

1992

Oneida/SLIC, an Arizona partnership v. Ronald G. Roth Company, an Arizona corporation and Oneida Cold Storage and Warehouse, Inc., a Colorado corporation : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Oneida/SLIC v. Ronald G. Roth Company*, No. 920434 (Utah Court of Appeals, 1992).
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IN THE UTAH COURT OF APPEALS

ONEIDA/SLIC, an Arizona partnership,
Plaintiff and Appellant,

vs.

RONALD G. ROTH COMPANY, an Arizona corporation and ONEIDA COLD STORAGE AND WAREHOUSE, INC., a Colorado corporation,
Defendants,

and

ONEIDA COLD STORAGE & WAREHOUSE, INC., a Colorado corporation,
Defendant, Third-Party Plaintiff, and Appellant,

vs.

METALCLAD INSULATION CORPORATION OF CALIFORNIA, a California corporation,
Third-Party Defendant, Fourth-Party Plaintiff, and Appellee,

vs.

ENPRO, INC., an Idaho corporation, ADVANCED FOAM PLASTICS, INC., a Colorado corporation; and RONALD G. ROTH COMPANY, An Arizona corporation,
Fourth-Party Defendants,

and

Case No. 920434-CA

BRIEF OF THE APPELLANT

Appeal from the Third District Court, Salt Lake County, Judge J. Dennis Frederick

PRIORITY NO. 16

UTAH COURT OF APPEALS
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Appeal from the Third District Court, Salt Lake County, Judge J. Dennis Frederick

PRIORITY NO. 16

RONALD G. ROTH COMPANY, an)
 Arizona corporation,)
)
 Defendant/Fourth-Party)
 Defendant/Fifth-Party)
 Plaintiff,)
)
 vs.)
)
 ARCHITECTURAL PRODUCTIONS &)
 DESIGN CONSULTANTS, INC., an)
 Arizona corporation; and)
 WALTER E. RILEY,)
)
 Fifth-Party Defendants.)
 _____)

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PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the District Court are: (1) Stanley Averch, as assignee of the claims of Oneida/SLIC, Plaintiff, and assignee of the claims of Oneida Cold Storage and Warehouse, Inc., Defendant, Third-Party Plaintiff; (2) Ronald G. Roth Co., Defendant; (3) Metalclad Insulation Corporation of California, Third-Party Defendant, Fourth-Party Plaintiff; (4) Enpro, Inc., Fourth-Party Defendant; and (5) Advanced Foam Plastics, Inc., Fourth-Party Defendant. Architectural Production and Designs Consultants, Inc., and Walter E. Riley, Fifth-Party Defendants, did not appear or otherwise participate in the trial.

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JURISDICTION

Utah Code Ann. § 78-2-2(3)(j), confers jurisdiction on the Supreme Court to decide this appeal. Utah Code Ann. § 78-2-2(4) confers the authority on the Supreme Court to transfer this appeal to the Court of Appeals. On July 9, 1992, the Supreme Court deferred this matter to the Utah Court of Appeals for disposition.

ISSUES

This appeal presents the following issues for the court's determination:

1. Whether the trial court erred in failing to find that the underfloor insulation supplied by Third-Party Defendant Metalclad Insulation Corporation of California ("Metalclad"), failed to meet agreed specifications and/or express and implied warranties made by Metalclad.

- This issue involves a finding of fact. The standard of review is "clearly erroneous." Under the clearly erroneous standard of review, this court will set aside fact findings "only if they are 'against the clear weight of evidence, or if the Appellate Court otherwise reaches a definite and firm conviction that a mistake has been made.'" Monroc, Inc. v. Sidwell, 770 P.2d 1022 (Utah App. 1989)

2. Whether the trial court erred in failing to award Appellant, Stanley Averch (as assignee of Oneida/SLIC and Oneida)

("Averch") damages arising out of Metalclad's breach of contract, and/or breach of express and implied warranties.

- This issue involves a conclusion of law. The District Court's conclusions of law are simply reviewed for correctness without any special deference. Western Kane Special Service District No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377-1378 (Utah 1987)

3. Whether the trial court erred in failing to find that Metalclad participated in the creation of defective plans and specifications for the insulated floor slab system installed in the warehouse which is the subject of this action.

- This issue involves a finding of fact by the District Court and therefore the clearly erroneous standard is applicable. Monroc, supra.

4. Whether the trial court therefore erred in failing to find that Metalclad was negligent.

- This issue involves a finding of fact by the District Court and therefore the clearly erroneous standard is applicable. Id.

5. Whether the trial court erred in failing to find that the defective expanded polystyrene foam insulation supplied by Metalclad contributed, as a concurrent cause, to the failure of the insulated floor slab system.

- This issue involves a finding of fact by the District Court and therefore the clearly erroneous standard is applicable. Id.

6. Whether as a result of its concurrent negligence, Metalclad is jointly and severally liable with Defendant Ronald G. Roth Company, for all damages arising from the failure of the insulated floor slab system.

- This issue involves a conclusion of law. The District Court's conclusions of law are reviewed by this Court for correctness without any special deference. Special Serv. District I, supra.

DETERMINATIVE STATUTES

Utah Code Ann. § 70A-2-104(1) (1990);

Utah Code Ann. § 70A-2-105(1) (1990);

Utah Code Ann. § 70A-2-313 (1990);

Utah Code Ann. § 70A-2-315 (1990);

Utah Code Ann. § 70A-2-714 (1990);

Utah Code Ann. § 70A-2-715 (1990).

The statutes cited above are set forth verbatim in Addendum A.

STATEMENT OF THE CASE

A. Nature of the Case. This is an action for breach of contract, breach of warranties, both express and implied, and negligence in the design and construction of a cold storage warehouse facility (the "warehouse") in Salt Lake City, Utah. Stanley Averch ("Averch" or "Plaintiff"), assignee of the Oneida/SLIC partnership, brought this action against the general contractor, Ronald G. Roth Co. ("Roth Co.") and the insulation contractor, Metalclad, to recover damages amounting to \$1,672,011.66, together with interest thereon, resulting from defects in the insulated concrete floor slab system installed in the warehouse. The floor slab system failed in that it cracked, broke up and spalled, both during and after construction. Deterioration of the floor slab system continues to the present day and leads to substantial operational problems.

B. Course of Proceeding. The original plaintiff, Oneida/SLIC, an Arizona Partnership comprised of Averch and Ronald G. Roth, filed its Complaint against defendant Roth Co. and defendant Oneida Cold Storage and Warehouse, Inc. ("Oneida"). Roth Co., as general contractor, had entered into a contract with Oneida/SLIC whereby Roth Co. agreed to develop, design and build the warehouse for Oneida/SLIC. Oneida, in connection with the development of the warehouse, had leased to Oneida/SLIC approximately 65,000 square feet of warehouse space. In the lease, Oneida agreed to supply, as tenant improvements, all insulation and

vapor barrier materials necessary for the construction of those areas of the warehouse which were to be insulated. Oneida entered into two separate contracts with Metalclad relating to the insulated portions of the warehouse. Alleging breach of these contracts, Oneida filed a Third-Party Complaint in the trial court against Metalclad. Oneida also alleged that Metalclad had breached express and implied warranties relating to the underfloor insulation supplied by Metalclad. The claims of Oneida against Metalclad relate to the expanded polystyrene insulation products ("EPS insulation") incorporated as a structural component of the warehouse insulated floor slab system.

Metalclad joined the manufacturers of the insulation products sold by Metalclad to Oneida in connection with this project. The suppliers are Fourth-Party Defendants Enpro, Inc., and Advance Foam Plastic, Inc.

Prior to trial, Averch purchased Ronald G. Roth's partnership interest in Oneida/SLIC, and the claims of Oneida/SLIC were assigned to Averch as the owner of the building. Oneida is a corporation wholly owned by Averch. The claims of Oneida against Metalclad were similarly assigned to Averch prior to trial.

At trial, Averch pursued his claims against Roth Co. for breach of contract, negligence and breach of warranties. Averch also pursued claims against Metalclad on theories of breach of contract, breach of warranties, both express and implied, and negligence in the design of the insulated floor slab system.

Averch also claimed that Metalclad, by virtue of its negligent contributions to the defective design and construction of the warehouse, is jointly and severally liable with Roth Co.

C. Disposition at Trial Court. The trial of this matter was held February 18-25, 1992. The trial court at the conclusion of the evidence entered judgment in favor of the plaintiff and against defendant Roth Co. in the sum of \$1,909,401.57¹, plus interest at the legal rate both before and after judgment. Costs of suit were also allowed plaintiff and assessed against defendant Roth Co. No party appeals the trial court's judgment against Roth Co.

However, the trial court found that plaintiff, Averch (and/or Oneida) failed to prove that Metalclad had breached its contract with Oneida and/or had breached express and implied warranties relating to the underfloor insulation products provided and installed by Metalclad. The trial court also found that plaintiff failed to prove that Metalclad was involved in designing the floor slab system or that any acts of omission or commission on the part of Metalclad caused or contributed to the damages sustained by Averch. Accordingly, the trial court dismissed all claims against Metalclad. Averch appeals from the dismissal of his claims against Metalclad.

¹ Of this amount, \$237,389.91 represents damages awarded to Averch for defective construction of the roof. There was no claim against Metalclad for the defective roof. Damages claimed against Metalclad amount to \$1,672,011.66.

FACTS

A. Parties.

Plaintiff, Averch, is the owner of the warehouse which is the subject of this lawsuit (II:208). The warehouse, located in the Salt Lake International Center, is a dock-high cold storage and warehouse structure consisting of approximately 101,500 square feet of storage space (III:6-10) (Exs. 6, 7, 8 and 9). It is 34 feet tall (II:235), has two freezer sections, at least three cooler sections and dry storage space. With the exception of the dock area, the entire concrete floor sits upon two three-inch layers of EPS insulation specified and supplied by Metalclad. (III:4-5)

The building was constructed in late 1981 and 1982. Oneida began operating the warehouse in January 1983. (III:10)

Roth Co. served as developer and general contractor. Roth Co. contracted with Oneida/SLIC, predecessor in interest to Averch, to develop, design and build the building. (Exs. 6, 7, 8 and 9) That is, Roth Co. was to design and build the shell of the building. (II:237) (III:7-10) The design and construction of insulated and refrigerated improvements such as the freezer and cooler sections of the building were excluded from Roth Co.'s contract. (Id., II:244-246) Metalclad was the insulation contractor. (I:69-72; 86-87; 115-120) (II:238-239) (Exs. 26 and 347) Evidence adduced at trial amply demonstrated that Metalclad, at all times relevant to this action, engaged in the business of supplying insulation products, supervising the installation of insulation products,

designing the refrigerated and insulated portions of cold storage facilities and participating as general contractor or subcontractor in connection with building and renovating cold storage facilities. (I:46-62) (II:227-234)

The design and construction of insulated and refrigerated improvements were the subject of the contract between Oneida and Metalclad. (I:69-72; 86-87; 115-120) (II:236-239; 244-247) (III:4-10; 17-24) (Exs. 26 and 347)

All claims previously vested in Oneida/SLIC, as owner of the project, and those vested in Oneida, as the party who contracted with Metalclad, are now vested in Averch as discussed above. As a result of the previously addressed purchases and assignments, Averch owns the claims of: (1) Oneida/SLIC against Roth Co. (general contractor) (2) Oneida/SLIC against Oneida (responsible for tenant improvements) and (3) Oneida against Metalclad (responsible for the entire insulation system). (II:208) Any liability of Oneida to Averch is "passive," as Metalclad was in fact the party that conferred and consulted with Roth Co. to develop the design of the insulated floor slab system, and Metalclad was also the party that specified and supplied all insulation products incorporated into the warehouse, including the underfloor insulation. (I:86-88)

B. The Insulated Floor System.

The floor installed in the warehouse differs from typical concrete floors in ordinary dry warehouses. It is an insulated

floor slab system designed to retard heat from entering the building from below the floor in the freezer and cooler sections of the warehouse. (I:50) The following are the components of the insulated floor slab system installed at the warehouse: (a) compacted fill, (b) two-inch sand bed, (c) ten MIL polyvinylchloride vapor barrier, (d) two three-inch layers of EPS insulation and (e) a six-inch concrete wearing slab. (I:48-49) (Ex. 1, pg. 6; Ex. 23)

