefore, cannot recover for work he did not perform (making the duct corrections and removing the refigeration system) which the Plaintiff was forced to perform because of the Defendant's delinquency.

29. The court finds that the Defendant was required under his subcontract agreement to level the air

conditioning system, but failed to do so, and that the Plaintiff was required to hire a third party to level the system at a cost to the Plaintiff of \$55.00. The court finds that the Defendant is liable to the Plaintiff for the cost of this work.

30. The court finds that the Plaintiff has not provided sufficient testimony concerning any other damages, such as clean up, etc., and it thus not entitled to additional damages.

#### CONCLUSIONS OF LAW

31. The court finds that the Plaintiff should be entitled to a judgment from the Defendant for the costs of repairs to the Milton Bennion Hall which Plaintiff was back-charged by the University of Utah, in the sum of \$363.66.

32. The court finds that the Plaintiff should be entitled to a judgment from the Defendant for work not completed by it on the subcontract agreement on the Frank E. Moss remodeling project in the sum of \$3,160.66.

33. The court finds that the Defendant should be awarded "no cause of action" on his counterclaim against the Plaintiff.

34. The court finds that the Plaintiff should be entitled to interest on the said sums at the legal rate from

August 27, 1992 to the date of entry of judgment herein.

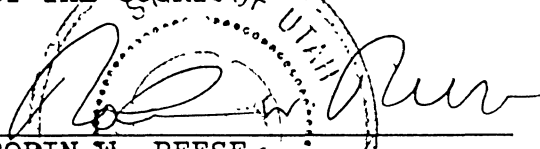
35. The court finds that the Plaintiff is entitled to a reasonable attorney's fee in prosecuting this claim, and that a reasonable fee is \$6,810.00.

36. The court finds that the Plaintiff is entitled to its costs of \$60.00, incurred in this action.

37. The court finds that the Defendant has failed to prove its claims for offsets on the theories of quantum meruit and/or promissory estopped, and hence, Defendant is not entitled to any offsets against Plaintiff's damages.

DATED this 3 day of <sup>NOV.</sup>~~October~~, 1995.

BY THE COURT OF UTAH

  
ROBIN W. REESE  
Circuit Court Judge

MAILING CERTIFICATE  
CIRCUIT COURT  
SALT LAKE

I hereby certify that I mailed a true and correct copy of the foregoing AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW to counsel for the Defendant this 14 day of October, 1995, postage prepaid, addressed as follows:



VICTOR LAWRENCE  
JOHNSON & LAWRENCE  
10 West Broadway, Suite 311  
Salt Lake City, UT 84101

  
\_\_\_\_\_  
DAVID K. SMITH, ESQ.

FILED

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CLERK OF THE DISTRICT COURT  
SALT LAKE COUNTY

Victor Lawrence, Esq., #4492  
Attorney for Defendant  
10 West Broadway, Suite 311  
Salt Lake City, Utah 84101  
Telephone: (801) 359-0600  
Telefax: (801) 359-1859

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IN THE THIRD CIRCUIT COURT FOR SALT LAKE COUNTY

STATE OF UTAH, SALT LAKE DEPARTMENT

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M&E CONSTRUCTION,	:	<b>MOTION FOR RELIEF</b>
	:	<b>UNDER RULE 60(B)</b>
Plaintiff,	:	
vs.	:	
TOOK MECHANICAL,	:	
Defendant.	:	Civil No. 930001171 CV Hon. Robin W. Reese

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Defendant, TOOK MECHANICAL, by and through legal counsel, does hereby petition the Court for relief under Rule 60(b)(1)(3)&(7) of the Utah Rules of Civil Procedure. Specifically the Court is asked to reconsider its "docket" denial of Defendant's Objection To Proposed Findings Of Fact And Conclusions Of Law and Judgment. This motion is based upon the following facts.

1. The Court rendered its decision in regard to this matter telephonically on or about 06/30/95.

2. The Court requested Plaintiff's counsel to prepare the necessary final documents, as always though, the Court instructed counsel to submit such documents to opposing counsel before

submission to the Court, all in accordance with Rule 4-504 of the Code of Judicial Administration.

