

2000

General Insurance Company of America v.
Carnicero Dynasty Corporation, Wendell L.
Butcher, Irene B. Butcher, Chris L. Stanfield, Janis B.
Stanfield, Ben D. Isaac, and Lila O. Isaac : Brief of
Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *General Insurance Company of America v. Carnicero Dynasty Corporation*, No. 13836.00 (Utah Supreme Court, 2000).

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13836

IN THE SUPREME COURT
OF THE STATE OF UTAH

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GENERAL INSURANCE COMPANY
OF AMERICA, a corporation,

Plaintiff and
Respondent,

vs.

CARNICERO DYNASTY CORPORATION,
a corporation; WENDELL L.
BUTCHER; IRENE B. BUTCHER;
CHRIS L. STANFIELD; JANIS B.
STANFIELD; BEN D. ISAAC; and
LILA O. ISAAC,

Defendants and
Appellants.

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 13836

BRIEF OF RESPONDENT

Appeal from Judgment
Third Judicial District Court of
Salt Lake County, State of Utah
The Honorable Bryant H. Croft, District Judge

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FILED

OCT 1 - 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GENERAL INSURANCE COMPANY
OF AMERICA, a corporation,

Plaintiff and
Respondent,

vs.

Case No. 13836

CARNICERO DYNASTY CORPORATION,
a corporation; WENDELL L.
BUTCHER; IRENE B. BUTCHER;
CHRIS L. STANFIELD; JANIS B.
STANFIELD; BEN D. ISAAC; and
LILA O. ISAAC,

Defendants and
Appellants.

BRIEF OF RESPONDENT

STATEMENT OF CASE

This is a civil action brought by plaintiff against defendants to recover moneys paid under a construction bond pursuant to the terms of an indemnity agreement given by defendants Butcher.

DISPOSITION IN LOWER COURT

The matter was tried to the court sitting without a jury, the Honorable Bryant H. Croft, District Judge, presiding. The trial court found the issues in favor of the plaintiff and against all defendants, and entered its Findings of Fact, Conclusions of Law, and Judgment accordingly. From said Judgment, defendants

Butcher appeal.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Judgment of the trial court entered herein.

STATEMENT OF FACTS

In reciting the facts in appellants' brief, they have abstracted testimony and drawn conclusions therefrom in a light most favorable to their position. The recitation of facts by respondent will be in conformity with this Court's pronouncement in the case of Cheney vs. Rucker, 14 Utah 2d 205, 381 P.2d 86, wherein the Court stated:

"In considering the soundness of the trial court's conclusion and judgment..., certain cardinal rules must be kept in mind: That the judgment is endowed with a presumption of validity; that the party attacking it has the burden of affirmatively showing that it is in error; and that the evidence and all the inferences that fairly and reasonably may be drawn therefrom must be viewed in the light most favorable to it."

Wendell Butcher and his wife are the only defendants appealing herein. The remaining defendants, against whom judgment was entered, have allowed respondent's judgment to become final.

Appellant, Wendell Butcher, was the managing director of the Carnicero (Butcher in Spanish) Dynasty Corporation.

The officers in the corporation and principal stockholders were his children (R-271). Wendell Butcher ran the corporation as its managing director. Such a description of his position is given for lack of a better terminology. He admittedly was the only one to really know what was going on in the company and was operating the company as he saw fit, the stock ownership however being in the names of his children.

A bond was needed before Carnicero could bid on the construction of a post office in Farmington, Utah. Butcher approached an insurance agent, Joseph Mills, and requested a bid bond on the project, explaining that in the event the bid was accepted, he would need a Labor, Materials and Performance Bond as well. He was the only person to ever contact the insurance agent concerning the bond (R-370). He was told by the agent that since the corporation was a new company and of questionable financial position, indemnity would be required from Butcher and the officers (R-361).

The trial judge questioned the agent concerning the proposal of indemnity as follows:

"The Court: And after the corporation got the bid, what steps were taken to get the bond issued?

"The Witness: When he notified us that he got the bid, we notified General Insurance Company in Denver, and they issued me to

issue the performance, labor and material bond.