During construction and following installation of the insulated floor slab system, massive problems developed with the floor including, but not limited to, substantial structural cracking of the concrete wearing slab when the precast tilt-up concrete walls for the structure were being lifted into place by a crane positioned on the floor slab. (Exs. 73-79 and 86) Roth Co. repaired those sections of the insulated floor slab system damaged during construction by replacing the insulation and concrete components of the floor slab system. (II:56; III:76-79) Following completion of the building, substantial problems with the insulated floor slab system continued to arise in that multiple substantial cracks in the floor developed during normal operation of the warehouse. (II:24-41; 65) (III:13-16; 34-37) (Exs. 154 through 160) These cracks have continued to occur. Spalling, the deterioration and disintegration of concrete which occurs at the site of these cracks, also developed and continues under normal operations. (III:180-182) (IV:184-187)

After the floor slab system cracked and broke under construction loads and while repair operations were in progress, Ronald G. Roth, owner of Roth Co., J. Patrick Kidd, Vice President of Metalclad ("Kidd"), and Averch met at the site to discuss the obvious problems with the floor slab system. Donald E. Bressler, P.E. ("Bressler"), of Chen and Associates ("Chen"), a Salt Lake City consulting engineering firm, also attended this meeting. The parties agreed that Chen should be retained to test the expanded polystyrene insulation which had been installed under the six-inch concrete slab. (I:124-127) (II:140-141) Test results, reflected in written reports, revealed that the EPS insulation supplied by Metalclad had densities and compressive yield strengths below the project specifications. (Exs. 108 and 112) Thus, the insulation supplied by Metalclad failed to comply with Metalclad's own specifications in the design of the warehouse insulated floor system. (I:86-87) (II:149-150; 155-158) (Exs. 102, 103, 105, 107, 108, 112, 115, 116 and 118)

The Chen tests revealed that the EPS insulation had a compressive strength of between 9.8 psi and 19.1 psi, far below the compressive strength specified by Metalclad, 25 psi. (Ex. 108) Additional tests were conducted by Southwest Research Institute at the request of Kidd. The Southwest Research Institute test results revealed that the insulation had a compressive strength of between 11.19 psi and 19.49 psi, again well below the 25 psi specified by Metalclad. (Ex. 112) (I:83-84) After the EPS insulation had been

tested, it was determined that the floor, as constructed, lacked sufficient strength to withstand the loads which would be imparted by products stored on the racks to be installed on the floor in the warehouse. (II:42, 46) (III:28-29) In order to attempt to place the warehouse in an operational state, Roth Co. installed several seven and one-half inch thick reinforced concrete pads on top of the original floor slab and in the locations where racks were to be installed. (Id.; III:183-184; 220) Storage racks were then installed on these pads. Id. The pads resulted in a reduction in the amount of space available for storing products in the warehouse with consequent loss of income to Averch. (III:225) The pads also resulted in total elimination of any flexibility to change the manner in which products could be stored in order to accommodate particular needs of customers. (III:11-12)

Bressler, a licensed professional engineer, testified at trial as an expert witness. In 1982, Bressler was the manager of the Salt Lake City office of Chen & Associates, consulting engineers. Since retiring from Chen in 1991, Bressler has been self-employed as a consultant. His areas of expertise include soils, compacted fills and floor slabs. (II:117-118) Bressler spends approximately 20% of his time analyzing pavements and slabs on grade. (II:166) Concrete over insulation is considered to be a slab on grade. Id.

At trial, Bressler opined that the weak EPS insulation supplied by Metalclad caused cracking of the concrete slab at the warehouse. (II:167) Bressler explained that insulation having a

compressive strength less than the specified value results in a smaller load causing the concrete slab to deflect (compress) more, leading to the cracking which occurred at the warehouse during operations. Id.

Peter J. Nussbaum ("Nussbaum"), a senior principal engineer and group manager employed by Construction Technology Laboratory of Skokie, Illinois, also testified as Averch's expert witness. Nussbaum's expertise includes concrete materials, concrete pavement design and slabs on grades. (III:177-179) (Ex. 151) Nussbaum, having investigated the condition of the insulated floor slab system, testified that Metalclad's provision of EPS insulation material with compressive strength of less than the 25 psi specified by Metalclad, exacerbated the stresses and cracks which occurred in the floor slab system. (III:190) Nussbaum also testified that the use of EPS insulation having an actual compressive strength of between 9 psi and 19 psi, instead of the 25 psi as warranted by Metalclad, increased the deflection in the concrete slab "by about fifty percent" which is "detrimental" to proper slab performance. (III:193-194) Nussbaum further testified that "the fact that a lesser strength EPS board was used than was specified, exacerbates" the deflections which occur at the edges of the various sections of the concrete slab leading to worse cracking and fatigue in the floor. (III:208-210) (IV:36-39)

Slab shattering and spalling also accelerates at locations of cracks or joints in the floor slab by virtue of the lack of support

attributable to the weaker EPS insulation supplied by Metalclad. The slab shattering and spalling "speeds up the damage" to the floor, and "causes the impediments to the warehouse operations," observed by Nussbaum and described by Averch. (III:214-219) (IV:42-44)

Earl Kemp ("Kemp"), Metalclad's expert witness, conceded that the EPS insulation supplied by Metalclad, assuming it was below the 25 psi specification and warranty, would exacerbate the cracking which was occurring in the floor slab. (IV:163-164) Kemp also acknowledged that the insulation supplied by Metalclad influences the occurrence of structural cracks described by Kemp as "beam stress cracks." (IV:165-166) According to Kemp, "beam stress cracks" are structural in nature and are the most severe cracks which developed at the warehouse. (IV:177-178) The beam stress cracks described by Kemp, are made worse by the fact that the insulation was not as represented, warranted and specified by Metalclad, thereby exacerbating operational problems. (IV:178)

Kemp acknowledged that the weaker insulation would result in 10 to 20% more deflection in the floor slab, meaning 10 to 20% more vertical movement of the concrete slab itself when placed under loads by loaded forklift trucks moving across the floor surface. (IV:167) Kemp conceded that the insulation acts as an important contributing factor to the distress associated with the beam stress cracks, when such cracks occur over the insulation. (IV:184-188)

As a result of the severe cracking, slab shattering and spalling occurring on the warehouse floor, significant operational problems have occurred. (III:11-16) There are cracks and holes in the aisles traveled by forklift trucks loaded with 2,000 - 3,000 lbs. of product. There have been at least two major accidents; one resulting in an injury to a worker. There have been products damaged as a result of the forklifts hitting holes in the slab. The efficiency of the entire warehouse operation has been negatively affected. Id.

There are 18,000 square feet of cold storage warehouse space which have never been fully utilized because the floor cannot sustain the forklift loads associated with a freezer or cooler operation without creating additional and more severe cracking. (III:4-5; 31-32) (IV:186-187) According to Kemp, the insulated floor slab system in this area must be replaced before Averch uses this area to store frozen products. Id.

Major problems continue to the present day and increase in severity as time goes on. (III:34, 81) Efforts by Averch to patch the cracks and holes in the floor in order to keep the warehouse operational are ineffective temporary measures. (III:34-35) Averch has resorted to placing metal plates over the large cracks and holes. The plates, however, result in safety hazards and are often displaced by normal forklift operations. (III:34-36; 122-124) (Exs. 154-160) (Exs. 381-387) Moreover, Averch's efforts to sell the warehouse have been unsuccessful because of the

condition of the floor. (IV:9-10) With regard to the value of the insulation as supplied, Averch testified that the floor, including the insulation, given the current problems, has no value whatsoever. (III:13) (V:10) This evidence was uncontradicted.

C. Metalclad's Role.

Prior to the warehouse, Metalclad had participated in several projects for Averch involving cold storage construction. Averch's principal contact at Metalclad was Kidd (I:55-56), Vice President of cold storage operations at Metalclad during all times relevant to this case. (I:39-40) Kidd refers to himself as a sales engineer. (I:41) By 1981, he had gained 27 years of experience in designing and constructing floor slab systems. (I:55; 77)

Between the mid-1970s and 1981, Metalclad had contracted with Averch (or a company owned by him) to renovate and convert three existing dry warehouse facilities to freezer and cooler facilities. One of those projects involved a facility owned by Averch in City of Commerce, California. Metalclad was retained as general contractor for that project to design and construct renovations to the warehouse, including removing the existing floor and installing an insulated floor slab system. Averch and Kidd both testified that Metalclad had designed the renovations, removed the existing floor, designed and installed a new insulated floor slab system, specified the materials to be used therein, supplied the materials and constructed the renovations. (I:55-62) (II:227-234) As in the present case, Averch relied upon Metalclad's skill, expertise and

judgment for the City of Commerce project. At trial, Kidd specifically acknowledged his knowledge of said reliance. (I:86-88)

Subsequently, Metalclad, pursuant to contracts with Averch or one or more of his wholly-owned companies, performed the same services and supplied similar products. Those additional projects were located in San Jose, California and Denver (Commerce City), Colorado. Id. Metalclad performed engineering, installation, design and similar services, including obtaining appropriate permits, and assumed total responsibility in the performance of design and construction duties for Averch and his companies. Id.

Because of his past experience with Metalclad and in particular, because of Metalclad's expertise in designing and constructing freezers and coolers in industrial warehouses, Averch requested that Metalclad work with Roth Co. from the inception of the warehouse project so that together Metalclad and Roth Co. could ensure that the warehouse was designed and constructed in a manner consistent with Averch's criteria. (II:222-225; 236-239; 244-246) (III:3-10; 21-22; 43; 47-50; 100-101; 103; 109-110; 198) In mid-1981, Averch contacted Metalclad, specifically informing Kidd of Averch's plans to have a dock-high cold storage warehouse facility constructed in or near the Salt Lake City area. Averch informed Kidd of the overall dimensions of the proposed structure, the approximate dimensions of the freezer and cooler sections to be installed in the facility and the manner in which the facility

would be used. Kidd was advised both that Roth Co. would be the general contractor on the project and that Roth Co. had no prior experience in constructing or designing refrigerated buildings.

(II:245-246) Kidd also was aware that the architects used by Roth Co. had no prior experience in designing cold storage warehouses.

(I:63-88) At trial, Kidd also acknowledged that cold storage construction is unique and differs from standard warehouse construction because in an insulated warehouse, there is insulation immediately below the concrete wearing slab instead of native soils or fill material and because of the need to create "an insulation surround." (I:77)

In reliance upon the skill, judgment and expertise of Metalclad, Averch requested that Metalclad meet, consult, coordinate, design and construct all of the insulated portions of the Salt Lake warehouse, and Metalclad agreed to do so. (I:68-72; III:106; 198) Kidd has admitted this delegation of duty to Metalclad and that Metalclad agreed to select, specify and supply all insulation products to be installed in the insulated floor slab system during construction, as well as to supervise the installation of all insulation products therein. Id. Averch testified that he relied exclusively upon Metalclad to select, specify, supply and supervise the installation of insulation materials suitable for the insulated floor slab system installed at the warehouse. (II:229-239; 245-246; III:5-7) Metalclad acknowledged said reliance. (I:69-72; 86-88)

The shop drawings or "details" relating to the insulated portions of the warehouse, including those shop drawings or "details" relating to the insulated floor slab system, the freezers and the coolers, were prepared by Metalclad and provided by Metalclad to Roth Co. and ultimately to the architects retained by Roth Co. for the project, Walfred Lassilla ("Lassilla") and John Smales ("Smales") of Architectural Production and Design Consultants, Inc. ("APDC") (I:99-108; 111-115) (V:41-42) (Roth Dep. II:273-277) (Exs. 20 and 23) The shop drawing or "details" now appear as details, containing specifications, on the plans for this project prepared by APDC. (I:69, 71-72) (II:12-13) (IV:45-49) (Smales Dep. II:141-150; 172-173) (Ex. 1, p. 5, Ex. 23)

The extent of Metalclad's involvement in the creation of plans and specifications for the insulated floor slab system is clearly evidenced by Kidd's meetings with the architects and by the documents provided by Kidd to the architects during the planning stages. Moreover, Kidd testified that Metalclad was asked by Averch "to aid in developing or designing this building." (I:68-69) During the fall of 1981, when the plans for the project were being prepared, Kidd, Roth and Smales met to discuss areas of the project where the involvement of Roth Co. and Metalclad would overlap. (I:73-79; 86-88) (Smales Dep. I:99; Smales Dep. II:314-315) At this meeting, Kidd informed Lassilla and Smales of Metalclad's prior experience in designing and installing complete freezer and cooler box systems for Averch and produced a "typical

detail" showing the components of an insulated floor slab system. (I:75-76; 88-93) (Ex. 19) The floor components, as provided in Kidd's initial "typical detail," included the following: (a) a two-inch PVC pipe heat system, (b) a two-inch sand bed, (c) a 10 MIL PVC vapor barrier, (d) insulation (two layers of two-inch thick EPS foam insulation board), (e) five one-half inch concrete slab floor reinforced with a #3 rebar and (f) at 18 inch O.C. (on center each way). Id.