3. Plaintiff's counsel did in fact submit proposed final documents to Attorney Victor Lawrence via mail dated 07/19/95.

4. Attorney Victor Lawrence, rather than filing a formal objection, simply called Plaintiff's counsel to discuss several concerns.

5. Plaintiff's counsel, rather than adopting all of attorney Victor Lawrence's proposed changes, modified his original documents and submitted via mail this "new" set of final documents on or about 08/03/95.

6. Unfortunately, on the day **before** he submitted these final documents to attorney Victor Lawrence, he submitted the same set, **not the original version supplied to attorney Victor Lawrence on 07/19/95**, to the Court for signature.

7. In his letter filed with the Court dated 08/02/95, he states, **actually misrepresents**, that the submitted documents were ". . . sent to Mr. Victor Lawrence on July 18, 1995 . . . ." **The version that was submitted to the Court was never submitted to attorney Victor Lawrence on July 18, 1995.**

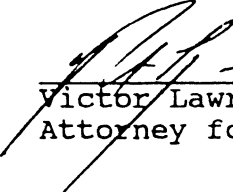
8. The Court stated in its "docket" entry that it denied Defendant's Objection for two reasons, first, because it was not filed in a timely manner. This is wrong, it was filed in a timely

manner if the Court hadn't been "defrauded" by Plaintiff's counsel's letter. The Court only needs to look at the mailing certificate on the documents that it signed and it will see that the version that was submitted for signature was the version that was mailed on 08/03/95, **not the earlier version**. Attorney Victor Lawrence addressed this very fact in a footnote in his Objection.

9. The second reason the Court denied the Objection was because it claimed that the proposed documents did in fact comport with the Court's ruling. The Court is respectfully asked to re-read the Objection. The documents are under the **wrong** court heading. The judgment amount re the "Moss remodeling project" **is different than the Judge's notes**. The Court **never addressed the "reasonableness"** of the claim for attorney fees.

WHEREFORE, the Court is respectfully asked to set aside its findings and judgment entered heretofore, to reconsider Defendant's Objection, to sanction, if deemed appropriate, Plaintiff's counsel's fraud perpetrated upon the Court, and for such other and further relief as it deems just and proper.

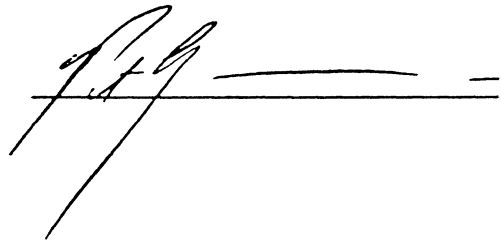
DATED this 6<sup>th</sup> day of SEP, 1995.

  
\_\_\_\_\_  
Victor Lawrence, Esq.,  
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed first class, postage prepaid, to the following on this 7 day of SEP, 1995:

David K. Smith, Esq.,  
Attorney for Plaintiff  
6925 Union Park Center, Suite 600  
Midvale, Utah 84047

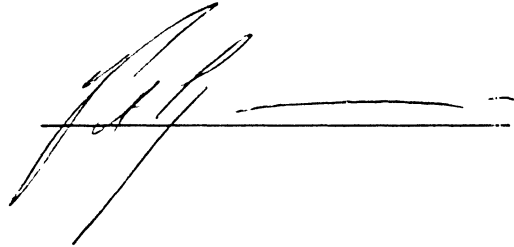


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I hand delivered two (2) copies of the foregoing Brief of Appellant to the following on this 25<sup>th</sup> day of January, 19 96 :

David K. Smith, Esq.,  
Attorney for Plaintiff/  
Appellee  
M&E Construction  
6925 Union Park Center, Suite 600  
Midvale, Utah 84047

A handwritten signature in dark ink, appearing to be 'D. K. Smith', is written over a horizontal line.

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