"The Court: What, if anything, was done with respect to the indemnity agreement?

"The Witness: When that was signed and turned in to me, I sent it in to the company office in Denver.

"The Court: Did you request that agreement?

"The Witness: No, sir, the company did.

"The Court: Do you know the means by which the company requested that agreement?

"The Witness: They request it on all bonds.

"The Court: How is that request transferred to the applicant for the bond?

"The Witness: Through me. I requested it from Mr. Butcher.

"The Court: Well, that was my question. Did you request the indemnity agreement?

"The Witness: After the company asked me to do it, yes.

"The Court: Was that before the bond was issued?

"The Witness: Yes, sir." (R.375-376) (Emphasis ours.)

Butcher, in negotiating with the insurance agent concerning the bond, admitted that he was told by the agent that before any bond could be issued on any of their jobs they might be bidding on, he would have to submit financial statements and

indemnity agreements to the company. He testified as follows:

"Q. (by Mr. Walker). Let me ask you when -- on or about the time you took these indemnity agreements to the insurance company, although you didn't sign an application, did you discuss obtaining bonds on either of these jobs with the insurance company?

"A. With the Safeway or the Forest Service Building?

"Q. Yes.

"A. Yes, I told Mr. Mills that that is what we was doing, that we were trying to get financing and we talked to -- where we presented it on our statement to him and told him we did not have permanent financing, that we possibly would need a completion bond on this. And so we might as well -- the company might as well submit what applications we needed for the bonds in case we needed bonds.

"Q. And did he instruct you to do anything but get this indemnity agreement?

"A. He said he would need an application which we signed at that time, I thought, and we would have to submit financial statements which we did and we would have to -- being it was a new corporation, we would have to sign indemnitor agreements which I went and had signed afterwards.

"Q. You say it was discussed with Mr. Mills at the time the indemnity agreement --

"A. I told him why we needed the bonds, yes." (R.360-361). (Emphasis ours.)

The agent, Joe Mills, testified that the company required

indemnity agreements to be signed on all bonds issued and more particularly, from the individuals where their corporation was new and credit was questionable (R.375-376).

Butcher presented the indemnity agreements to his own children and their respective spouses for signature and returned them to the insurance agent, Mills. In the meantime, the agent had prepared and delivered to Butcher the bonds requested, dating said bonds in conformity to the date of the contract with the United States Government for the building of the post office. The bonds were prepared by the insurance company on bond forms provided by the United States Government and as required under the contract. The forms were not insurance company forms but were U. S. Government forms, merely signed by the bonding company and the contractor.

After approximately four months had elapsed and no indemnity agreement had been signed by Wendell Butcher or Irene Butcher, the company requested the agent to again contact Mr. Butcher and request that he sign and furnish it the indemnity agreement previously agreed upon. Upon receiving this request, Butcher then responded as promised and delivered the signed indemnity agreement to the company after having the same notarized. Approximately one year thereafter, notice of losses began appearing on the scene. Claims of unpaid

creditors were being forwarded to the bonding company for payment.

The insurance carrier contacted Butcher and his children concerning their obligations and requested that they clear up the outstanding debts if possible. Upon receiving no financial assurances from the defendants, the bonding company was then required to meet with all the creditors and make arrangements to satisfy their claims to remove liens from the building so that the post office could commence its operations.

Suit was thereafter filed claiming payment under the indemnity agreements. In answering the pleadings, all but defendants Isaac admitted the allegations of consideration for the indemnity agreement. In paragraph 2 of plaintiff's complaint, it alleged as follows:

"That the defendants, and each of them, applied to and received a Labor and Materials Payment Bond and Performance Bond Numbers 573306 from the plaintiff insurance company ..."

And thereafter in paragraph 4 of said complaint, it stated:

"That the defendants, and each of them, in consideration for the issuance of said bonds, executed a General Agreement of Indemnity indemnifying the plaintiff herein for any and all loss that it might suffer as the result of its issuing said bonds."