Kidd testified that Exhibit 19 represented his "recommendation" as to the design of the insulated floor slab system to be constructed in the warehouse. (V:39-40) Kidd further testified that this "recommendation" was apparently not acceptable to Roth Co. as Roth Co. desired to construct the floor slab system without utilizing steel reinforcement within the concrete slab itself. Id. The testimony of Kidd and that of Lassilla demonstrates that Kidd subsequently had telephone conversations with Lassilla and/or Walter E. Riley ("Riley"), Roth Co.'s structural engineer, during which a tradeoff between the use of steel reinforcement and thicker concrete was discussed. (I:94-95) (III:162-165) (Ex. 181) Following this telephone conversation, Kidd transmitted to Roth Co. and/or its architects a shop drawing for a floor slab system which did not contain reinforcement. (I:100-101) (Exs. 20 and 23) This detail shows the following components: (a) compacted fill, (b) two-inch sand bed, (c) 10 MIL polyvinyl chloride vapor barrier, (d) two three-inch layers of

polystyrene foam installation with 1.5 lb. density and 25 psi yield (compressive strength), and (e) a six-inch unreinforced concrete slab. (I:99-108; 110-115) (Exs. 20 and 23) This Metalclad shop drawing or "detail" thus furnished, with a slight modification relating only to the connection of the wall to the floor, was ultimately incorporated as detail number 6 on sheet number 5 of the plans and specifications for the warehouse. (Ex. 1, p. 5; Ex. 23) The shop drawing which became detail number 6 on page 5 of the plans and specifications, does not call for steel reinforcement in the interior of the floor slab system. (I:101-108) (IV:45-49) (Smales Dep. II:141-150; 172-173; 336-337) (Ex. 1, p. 5; Ex. 23) Moreover, Kidd testified that this detail or shop drawing transmitted by him to the architects during the planning phase was indeed intended by him to depict "a suitable design of the floor . . . at the Salt Lake facility." (I:110-115)

Following receipt of Metalclad's proposals, Plaintiff, through an employee, Steve Renslow, authorized Metalclad to specify, supply and supervise the construction of all insulated portions of the cold storage and warehouse. (III:115-116) (Ex. 40) Metalclad's proposal NO. 3542, dated October 23, 1981, represented and warranted that the insulation to be supplied by Metalclad for installation into the insulated floor slab system would have a density 1.5 psi. (Exs. 26 and 347) Kidd testified that a insulation product having a density of 1.5 psi was to have a compressive strength of 25 psi. (I:85-87) As set forth in

Metalclad's detail or shop drawing, Metalclad warranted that the floor insulation which it was supplying to the project would have a compressive strength of 25 psi. (Ex. 1, p. 5; Ex. 23) Indeed, Metalclad's detail which was later incorporated into the plans, calls for insulation product having compressive strength of 25 psi. (Exs. 20 and 23)

Between August, 1981 and December 29, 1981, Averch and Mr. Roth negotiated concerning the development, design and construction of the warehouse. Ultimately, Roth Co. agreed to be totally responsible to fully develop, design, build and convey to Oneida/SLIC, Averch's assignor, a complete industrial dock-high building constructed in accordance with certain plans and specifications. (Exs. 6, 7, 8 and 9) Metalclad was to design, specify materials for and construct the insulated portions of the warehouse including the freezers and coolers. (I:69; 71-72; 76; 86-87; 111-115) (III:7-10; 17-24; 100-101) (IV:45-49) Roth Co. was to supply the labor for installing the underfloor insulation under Metalclad's supervision. This proposal was ultimately accepted by Averch. (IV:60-62)

Roth Co., Riley and APDC had no prior experience in constructing or designing refrigerated buildings. (III:152) (Riley Dep. I:16) (Smales Dep. II:167-173) For this reason, Averch, given his prior relationship and dealings with Metalclad, agreed that all insulation products and the freezer and cooler components would be supplied by Oneida as a tenant improvement. (III:103-108) Oneida

then contracted with Metalclad, which agreed to fulfill that responsibility. Id.

Riley performed the structural calculations for the warehouse. (Smales Dep. II:150) The Riley calculations, consistent with Metalclad's shop drawing, call for a six-inch thick, unreinforced, concrete slab to be poured over the 2-3 inch layers of expanded polystyrene foam insulation specified and supplied by Metalclad. (Roth Dep. I:96-97; Roth Dep. III:41-42) According to Riley's calculations, he was provided with information that the insulation specified and to be supplied by Metalclad would have a compressive strength of 25 psi. (Riley Dep. I:67-68) At the time Riley prepared his structural calculations, he had the information provided by Metalclad including the compressive strength of the underfloor insulation and the shop drawing furnished by Metalclad concerning the design of the insulated floor slab system. (IV:45-49 (Riley Dep. I:45-46) (Roth Dep. IV:96-97) Roth testified that Riley verified the appropriateness of Metalclad's proposed design via his calculations. (IV:46)

Nussbaum testified that even the design which Kidd stated he "recommended" was "completely inadequate" and would have led to cracking of the slab. (A floor slab system comprised of compacted granular fill, two three-inch layers of 25 psi EPS insulation below a five and one-half inch concrete slab with reinforcement, 18" on center, #3 rebar, is "completely inadequate".) (III:211-214) (Ex. 19) Nussbaum also opined that EPS insulation with a compressive

strength of 25 psi is not suitable for concrete floor slab construction. A higher compressive strength material should be used. (III:210) While Kemp appeared to imply that cracking in the concrete slab would have occurred whether or not the EPS insulation material met the 25 psi compressive strength specification, he also testified that had insulation materials having compressive strength of over 100 psi been specified and installed, the cracking would not have occurred. Kemp also indicated that weaker insulation equates with more vertical displacement, more deformation in the insulation itself and thus more cracking. (IV:162-164)

Bruce Kidd, Metalclad's contract administrator, testified that he no longer uses EPS foam insulation as a structural component of insulated floor slab systems. Rather, he currently uses "DOW SM Board" which is an extruded rather than an expanded product. The DOW is available with compressive strengths up to 115 psi. (IV:83; 94-95)

Finally, Smales testified that the plans and specifications for the insulated portions of the warehouse, including the floor slab system, were subject to approval by and in fact were approved by Metalclad. (Smales Dep. II:336-337)

SUMMARY OF THE ARGUMENT

Metalclad breached its contract with Averch by supplying EPS insulation, a structural component in the insulated floor slab system, which did not meet specifications. Use of weaker insulation in the construction of the floor slab system caused the

floor to crack and spall and/or exacerbated floor cracking. The cracking, spalling and exacerbation results in severe operational problems at the warehouse, and the floor must be replaced. Metalclad is liable to Averch for the cost of making the materials furnished conform to contract specifications. In the present case, as repair to a state of conformity is impossible, the cost of replacement is the appropriate remedy. However, because replacement would necessitate removal of the concrete flooring, Metalclad is liable for the cost of replacing the floor as well as the expenses incurred by Averch in attempting temporary repairs and testing the insulation, as additional consequential damages.

Because specifications were not followed and a defective floor slab system was thereby constructed, breach of express warranty is established. That Metalclad supplied underfloor insulation materials to the project which did not meet its own specifications is uncontradicted in the record. Metalclad breached its express warranty relating to the density and compressive strength of the insulation which it specified. As a matter of law, Averch is therefore entitled to damages equal to the sum which he paid for the insulation together with incidental and consequential damages resulting from the need to remove and replace the floor slab system.

Proof of causation is not a condition to recovery of these damages. Utah Code Ann. § 70A-2-714(2) (1990).

Metalclad also breached its implied warranty of fitness for a particular purpose by supplying underfloor insulation materials to the project which were not suitable for use in construction of an insulated floor slab system.

Metalclad consulted with the contractor and architects with respect to the plans and specifications for the warehouse. Metalclad materially participated in the design of the insulated floor slab system. Metalclad provided documents and data to the architects who in turn provided these to Roth Co.'s structural engineer, specifying the various components of an insulated floor slab system. The insulated floor slab system, as designed, was defective in that it was not capable of withstanding loads imparted on the floor during normal warehouse operations. Metalclad as well as Roth Co. owed a duty of due care to Averch in connection with the design of the floor slab system. Metalclad, like Roth Co., breached that duty. Metalclad's breach proximately caused severe structural cracking and spalling in the floor slab system. Metalclad is therefore jointly and severally liable with Roth Co. for all damages suffered by Averch as a consequence; specifically, the cost of removal and replacement of the floor slab system, the cost of temporary floor repairs, the cost of testing and inspecting the floor, damages due to delayed completion, damages due to business interruption during the repair and replacement operation, and damages associated with forklift and equipment repairs.

ARGUMENT

I.

Metalclad Breached Its Contract With Averch By Supplying EPS Insulation Which Did Not Meet Agreed Specifications And By Failing To Recommend An Appropriate Design For The Insulated Floor Slab System.

Metalclad specified the EPS insulation materials to be incorporated into the insulated floor slab system at the warehouse. (I:69-72) Metalclad's proposal concerning EPS insulation to be used in constructing the insulated floor slab system, accepted by Averch, calls for material having a density of 1.5 psi. (Ex. 26 and 347) According to Metalclad, insulation having a density of 1.5 psi was to have a compressive strength of 25 psi. (I:85-87) Ex. 1, Pg. 5, 23, 26 and 347) The uncontroverted evidence offered at trial established that Metalclad agreed to supply EPS insulation to be incorporated into the floor slab system having those specified characteristics. Uncontroverted evidence also proved that the EPS insulation supplied by Metalclad and incorporated into the insulated floor slab system as a structural component, did not meet Metalclad's own specifications. (I:83-84; 135; 139-140; 154) (II:149-151; 156-158) (Exs. 103, 105, 108, 112 and 115)

Bruce Kidd, Metalclad's contract administrator, ordered all of the EPS insulation for the warehouse. (IV:57-58; 65-66) Metalclad purchased the EPS insulation used in construction of the floor slab system from Enpro. (IV:69-71) (Exs. 351-357) At trial, Bruce Kidd admitted that he did not even know whether Enpro manufactured

EPS insulation with a density of 1.5 psi which would meet the compressive strength specification of 25 psi at the time the Enpro EPS insulation was used in constructing the floor slab system. (IV:101)

Metalclad purchased EPS insulation used in the repair of the floor from Advanced Foam Plastics, Inc. ("AFP") subsequent to the crane damage. The replacement EPS insulation did not meet specifications either. (III:29) (IV:84-91) (Ex. 180)

Metalclad therefore breached its contract with Averch. Sidney Stevens Implement Co. v. Hintze, 92 Utah 264, 67 P.2d 632, 637 (1937) (noncompliance with specifications constitutes breach of contract). Accord Gilbert v. City of Caldwell, 112 Idaho 386, 732 P.2d 355, 363 (Idaho App. 1987) (a contractor is required to perform in accordance with plans and specifications); Cochrell v. Hiatt, 97 N.M. 256, 638 P.2d 1101, 1103 (N.M. App. 1981) (noncompliance with the performance promised is a breach of contract). See also Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc., 124 Ariz. 242, 603 P.2d 513, 519 (Ariz. App. 1979).

Bressler testified that the fact that insulation below Metalclad's specifications was incorporated as a structural component of the insulated floor slab system caused cracking of the slab. (II:167) Nussbaum, another expert called by Averch, opined that as a direct and proximate result of Metalclad's breach, the concrete wearing slab installed over the EPS insulation, deflected, under normal operating loads, by as much as an additional 50%,

thereby exacerbating the cracking of the floor and the spalling which occurred at those cracks. (III:189-190; 193-194; 208-210; 214-215) (IV:38-39, 42) The defective insulation creates operational problems at the warehouse. (III:13; 34-37; 207) In addition, the defective insulation "will reduce the service life" of the floor slab system. (III:219)

Even Metalclad's expert, Kemp, conceded that the cracking and spalling as well as resultant operational problems are exacerbated because the insulation supplied by Metalclad is under the specified compressive strength required (weaker insulation will result in more vertical displacement, "maybe 10% more deformation"). (IV:163-164) Kemp also acknowledged that EPS insulation less than 21 psi in compressive strength will result in "10-20% more deflection." (IV:167) He anticipates more cracking will occur and cracks that are there will get worse under normal operating loads. (IV:177) Kemp also opined that beam stress cracks which are structural cracks, and the most severe, cause the most significant problems from an operational standpoint, caused the upset of a forklift, and that insulation with a compressive strength less than specified exacerbates beam stress cracks and operational problems. (IV:178) Most important, Kemp testified that "insulation is an important contributing factor to the distress associated with the beam stress cracks where the beam stress cracks occur over insulation" (IV-184).

Experts for both parties are in absolute agreement on at least one critical point, that the installation of EPS insulation which did not meet the specified compressive strength requirements substantially contributes to the most severe types of cracks occurring in the warehouse. These experts also agree that the severe cracks are causing significant problems with operations at the warehouse including safety concerns and, at least in one instance, caused personal injury to a forklift operator. In view of this uncontroverted evidence, the trial court clearly erred in failing to find that Metalclad breached its contract with Averch by failing to supply EPS insulation materials which met specifications. Hintze, 67 P.2d at 637; Gilbert, 732 P.2d at 363. Moreover, given that experts for both parties agree that there exists a causal connection between the weak insulation and the damages suffered by Averch, the trial court clearly erred in failing to find that Metalclad's breach of contract caused or substantially contributed to the defects in the insulated floor slab system. The experts similarly agree that the only reasonable remedy in the circumstances is a complete replacement of the insulated floor slab system. (III:218-219) (IV:185-187)

The Restatement (Second) of Contracts § 346 has been adopted by the Utah Court. Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298, 445 P.2d 136 (1968). Generally, under the Restatement, in cases of defective performance, the measure of damages is the cost of making the work performed or materials furnished conform to

contract specifications. Winsness and Assoc. v. M.J. Conoco Distributors, Inc., 593 P.2d 1303, 1307 (Utah 1979). In those cases where a contractor or supplier substitutes an inferior product for the one specified, the cost of repair or replacement is the measure of damages utilized by the courts. Beik v. American Plaza Co., 280 Or. 547, 572 P.2d 305, 310 (1977), (the only way plaintiffs can be made whole is to award them the cost of repair). See also Eastlake Construction Co. v. Hess, 33 Wash. App. 378, 655 P.2d 1160 (Wash. Ct. App. 1983), aff'd in part, and rev'd in part on other grounds, 102 Wash. 2d 30, 686 P.2d 465 (1984).

In short, it is obvious from the record that in order to bring the insulation component of the insulated floor system into conformance with the contract specifications, the insulation must be replaced. It is also clear that in order to replace the insulation, the concrete wearing slab installed above the insulation must be removed and replaced. The uncontroverted evidence at trial established that the cost of removal and replacement of the insulation and concrete is \$921,705.00. (Ex. 161)

In addition, Averch expended \$26,746.91 in testing and inspecting the insulation products and \$15,194.55 in temporary floor repairs. (Ex. 161) He is entitled to recover both amounts as incidental damages. Tarter v. Monark Boat Co., 430 F. Supp. 1290 (E.D. Mo. 1977), aff'd, 574 F.2d 984 (8th Cir 1978) (buyer could recover his incidental damages under section 2-715 of the

Uniform Commercial Code ("UCC"), expenses incurred to repair defective materials and parts); Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391 (Idaho App. 1982), aff'd, 105 Idaho 123, 666 P.2d 650 (1983) (cost of replacing paneling purchased from seller was recoverable as incidental damages under UCC §§ 70A-2-715(1) and 70A-2-714(3)); S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc., 39 Ill. App. 3d 353, 350 N.E.2d 321 (Ill. App. Ct. 1976) (where buyer, upon discovering defect in hardened concrete, conducted tests at extensive cost to test the strength of the concrete, buyer could recover costs of tests as reasonable incidental expenses under UCC § 70A-2-715).

The trial court clearly erred in disregarding the uncontroverted evidence establishing breach of contract by Metalclad and the damages caused by such breach and in failing to award Averch the damages in an amount at least equal to the cost of the removal and replacement of the insulation and concrete and the amount of his incidental expenses as set forth above.

II.

Metalclad Breached Its Express Warranty And Implied Warranty Of Fitness For A Particular Purpose.

The following provisions of Article 2 of the Uniform Commercial Code as adopted in Utah apply to Plaintiff's claims against Metalclad for breach of warranties:

"Merchant" as that term is defined in Utah Code Ann. § 70A-2-104(1):

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

The testimony of Kidd establishes that Metalclad is a merchant. During the time relevant to this action, Metalclad was involved in renovating, designing, constructing and selling products incorporated into cold storage warehouse facilities. Specifically, between 1975 and 1984, Metalclad was involved in at least 50 different jobs, annually, involving the sale and installation of underfloor insulation. (I:46-47)

Metalclad, which provided the insulation for the warehouse floor system, provided "goods" as that term is defined in Utah Code Ann. § 70A-2-105(1):

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action.

A. Express Warranty.

Metalclad furnished goods (i.e., insulation materials) which did not conform to specifications. Kidd admitted that Metalclad specified the insulation products to be used (I:71-72); that the specification for the underfloor insulation was 25 psi yield material (I:86-87); and, that the insulation supplied did not meet that specification (I:154-155). (I:138-140) (Ex. 115)

Utah Code Ann. § 70A-2-313 (1990) ("Express warranties by affirmation, promise, description, sample") provides as follows:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

In the instant case, the evidence was uncontroverted that Metalclad failed to furnish insulation materials which conformed to the specifications; specifications which Metalclad had provided. Where plans and specifications are not followed and a faulty and defective facility is thereby constructed, breach of warranty is established. See generally Cambelt International Corp. v. Dalton, 745 P.2d 1239, 1242-43 (Utah 1987) (J. Howe, concurring). See also

Pacific Marine, 525 P.2d at 618-19 (Sales by description, sample or model constitute express warranties. "A description of the goods may be by words or may be expressed in any other manner, such as, use of technical specifications or blueprints, which may be more exact than language. As long as they are made part of the basis of the bargain the goods must conform.").

In the instant case, Averch clearly proved the existence of an express warranty and breach thereof by Metalclad. Tender of a product which is different from that bargained for by the plaintiff is a breach of warranty. Jones v. Allen, 7 Utah 2d 79, 318 P.2d 637 (1957). The trial court accordingly erred in failing to find that Metalclad breached its express warranty.²

B. Implied Warranty of Fitness.

The evidence adduced at trial also clearly established that the underfloor insulation furnished by Metalclad breached the implied warranty of fitness for a particular purpose defined in Utah Code Ann. § 70A-2-315.

An implied warranty of fitness is "inherent in the transaction" and a supplier's knowledge of the purpose which the goods are to serve may be inferred from a course of dealing between the parties over several years. Utah Cooperative Ass'n v. Egbert-Haderlie Hog Farms, Inc., 550 P.2d 196, 198 (Utah 1976). A prior

² Paragraph 15 of the trial court's Findings of Fact and Conclusions of Law indicate that the trial court implicitly found that the EPS insulation was in conformance with specifications. This finding is clearly erroneous as there is no evidence to support such finding.

course of dealing between Averch and Metalclad spanned several years. Metalclad had previously selected and installed insulation products in connection with the construction of insulated floor slab systems at three other facilities owned by Averch or one of his companies. (I:51-62) Clearly, Metalclad, through its representative, Kidd, had specific knowledge of the purpose for which the underfloor insulation would be used. With respect to the prior course of dealing, Kidd testified as follows:

Q. Alright, and all three facilities with respect to the various projects undertaken there for Mr. Averch or Oneida, it is correct, is it not, that Mr. Averch and Oneida were relying on Metalclad's judgment and expertise in selecting suitable materials; is that correct?

A. Yes.

Q. And in connection with all three projects it was, was it not, Metalclad who specified all of the materials including materials to be incorporated in the insulated floor slab system?

A. Yes.

(I:62)

In this case, Metalclad specified that insulation having a compressive strength of 25 psi be used. (I:86-87) Metalclad knew that the insulation was to be used as a structural component of the insulated floor slab system in a cold storage warehouse facility. (I:86-87) Kidd also acknowledged that the architects were similarly relying on Metalclad to specify and supply insulation

materials which would be suitable for use in construction of the warehouse. (I:87-88)

The insulation supplied by Metalclad was not appropriate for use as a structural component of the floor slab system. Instead of supporting the concrete component of the system under anticipated loads, it compressed or "deflected" by as much as 50% over what was expected, thereby substantially contributing to cracks, spalling and operational problems. (III:193)

The present case contains similarities to the facts in Aluminum Co. of America v. Electro Flo Corp., 451 F.2d 1115 (10th Cir. 1971) (affirming a decision by the United States District Court for the District of Utah). In Aluminum Co., "Alcoa undertook to design and produce flooring material that could be assembled, with suitable insulation supplied by [a supplier] to design specifications of Alcoa, to meet the panel floor requirements of Electro Flo's trailer." Id. at 1116-17. Ultimately, the flooring designed and produced by Alcoa was inadequate to meet the needs of Electro Flo. Id. Alcoa's failure to supply goods meeting Electro Flo's known requirements breached Alcoa's implied warranty of fitness. Id. at 1118.

Alcoa argued that the transaction should be characterized as one for professional engineering and design services rather than as a sale of goods to which the implied warranty of fitness would apply. Id. The Court disagreed, holding that implied warranties apply to a transaction in which the seller's (Alcoa's) experts

studied the buyer's (Electro Flo's) needs and the seller undertook to provide a product specially designed for those needs. Id. In addition, the court relied on case law from other jurisdictions to the effect that a transaction calling for professional design services as well as the provision of goods may be viewed as involving separate and distinct contractual undertakings. Id. To establish breach of the implied warranty of fitness for a particular purpose, the buyer need only establish that "at the time of contracting to supply the goods in question, [the seller] Alcoa had reason to know the particular purpose for which the goods were required....Alcoa also had reason to know that [the buyer] Electro Flo was relying on Alcoa's skill and judgment in furnishing suitable goods." Id. at 1119. These circumstances established an implied warranty of fitness, which was breached when the goods failed to meet the buyer's requirements. Id. at 1118-19.

Goods may be defective, not as represented, not fit for the purposes intended and not salable or merchantable, i.e., in breach of all three warranties. Pacific Marine Schwabacher, Inc. v. Hydrosift Corp., 525 P.2d 615, 617-18 (Utah 1974).

Here, the uncontroverted evidence clearly establishes that Metalclad breached its implied warranty of fitness for a particular purpose. Metalclad knew the particular purpose for which the insulation was required (structural component of an insulated warehouse floor) (IV:101) and knew that Averch (Oneida) as well as others involved in the project were relying on Metalclad's skill

and judgment in furnishing suitable insulation. Finally, the furnished insulation was not suitable for its intended purpose. The trial court erred in failing to find that Metalclad breached its implied warranty of fitness for a particular purpose and in failing to award Averch damages in accordance with Utah Code Ann. § 70A-2-714(2).

C. Damages.

Under the Utah Uniform Commercial Code, the measure of damages for breach of warranty is the difference "between the value of the goods accepted and the value that they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." Id.

Incidental and consequential damages may be recovered as well. Utah Code Ann. §§ 70A-2-714(3) and 70A-2-715.

Evidence adduced at trial demonstrated that the value of the defective insulation as accepted was zero. (IV:10) The integrity of the entire floor slab system, both from the design standpoint and the operational standpoint, was dependant upon the underfloor insulation having a compressive strength of 25 psi. III:186-187; 194)

The evidence showed that the contract price for the insulation was \$104,199.00. (Ex. 347) (IV:60-62)

Even assuming that the trial court was not persuaded that the failure of the insulated floor slab system was caused solely by Metalclad's breach of warranty, the court committed an error of law

in declining to award damages to Averch equal to the price of the insulation. Utah Code Ann. § 70A-2-714(2) does not require proof of causation in order to recover the differential between the value of the goods as warranted and the value of goods as accepted as damages. As a matter of law, the buyer, in this case Averch, is entitled to receive the difference between the value as warranted and the value as accepted. Lamb v. Bankgart, 525 P.2d 602, 608-09 (Utah 1974) The trial court's holding that causation is required to recover is erroneous.

Averch also respectfully submits that he is entitled to recover, as incidental damages, the sum he expended in testing and inspecting the insulation, \$26,746.91, and the sum he expended in attempting temporary repairs, \$15,194.55. Carter, supra, 430 F. Supp. at 1290. In addition, Averch also submits that under UCC § 70A-2-714, he is entitled to recover consequential damages and that the trial court therefore erred in failing to award him the following: damages due to delay of completion in the amount of \$606,876.09; business interruption damages in the amount of \$70,908.64; and damages associated with forklift and equipment repairs in the amount of \$30,508.50. (Ex. 161)

III.

The Court Erred By Failing To Find
Metalclad Jointly And Severally
Liable For The Negligent Design Of
The Floor Slab System.

A. Negligence.

The elements of a cause of action for negligent design and/or construction are: (1) duty of care, (2) breach of that duty, (3) damage (4) proximately caused by the breach of duty. See, e.g., Wessel v. Erickson Landscaping Co., 711 P.2d 250, 252 (Utah 1985) (collapse of retaining walls proximately caused by negligent design and/or construction). A professional involved in the design and/or construction of a facility or structure is held to a duty to utilize "the care, skill, and diligence normally exercised" by professionals in good standing in the same trade or profession. Wessel, 711 P.2d at 253.

Where negligent product design or manufacture results in damage to the product itself, "actions to recover all damages resulting from the product's deterioration should be allowed." W.R.H., Inc. v. Economy Builders Supply, 633 P.2d 42, 44 (Utah 1981). Thus, if negligence and causation are established, damage to the product itself (in this case, the insulated floor slab system) resulting from its defective design and/or manufacture is a recoverable item of loss whether or not persons or other property suffered harm. Id. at 44-46.

A breach of duty may give rise to claims both in contract and in tort. The Utah Supreme Court has explained that "contractual

relationships for the performance of services impose on each of the contracting parties a general duty of due care toward the other, apart from the specific obligations expressed in the contract itself." DCR Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983). As the Court reasoned in DCR, negligence consists of "a failure to exercise the degree of care which a reasonable person would have exercised under the same circumstances, whether by acting or by failing to act." Id. at 434-35. To the extent that the alleged negligence consists of a failure to act, the person injured by inaction "must demonstrate the existence of some special relationship between the parties creating a duty on the part of the latter to exercise due care in behalf of the former." Id. at 435. Such a relationship can arise out of contract. Id. Thus, a "party who breaches his duty of due care toward another may be found liable to the other in tort, even where the relationship giving rise to such a duty originated in a contract between the parties." Id.

Averch respectfully submits that the evidence clearly shows that Metalclad played a significant role in the creation of the plans and specifications for the insulated floor slab system. As set forth in detail in the Facts section of this Brief, Metalclad had considerable experience in designing and constructing cold storage warehouses. Roth Co. and the engineer and architects retained by him, Riley and APDC, did not. Metalclad had converted at least three dry warehouses to cold storage facilities for Averch

before the Salt Lake City project. Averch asked Kidd to meet with Roth Co.'s architects and to become involved in the creation of plans and specifications for the warehouse. Metalclad did so. Metalclad discussed all components of the insulated floor slab system and how they fit together with the architects. Metalclad provided typical details depicting a typical insulated floor slab system and later provided "shop details" to Roth Co. and the architects for incorporation into the plans. (Exs. 20, 21 and 23) As discussed above, all parties involved in this project were relying on Metalclad to provide information as to how the insulated floor slab system should work and look. Metalclad, like the others involved in the creation of the plans and specifications, Roth Co., Riley and APDC, was under a duty to exercise due care.

The uncontroverted evidenced adduced at trial proved that Roth's primary responsibility was to provide the "shell" of the warehouse (Roth Dep. I:55-58), and Metalclad was responsible for the design and construction of the freezer and cooler sections of the warehouse. (I:69; 71-72; 76; 86-87; 111-15) (III:7-10; 17-24; 100-101) (IV:45-49) The single most important area where the responsibility of Roth Co., and those employed by and responsible to him, Riley and APDC, and Metalclad overlapped was the insulated floor slab system. Each had a role, and it is respectfully submitted that each was under a duty to exercise due care. Metalclad's expertise was essential to the creation of plans and specifications for the insulated floor slab system because Smales

and Lassilla (the architects) and Riley (Roth Co.'s structural engineer) had no prior experience in the design of insulated floor slab system. (III:152) (Riley Dep. I:16) In fact, Roth, Riley and Smales all testified that they were relying on Metalclad's expertise and assistance in the design of the insulated floor slab system. (Smales Dep. II:141-150) (Riley Dep. II:133-134) (Roth Dep. III:273-277) Indeed, Kidd admitted at trial that Averch asked Metalclad to assist in the development or design of the warehouse and meet with the architects regarding the design. (I:68-69) Testimony of the parties directly involved in the creation of the plans or blueprints for warehouse clearly reveals that Kidd subsequently met with Smales to discuss the details of the insulated floor system and that APDC subsequently incorporated Metalclad's details into the final plans. (Smales Dep. I:99) (Smales Dep. II:141-150, 172-173, 314-315)

The record is also clear that Roth considered Metalclad as part of the design team (Roth Dep. III:17-18, 22-23), responsible not only for the specifications and elements of the freezer and cooler sections (Roth Dep. III:26-27, 29-30) but also for the provision of details depicting the components to the insulated floor slab system. Roth subsequently delivered these to Riley, and the details depicted Metalclad's design of the insulated floor slab system, including the specification of a six-inch unreinforced concrete wearing slab. (Roth Dep. III:96-97) Riley, who was also aware of Metalclad's expertise in the design and construction of

insulated floor slab systems, testified that he utilized Metalclad's drawings in performing his structural calculations and verifying Metalclad's design inclusion of a six-inch concrete slab. (Riley Dep. I:232-233; Riley Dep. II:362-365) (Roth Dep. III:41-42) In fact, Smales testified that all final plans of the insulated floor slab system had to be and were approved by Metalclad. (IV:193-194) (Smales Dep. II:336-337)

The testimony and evidence adduced at trial clearly establishes that Metalclad participated in the design of the insulated floor slab system and was jointly responsible with the others for ensuring that the floor as designed, was capable of proper performance. Metalclad breached its duty of care in that the design and plans and specifications were defective. Similarly, Roth Co. breached its duty of care in participating in the creation of the defective design. The trial court correctly found that Roth Co., more specifically, those employed by him, were negligent regarding the design (Addendum B). However, the evidence shows that Metalclad was also negligent and that its negligence was a concurrent cause of the defective design.

As in the present case, structural failures can have more than one concurrent, proximate cause. See, e.g., Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 154, 161 (Utah 1979). See also Jacques v. Farrimond, 14 Utah 2d 166, 380 P.2d 133, 134 n.5 (Utah 1963) ("[T]here may be more than one proximate cause for the same injury.") Thus, under the principles of joint and several

liability in effect in Utah during the relevant time (1982), Averch may recover from either or both of Metalclad or Roth whose negligence concurrent in proximately causing Plaintiff's losses.

B. Joint and Several Liability.

In 1986, the Utah legislature repealed the Comparative Negligence Act, Utah Code Ann. § 78-27-37 to 43, and replaced it with the Liability Reform Act. Stephens v. Henderson, 741 P.2d 952, 953 (Utah 1987). The Comparative Negligence Act "provided for joint and several liability, that is, each defendant was liable to the plaintiff for the full amount of the plaintiff's damages." Id. at 953. The Comparative Negligence Act "was the substantive law defining, in part, the relationship between the parties at the time of the accident." Id. at 954. Section 78-27-41 of the Comparative Negligence Act provided that "nothing in this Act shall affect: (1) the common-law liability of the several joint tort-feasors to have judgment recovered, and payment made, from them individually by the injured person for the whole injury." Stephens, 741 P.2d at 954. The Comparative Negligence Act applies to actions based on injuries which occurred prior to the 1986 repeal and replacement of the Act with the Liability Reform Act. Id. at 954-55. The Liability Reform Act is not to be retroactively applied. Id.

With respect to negligence claims, the purposes of the Comparative Negligence Act were "first, to alleviate the harshness of the old common law doctrine of contributory negligence; and second, to provide for a system of loss allocation by apportioning

liability based at least in part on fault and to provide for contribution among tortfeasors according to fault." Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 907 (Utah 1984). While comparative negligence principles, in effect in Utah during the applicable time frame, enabled the trier of fact to determine the relative degrees of fault in a multi-defendant negligence case, findings as to the relative degrees of fault were solely for the purpose of determining rights of contribution among tortfeasors, "each remaining severally liable to the injured person for the whole injury as at common law." Id. at 907; Cruz v. Montoya, 660 P.2d 723, 727-28 (Utah 1983) ("§ 78-27-41(1) allows the injured party to collect from the tort-feasors individually for the whole injury as at common law.").

The Comparative Negligence Act left intact the common law liability of joint tort-feasors, defining "joint tort-feasor" as "one of two or more persons, jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Utah Code Ann. § 78-27-40(3) (1973). Thus joint tortfeasors are persons whose negligent conduct "concur in injuring another." Marsh v. Irvine, 22 Utah 2d 154, 449 P.2d 996, 998 (Utah 1969). This definition is in accordance with the law of other jurisdictions. See generally Annot., "Propriety and Effect of Jury's Apportionment of Damages as Between Tortfeasors Jointly and Severally Liable," 46 A.L.R. 3d 801 (1972), discussing "who are tortfeasors jointly and severally

liable...." Id. at 816-17. "[I]t has been variously expressed that those acting in concert, or those contributing to an indivisible injury, are jointly and severally liable, whereas one whose acts may be attributed to a particular part of the total injury is liable only for that portion of the damages associated with that part." Id. at 817.

Notwithstanding the evidence discussed above, the trial court found that Averch "failed to meet [his] burden of proving that any act or omission of Metalclad contributed in any way to the damages suffered by Averch" and also found that "the damages suffered by the plaintiff were caused solely by the Roth Co.'s breach of contract, breaches of express and implied warranties and negligence." (Finding of Fact and Conclusions of Law, p. 10, paragraphs 11 and 13, Addendum B) The trial court's finding that Roth Co. breached its contract, warranties and was negligent is indeed proper and is supported by the evidence. However, the trial court's implicit finding that Metalclad was not also negligent is clearly erroneous. The trial court committed an error of law not holding Metalclad jointly and severally liable with Roth Co. for the full extent of damages sustained by Averch as a result of the defective floor, \$1,672,011.66. (Ex. 161)

It clear that Metalclad owed a duty to Averch to exercise due care in connection with its participation in the creation of plans and specifications for this project. Metalclad's argument that its duty to exercise due care was somehow displaced by Roth's

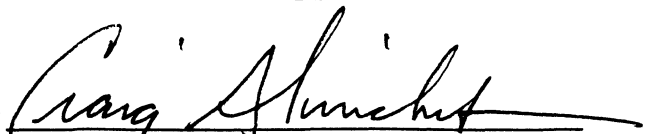
employment of a structural engineer, Riley, who prepared erroneous calculations, is misplaced. Zion's Cooperative Merchantile Institution v. Jacobsen Construction Co., 492 P.2d 135, 136-37 (Utah 1971) (Contractor could not escape liability for its own neglect of a contractual duty and duty of care by shifting its burden to another subcontractor). Accordingly, this Court should reverse the trial court and dismissal of Metalclad and find Metalclad jointly and severally liable with Roth Co. for all damages sustained by Averch as the result of the defective floor slab system. At trial, Averch established total damages resulting from the negligently designed floor in the amount of \$1,672,011.66 (cost of replacement: \$921,705.00; damages due to delay of completion: \$606,876.09; cost of repairs to forklifts and equipment: \$30,508.50; testing costs: \$26,746.91; temporary floor repair costs: \$15,194.55; and business interruption damages: \$70,980.64).

CONCLUSION

For the reasons stated herein, this Court should reverse the trial court's dismissal of Metalclad and remand this cause with directions to enter judgment in favor of Averch as assignee of Oneida/SLIC and Oneida as set forth herein.

DATED this 4th day of December, 1992.

STANLEY AVERCH, as Assignee of
ONEIDA/SLIC, a partnership and
as Assignee of ONEIDA COLD
STORAGE AND WAREHOUSE, INC., a
Colorado corporation,
Plaintiff and Appellant,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above foregoing Appellate's Brief was served by regular United States mail, postage prepaid, this 4th day of December, 1992, to the following:

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ADDENDUM

A. Determinative Statues

UTAH CODE, 1953
TITLE 70A. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES

PART 1. SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

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Current through Ch. 6 of the 3rd Special Session, approved 6-1-92

70A-2-104 Definitions -- "Merchant" -- "Between merchants" -- "Financing agency."

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

UTAH CODE, 1953
TITLE 70A. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES

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70A-2-105 Definitions -- Transferability -- "Goods" -- "Future" goods --
"Lot" -- "Commercial unit."

(1) "Goods" means all things (including specially manufactured goods) which
are movable at the time of identification to the contract for sale other than
the money in which the price is to be paid, investment securities (chapter 8)
and things in action. "Goods" also includes the unborn young of animals and
growing crops and other identified things attached to realty (Section 70A-2-
.07).

UTAH CODE, 1953
TITLE 70A. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES

PART 3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

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70A-2-313 Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

History: L. 1965, ch. 154, s 2-313.

UTAH CODE, 1953
TITLE 70A. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES

PART 3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

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2A-2-315 Implied warranty -- Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

History: L. 1965, ch. 154, s 2-315.

UTAH CODE, 1953
TITLE 70A. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
PART 7. REMEDIES

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Current through Ch. 6 of the 3rd Special Session, approved 6-1-92

70A-2-714 Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (Subsection (3) of Section 70A-2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

History: L. 1965, ch. 154, s 2-714.

UTAH CODE, 1953
TITLE 70A. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
PART 7. REMEDIES

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Current through Ch. 6 of the 3rd Special Session, approved 6-1-92

70A-2-715 Buyer's incidental and consequential damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

History: L. 1965, ch. 154, s 2-715.

ADDENDUM

B. Findings of Fact and Conclusions of Law

12/13/22
J. Dennis Frederick

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

ONEIDA/SLIC, an Arizona
partnership,

Plaintiff,

vs.

RONALD G. ROTH COMPANY, an
Arizona corporation and ONEIDA
COLD STORAGE AND WAREHOUSE,
INC., a Colorado corporation,

Defendants,

and

ONEIDA COLD STORAGE &
WAREHOUSE, INC., a Colorado
corporation,

Defendant and
Third-Party Plaintiff,

vs.

METALCLAD INSULATION
CORPORATION OF CALIFORNIA, a
California corporation,

Third-Party Defendant
and Fourth-Party Plaintiff,

vs.

ENPRO, INC., an Idaho
corporation; ADVANCED FOAM
PLASTICS, INC., a Colorado
corporation; and RONALD G.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. 840902530 PR

Honorable J. Dennis
Frederick

| | |
|------------------------------|---|
| ROTH COMPANY, an Arizona |) |
| corporation, |) |
| |) |
| Fourth-Party |) |
| Defendants, |) |
| |) |
| and |) |
| |) |
| RONALD G. ROTH COMPANY, an |) |
| Arizona corporation. |) |
| |) |
| Defendant/Fourth-Party |) |
| Defendant/Fifth-Party |) |
| Plaintiff, |) |
| |) |
| vs. |) |
| |) |
| ARCHITECTURAL PRODUCTION & |) |
| DESIGN CONSULTANTS, INC., an |) |
| Arizona corporation; and |) |
| WALTER E. RILEY, |) |
| |) |
| Fifth-Party Defendants. |) |
| |) |
| |) |
| |) |

The trial of this matter was held February 18-25, 1992. Plaintiff Oneida/SLIC was not represented at trial. Stanley Averch ("Averch"), successor-in-interest to Oneida/SLIC, and defendant Oneida Cold Storage and Warehouse, Inc. ("Oneida") were represented at trial by Craig A. Knickrehm and Donald J. Straka of Brashear & Ginn. Randy L. Dwyer of Parsons, Behle & Latimer appeared on behalf of Ronald G. Roth Company ("Roth Company") at the outset of trial and represented that he had been instructed by Ronald G. Roth, President and sole shareholder of the Roth Company, not to present a defense on

behalf of Ronald G. Roth Company or otherwise to participate in the trial or to present evidence in support of Roth Company's Counterclaim, Cross-Claim, or Fifth-Party Complaint. Third-party defendant Metalclad Insulation Corporation of California ("Metalclad") was represented by Jeffrey E. Nelson of Van Cott, Bagley, Cornwall & McCarthy. Fourth-party defendant Enpro, Inc. ("Enpro") was represented by William W. Barrett of Kipp & Christian. Fourth-party defendant Advanced Foam Plastics, Inc. ("AFP") was represented by Stephen F. Hutchinson of Taylor, Ennenga, Adams & Lowe. Fifth-party defendants Architectural Production & Design Consultants, Inc., ("APDC") and Walter E. Riley were not represented at trial.

The parties called several witnesses, introduced numerous exhibits, read portions of depositions into the record and designated other portions of depositions to be included in the record, and made proffers of certain evidence. Based on the evidence presented, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff Oneida/SLIC was a partnership or joint venture between Stanley Averch and Ronald G. Roth. Stanley Averch succeeded to the rights and liabilities of Oneida/SLIC by purchasing Ronald G. Roth's interest in Oneida/SLIC. The claims of defendant Oneida were assigned to Stanley Averch.

2. In late 1981, the plaintiff and Ronald G. Roth Company entered into a contract represented by various documents under which the Roth Company agreed to develop, design, and build for Oneida/SLIC a dock-high cold storage warehouse facility of approximately 101,500 square feet in the Salt Lake International Center. Pursuant to this contract, Roth agreed that it would construct a warehouse building of first-class quality, free of defects, and in a manner that would result in a warehouse compatible with the criteria of plaintiff and Oneida and that was of a quality consistent with or better than industry standards. By virtue of its undertaking as general contractor, Roth Company also warranted that the work performed by it and by its subcontractors would be done in a workmanlike manner.

3. The plaintiff entered into a lease with defendant Oneida under which Oneida agreed to provide as a tenant improvement, among other things, certain vapor barrier and insulation materials in connection with the construction of the floor of the cold storage warehouse. The lease also required that Oneida provide, as a tenant improvement, the freezer and cooler component of the warehouse.

4. Oneida and Metalclad entered into a contract represented by a "Proposal" submitted by Metalclad to Oneida and accepted by Oneida, under which Metalclad agreed to supply

certain vapor barrier and insulation materials and to supervise the installation of these materials in connection with the construction of the floor in the Oneida warehouse.

5. The Roth Company relied on its own expertise and on the expertise of its architects and structural engineer in designing and constructing the Oneida warehouse. Neither the Roth Company nor its architects or structural engineer relied on Metalclad in connection with the calculation of the structural capability of the Oneida warehouse floor.

6. The plaintiff satisfied its burden of proof against the Roth Company in that the preponderance of the evidence proved that the Roth Company breached its contract with plaintiff, breached express and implied warranties relating to the fitness and quality of the warehouse, in particular, the floor and the roof, breached its warranty that the work performed by Roth Company would be done in a workmanlike manner, and failed to exercise reasonable care in the design and construction of the Oneida warehouse in the following ways:

(a) in failing to design and construct the Oneida warehouse floor in a manner consistent with Roth Company's agreement and warranties with respect to the fitness of the floor for its intended use;

(b) in failing to construct the Oneida warehouse floor in a manner consistent with its agreement and

warranty that the floor would be of a quality consistent with or better than industry standards;

(c) in breaching warranties made at the time the contract was entered into and during the course of construction that the floor, as designed and constructed, would be sufficient and suitable for its intended use;

(d) in breaching warranties made at the time the contract was entered into and during the course of construction that the floor, as designed and constructed, was sufficient and suitable for use as a base for the crane that was used to tilt-up precast concrete wall panels in place during construction of the exterior walls;

(e) in placing a crane on the completed floor during construction of the precast concrete tilt-up wall panels that imparted loads on the floor in excess of the floor's load-bearing capacity, thereby damaging the completed floor and the insulation materials installed beneath the concrete floor slab;

(f) in failing to repair all areas of the floor damaged during construction of the walls and in failing to repair those areas that Roth Company attempted to repair in a workmanlike manner or otherwise in a manner

consistent with Roth Company's warranties relating to the fitness and quality of the repairs;

(g) in failing to design and construct the floor in a manner such that it would be capable of withstanding the loads imparted by food storage racks placed in the freezer and cooler sections of the warehouse thereby breaching the contract and both express and implied warranties;

(h) in failing to consult with or rely on Metalclad regarding proper methods for the design and construction of the warehouse floor;

(i) in failing to construct the floor in a workmanlike manner consistent with applicable construction standards;

(j) in failing to provide a warehouse roof with a fifteen-year warranty against leaks as agreed, represented, and warranted;

(k) in failing to construct the warehouse roof in a workmanlike manner consistent with applicable construction standards and agreed warranties.

7. As a direct and proximate result of Roth Company's breach of contract, breach of express and implied warranties, negligence, and breach of warranty that the floor would be constructed in a workmanlike manner, the Oneida floor cracked

and was damaged during the construction of the exterior walls and thereafter cracked and was damaged following completion of construction when the warehouse was put to its intended use by the plaintiff and Oneida.

8. As a direct and proximate result of Roth Company's breach of contract, breach of express and implied warranties, and breach of its warranty that the roof would be constructed in a workmanlike manner, the roof on the Oneida warehouse has leaked and otherwise failed to perform the function that a properly designed and constructed roof should perform. Moreover, as a direct and proximate result of Roth Company's breach of contract and breach of express warranty, Roth Company failed to provide a roof with a fifteen-year warranty as agreed and warranted.

9. As a direct and proximate result of Roth Company's breach of contract, breach of warranties, and negligence, the plaintiff has suffered damages in the amount of \$1,909,401.57 as set forth in Plaintiff's Exhibit 161. In particular, the plaintiff and Oneida have had to expend the sum of \$15,194.55 on temporary repairs to the floor; the plaintiff and Oneida have had to expend the sum of \$26,746.91 in connection with the testing and inspection of the floor; and the cost to the plaintiff and Oneida of replacing the floor slab system, including the insulation installed under the concrete slab,

which will be damaged during replacement of the concrete slab, will be \$921,735.00. The evidence at trial also proved by a preponderance of the evidence that as a direct and proximate result of the damage to the floor that occurred during construction of the exterior walls, and as a direct and proximate result of the inability of the floor as designed and constructed to handle the loads to be imparted by the food storage racks installed in the freezer and coolers, the building was not completed by the date agreed and Oneida suffered, as a consequence, loss-of-use damages in the amount of \$606,876.09; that the plaintiff and/or Oneida will suffer business-interruption damages during the repair operation in the sum of \$70,930.64; and that Oneida has been required to expend the sum of \$30,508.50 for forklift and equipment repairs due to damage to the forklifts and equipment caused by cracks in and damage to the floor. Also, as a direct and proximate result of Roth Company's acts and omissions as set forth above, the plaintiff and Oneida have been required to expend the sum of \$26,380.11 in temporary repairs to the roof, \$1,009.30 for inspection of the roof, and will be forced to expend the sum of \$210,000.00 in replacing the roof.

10. Moreover, as a direct and proximate result of Roth Company's acts and omissions as set forth above, the plaintiff has suffered damages in an amount equal to the diminution in

value of the warehouse in a sum that exceeds the cost of repair and replacement of the warehouse floor and roof.

11. The damages suffered by the plaintiff were caused solely by the Roth Company's breach of contract, breaches of express and implied warranties, and negligence.

12. There is no evidence that any act or omission of the plaintiff contributed to the damages suffered by the plaintiff and/or Oneida.

13. The plaintiff and/or Oneida failed to meet their burden of proving that any act or omission of Metalclad contributed in any way to any damages suffered by the plaintiff and/or Oneida.

14. The plaintiff and/or Oneida failed to meet their burden of proving that the insulation materials supplied by Metalclad proximately caused any damages suffered by the plaintiff and/or Oneida.

15. Even if the insulation materials supplied by Metalclad failed to meet specifications as the plaintiff contends, which this Court does not find, the plaintiff and/or Oneida failed to meet their burden of proving that any such deficiency proximately caused any of the damages suffered by the plaintiff and/or Oneida.

16. The Court finds that Metalclad's expert, Earl Kemp, was more persuasive and credible than the plaintiff's

expert, Peter Fischbaum, with respect to the issues related to the causes of the floor damage in the Oneida warehouse. The preponderance of the evidence established that even if the insulation materials did not meet the density and strength specifications as contended by the plaintiff, the insulation materials did not proximately cause the Oneida warehouse floor damage; and that the floor damage was proximately caused solely by the acts and omissions of the Roth Company as set forth above.

17. With respect to AFP's Fourth-Party Counterclaim, the Court finds that Metalclad owes AFP the sum of \$5,011.00 for insulation materials sold and delivered by AFP to Metalclad.

CONCLUSIONS OF LAW

1. Defendant Roth Company breached its contract with the plaintiff, breached express and implied warranties, breached its warranty that the work performed by Roth Company or its subcontractors would be done in a workmanlike manner, and performed its contractual duties with plaintiff in a negligent manner. These acts or omissions of the Roth Company were the sole proximate cause of the plaintiff's damages.

2. The plaintiff is entitled to judgment against the Roth Company in the amount of \$1,909,401.57, together with interest at the legal rate both before and after judgment and costs of suit.

3. Oneida failed to prove by a preponderance of the evidence that Metalclad breached its contract, breached express or implied warranties, was negligent, or was subject to strict liability in connection with Metalclad's supplying of insulation materials or supervision of the installation of those materials in the construction of the Oneida warehouse.

4. Metalclad is entitled to judgment dismissing Oneida's Third-Party Complaint with prejudice, no cause of action, each of these parties to bear its own costs of suit.


5. Fourth-Party Defendants Enpro and AFP are entitled to judgment dismissing Metalclad's Fourth-Party Complaint with prejudice, no cause of action, each of these parties to bear its own costs of suit.

6. AFP is entitled to judgment under its Fourth-Party Counterclaim against Metalclad in the amount of \$5,011.00 plus interest at the legal rate both before and after judgment, each of these parties to bear its own costs of suit.

7. The plaintiff and Oneida are entitled to judgment dismissing Roth Company's Counterclaim and Cross-Claim with prejudice, no cause of action.

DATED this 25th day of March, 1992.

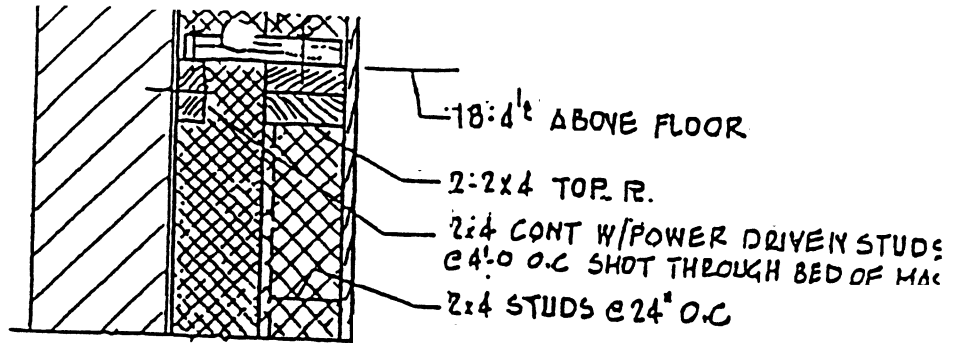
BY THE COURT:



Honorable J. Dennis Frederick
Third District Judge

ADDENDUM

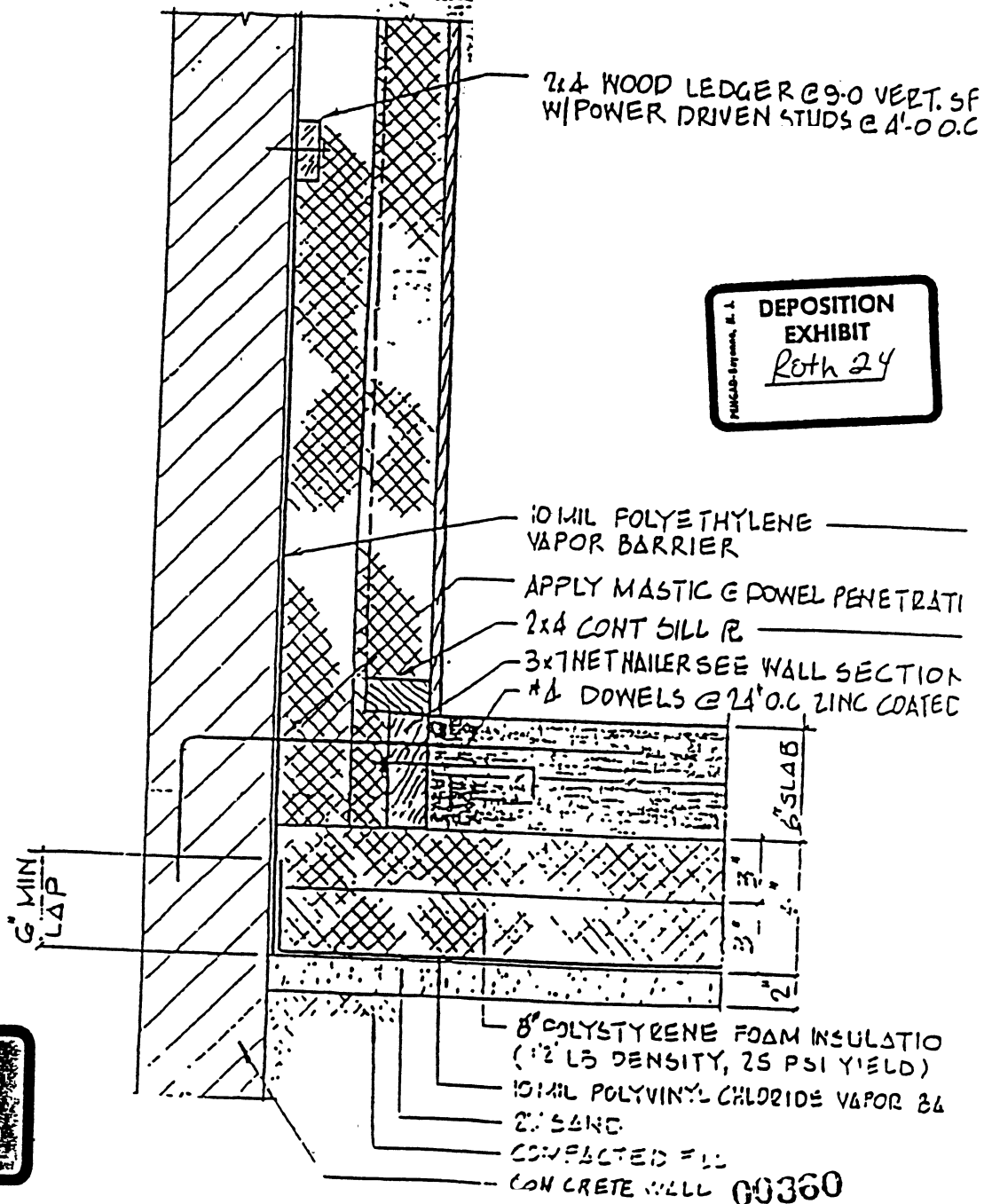
C. Exhibit 23



WALL

1/2" = 1'-0"

2
6



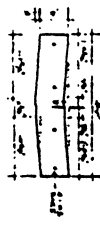
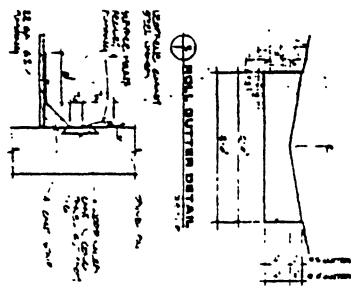
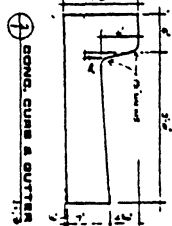
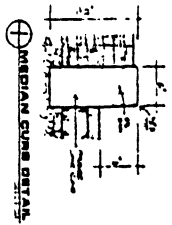
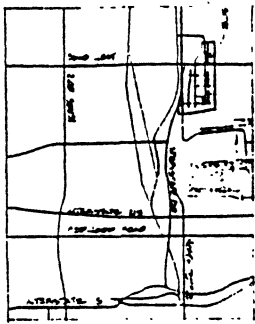
DEPOSITION
EXHIBIT
Roth 24

PLAINTIFF'S
EXHIBIT
23

8" POLYSTYRENE FOAM INSULATION
(12 LB DENSITY, 25 PSI YIELD)
10 MIL POLYVINYL CHLORIDE VAPOR BARRIER
2" SAND
COMPACTED FILL
CONCRETE WALL 00360

ADDENDUM

D. Exhibit 1, Sheets 1 and 5



① WINDOW CURB DETAIL

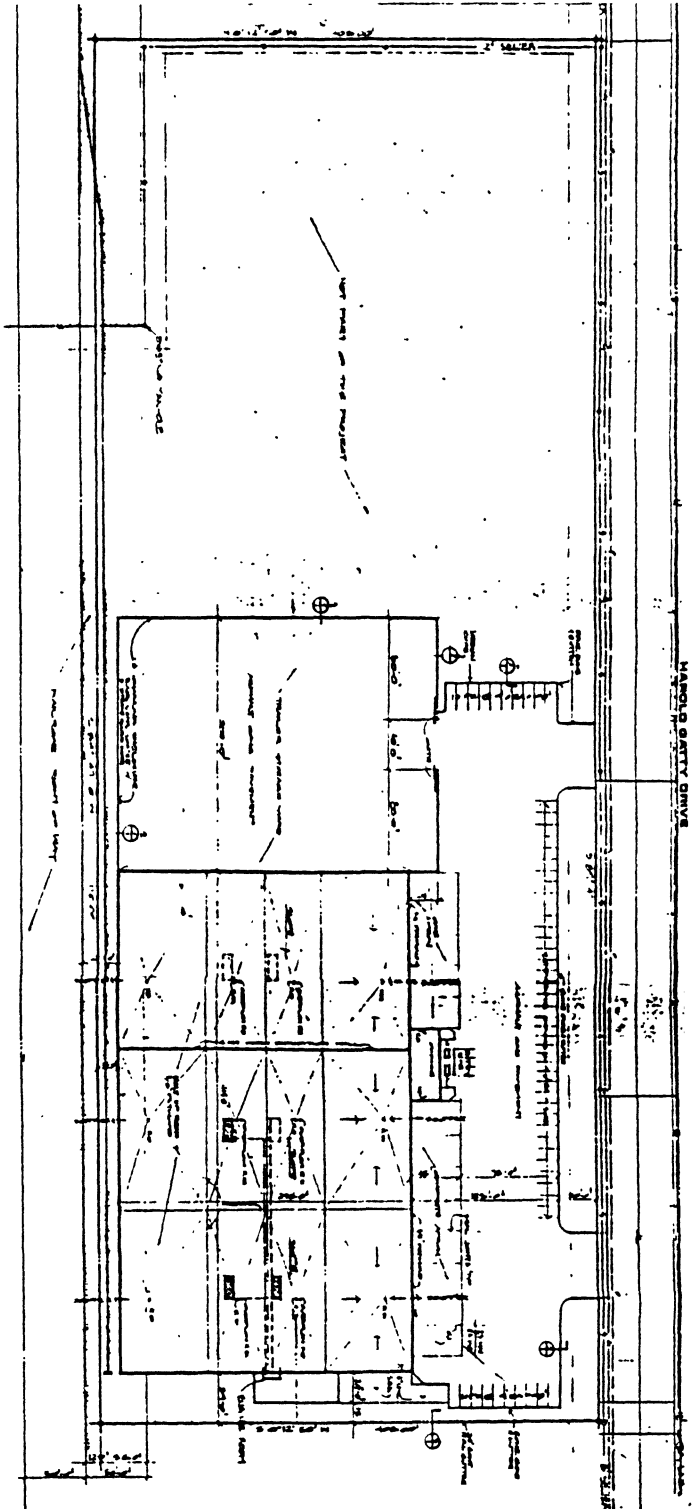
② DOOR CURB & GUTTER

③ ROLL-UP DOOR DETAIL

④ DOOR WATERWAY DETAIL



SITE PLAN



PLAINTIFF'S EXHIBIT

| <p>LEGEND & SYMBOLS</p> <p>① 1/2" = 1'-0" EXTERIOR WALL</p> <p>② 1/2" = 1'-0" EXTERIOR DOOR</p> <p>③ 1/2" = 1'-0" EXTERIOR WINDOW</p> <p>④ 1/2" = 1'-0" EXTERIOR ROLL-UP DOOR</p> <p>⑤ 1/2" = 1'-0" EXTERIOR WATERWAY</p> <p>⑥ 1/2" = 1'-0" EXTERIOR LIGHT FIXTURE</p> <p>⑦ 1/2" = 1'-0" EXTERIOR VENT</p> <p>⑧ 1/2" = 1'-0" EXTERIOR SIGN</p> <p>⑨ 1/2" = 1'-0" EXTERIOR STAIR</p> <p>⑩ 1/2" = 1'-0" EXTERIOR ELEVATOR</p> | <p>LEGAL DESCRIPTIONS</p> <p>Lot 1, Block 1, Subdivision 1, Salt Lake International Center, Salt Lake City, Utah.</p> | <p>PROJECT DATA</p> <p>PROJECT NAME: ONEIDA COLD STORAGE</p> <p>OWNER: SALT LAKE INTERNATIONAL CENTER</p> <p>ARCHITECT: CURTIS INC.</p> <p>DATE: 10/15/2000</p> | <p>INDEX OF DRAWINGS</p> <table border="1"> <tr> <th>NO.</th> <th>DESCRIPTION</th> </tr> <tr> <td>1</td> <td>GENERAL NOTES</td> </tr> <tr> <td>2</td> <td>FOUNDATION PLAN</td> </tr> <tr> <td>3</td> <td>FLOOR PLAN</td> </tr> <tr> <td>4</td> <td>ELEVATIONS</td> </tr> <tr> <td>5</td> <td>SECTION</td> </tr> <tr> <td>6</td> <td>DETAILS</td> </tr> <tr> <td>7</td> <td>MECHANICAL PLAN</td> </tr> <tr> <td>8</td> <td>ELECTRICAL PLAN</td> </tr> <tr> <td>9</td> <td>PLUMBING PLAN</td> </tr> <tr> <td>10</td> <td>HAZARDOUS WASTE PLAN</td> </tr> <tr> <td>11</td> <td>EXTERIOR FINISH PLAN</td> </tr> <tr> <td>12</td> <td>EXTERIOR LIGHTING PLAN</td> </tr> <tr> <td>13</td> <td>EXTERIOR SIGN PLAN</td> </tr> <tr> <td>14</td> <td>EXTERIOR STAIR PLAN</td> </tr> <tr> <td>15</td> <td>EXTERIOR ELEVATOR PLAN</td> </tr> <tr> <td>16</td> <td>EXTERIOR WALL PLAN</td> </tr> <tr> <td>17</td> <td>EXTERIOR DOOR PLAN</td> </tr> <tr> <td>18</td> <td>EXTERIOR WINDOW PLAN</td> </tr> <tr> <td>19</td> <td>EXTERIOR ROLL-UP DOOR PLAN</td> </tr> <tr> <td>20</td> <td>EXTERIOR WATERWAY PLAN</td> </tr> <tr> <td>21</td> <td>EXTERIOR LIGHT FIXTURE PLAN</td> </tr> <tr> <td>22</td> <td>EXTERIOR VENT PLAN</td> </tr> <tr> <td>23</td> <td>EXTERIOR SIGN PLAN</td> </tr> <tr> <td>24</td> <td>EXTERIOR STAIR PLAN</td> </tr> <tr> <td>25</td> <td>EXTERIOR ELEVATOR PLAN</td> </tr> </table> | NO. | DESCRIPTION | 1 | GENERAL NOTES | 2 | FOUNDATION PLAN | 3 | FLOOR PLAN | 4 | ELEVATIONS | 5 | SECTION | 6 | DETAILS | 7 | MECHANICAL PLAN | 8 | ELECTRICAL PLAN | 9 | PLUMBING PLAN | 10 | HAZARDOUS WASTE PLAN | 11 | EXTERIOR FINISH PLAN | 12 | EXTERIOR LIGHTING PLAN | 13 | EXTERIOR SIGN PLAN | 14 | EXTERIOR STAIR PLAN | 15 | EXTERIOR ELEVATOR PLAN | 16 | EXTERIOR WALL PLAN | 17 | EXTERIOR DOOR PLAN | 18 | EXTERIOR WINDOW PLAN | 19 | EXTERIOR ROLL-UP DOOR PLAN | 20 | EXTERIOR WATERWAY PLAN | 21 | EXTERIOR LIGHT FIXTURE PLAN | 22 | EXTERIOR VENT PLAN | 23 | EXTERIOR SIGN PLAN | 24 | EXTERIOR STAIR PLAN | 25 | EXTERIOR ELEVATOR PLAN |
|--|--|--|--|-----|-------------|---|---------------|---|-----------------|---|------------|---|------------|---|---------|---|---------|---|-----------------|---|-----------------|---|---------------|----|----------------------|----|----------------------|----|------------------------|----|--------------------|----|---------------------|----|------------------------|----|--------------------|----|--------------------|----|----------------------|----|----------------------------|----|------------------------|----|-----------------------------|----|--------------------|----|--------------------|----|---------------------|----|------------------------|
| NO. | DESCRIPTION | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 1 | GENERAL NOTES | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 2 | FOUNDATION PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 3 | FLOOR PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 4 | ELEVATIONS | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 5 | SECTION | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 6 | DETAILS | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 7 | MECHANICAL PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 8 | ELECTRICAL PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 9 | PLUMBING PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 10 | HAZARDOUS WASTE PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 11 | EXTERIOR FINISH PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 12 | EXTERIOR LIGHTING PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 13 | EXTERIOR SIGN PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 14 | EXTERIOR STAIR PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 15 | EXTERIOR ELEVATOR PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 16 | EXTERIOR WALL PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 17 | EXTERIOR DOOR PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 18 | EXTERIOR WINDOW PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 19 | EXTERIOR ROLL-UP DOOR PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 20 | EXTERIOR WATERWAY PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 21 | EXTERIOR LIGHT FIXTURE PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 22 | EXTERIOR VENT PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 23 | EXTERIOR SIGN PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 24 | EXTERIOR STAIR PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 25 | EXTERIOR ELEVATOR PLAN | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |

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| NO. | DATE | DESCRIPTION |
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| 2 | 10/15/2000 | ISSUED FOR CONSTRUCTION |
| 3 | 10/15/2000 | ISSUED FOR AS-BUILT |

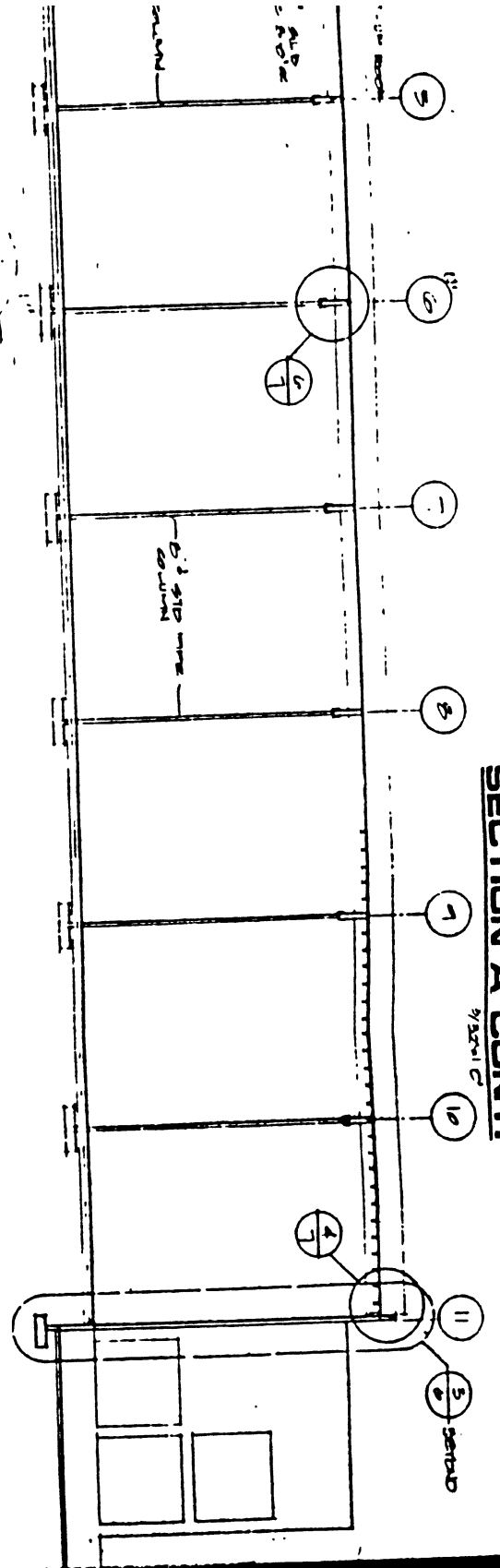
ARCHITECTURAL PRODUCTION & DESIGN CONSULTANTS, INC.
 1700 N. 15TH STREET
 PHOENIX, ARIZONA 85016
 602-955-1000

GEN. A. SALAS & ASSOCIATES
 1500 W. N. TEMPLE
 SALT LAKE CITY, UTAH 84119
 801-462-1000

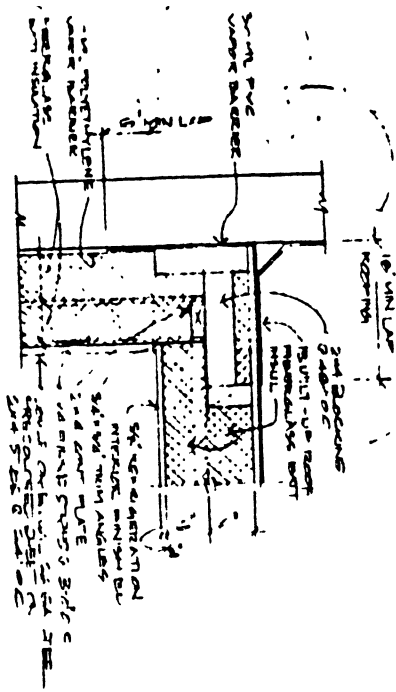
COLD STORAGE WAREHOUSE FOR
ONEIDA COLD STORAGE
 A DIVISION OF CURTIS INC.
 SALT LAKE INTERNATIONAL CENTER
 SALT LAKE CITY, UTAH
 AN AVERBROTH JOINT VENTURE

| | | |
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| NO. | DATE | DESCRIPTION |
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| 2 | 10/15/2000 | ISSUED FOR CONSTRUCTION |
| 3 | 10/15/2000 | ISSUED FOR AS-BUILT |

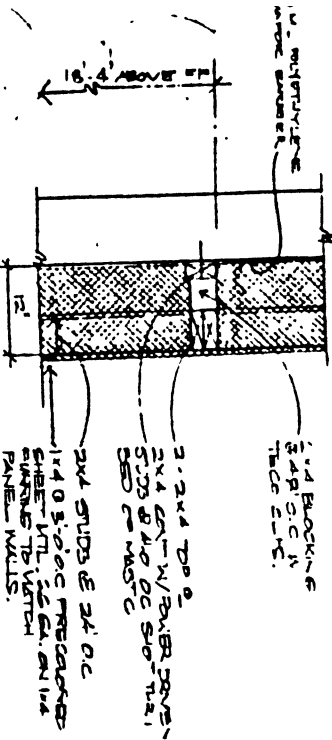
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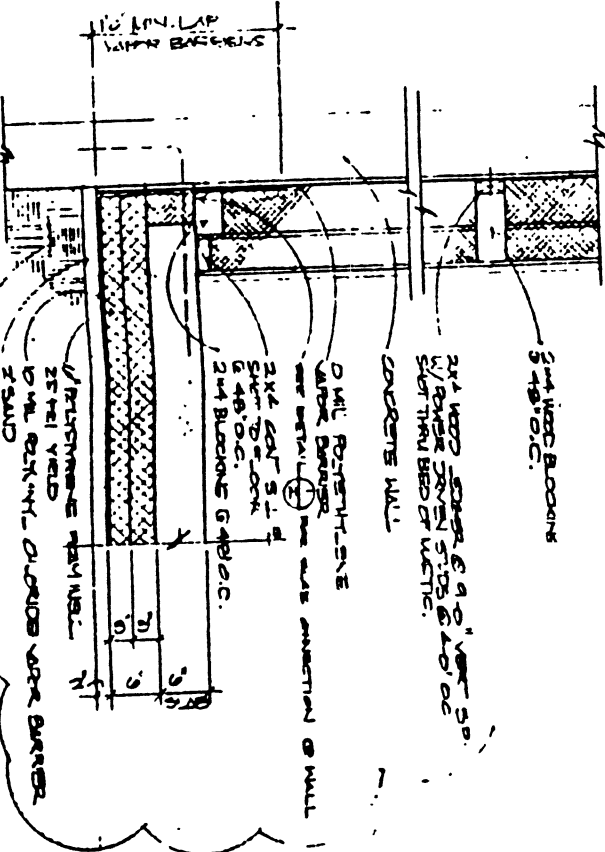
SECTION B



WALL DETAIL



WALL DETAIL



WALL DETAIL

| | |
|------------|----------|
| DATE | 11/18/91 |
| SCALE | AS SHOWN |
| DRAWN BY | 5 |
| CHECKED BY | 5 |
| DATE | 5/30 |
| PROJECT | 5 |

ARCHITECTURAL PRODUCTION & DESIGN CONSULTANTS INC.
 JOHN M. SMALES AIA. SUITE 102 85008
 2701 N. 18TH STREET
 PHOENIX, ARIZONA

DON J. ELLIS & ASSOCIATES
 1848 W. N. TEMPLE SUITE B 84118
 SALT LAKE CITY, UTAH

COLD STORAGE WA

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 A DIVISION OF CUF

SALT LAKE INTERN
 SALT LAKE CITY, UTAH