In response to the above allegations in the complaint, defendants Isaac denied the same. As soon as receiving that answer, counsel for respondent herein immediately deposed the Isaacs wherein they admitted the truthfulness of the allegations and that they had, in fact, signed the indemnity agreement laying the issue to rest at that point.

In answering the complaint on behalf of the Butchers, the answer failed to deny any of the allegations to plaintiff's complaint other than as stated in defendants Butchers' answer which set forth four defenses as follows:

- "1. That plaintiff failed to state a claim upon which relief could be granted;
- "2. That the plaintiff was not the real party in interest;
- "3. That plaintiff's action was premature;
and
- "4. Disputed claims to creditors who were not entitled to payment and would become a volunteer."

No other defenses were raised by the Butchers nor did they deny the allegations of plaintiff's complaint and more specifically, paragraphs 2 and 4 of said complaint (R.8-9). Shortly thereafter, defendants amended their answer to exclude as an answering party the defendants Isaac but again reiterated the same defenses contained in the original answer (R-10).

About four or five months prior to the trial of the case, defendants Butcher requested copies of the document in question, namely, the Indemnity Agreement they had signed, which were furnished to them. Although the document bore a date clearly visible on its face, and Wendell Butcher was fully aware of the time when the bond was issued as he signed the contract and bond on behalf of the corporation, there was nevertheless no motion to amend these defendants' answer to allege a defense of lack of consideration nor was any ever claimed. It was not until after respondent rested its case that appellants Butcher attempted to then amend their pleadings to include a defense of lack of consideration.

The apparent difference in the time or dates, as indicated on the Indemnity Agreement of the Butchers, as compared to the bonds came about because of the late signing of the agreement by the Butchers although they had previously agreed to give such indemnification.

Considerable argument is made by appellants herein (its materiality on the issues however is unknown) that there were several continuances in the trial of the matter which were solely the responsibility of respondent. It is respectfully pointed

out that the last continuance of the trial setting in the matter was granted by Judge Ernest F. Baldwin at the request of counsel for defendants Butcher. He contacted counsel for the plaintiff and indicated that a continuance was desired. At that point, counsel for plaintiff was requested to confer with the Judge, indicating a lack of objection for a continuance and requesting the court to do so at the request of Mr. Barker. Since plaintiff had received a continuance from Mr. Barker with the court's consent, it was felt that plaintiff was obligated to give consent. In any event, a continuance of the last trial setting was given by Judge Baldwin only after insisting that Mr. Ronald Barker, counsel for the Butchers, contact Judge Baldwin personally and make the request directly rather than by counsel for plaintiff. Apparently, this was done and Judge Baldwin granted the continuance.

After all the evidence had been presented to the court by respondent, the matter was taken under advisement, including defendants Butchers' motion to amended their pleadings. Thereafter the court ruled in favor of the respondent herein, finding that appellants Butcher had, in fact, signed their Indemnity Agreement in consideration for the respondent issuing its bonds and that respondent, in reliance upon their promise to do so,

issued the bonds although the Agreement of Indemnity had not actually been signed until after the bonds had been delivered. The court further found that the damages, as alleged by the respondent, had been proven and awarded judgment accordingly (R. 150 through 155). From said Judgment, the Butchers take this appeal.

POINTS URGED FOR AFFIRMANCE

POINT I

APPELLANTS BUTCHER ARE LEGALLY BOUND TO INDEMNIFY THE RESPONDENT AS FOUND BY THE TRIAL COURT.

POINT II

APPELLANTS BUTCHER FAILED TO RAISE THE DEFENSE OF LACK OF CONSIDERATION IN THEIR ANSWER AND SHOULD BE PRECLUDED FROM NOW SO DOING.

ARGUMENT

POINT I

APPELLANTS BUTCHER ARE LEGALLY BOUND TO INDEMNIFY THE RESPONDENT AS FOUND BY THE TRIAL COURT.

The Butchers were told that before any bond could be issued on the post office job, indemnity would be required from all concerned. Wendell Butcher presented the agreements to his family for signature. He returned those signed by his children and their spouses but delayed in signing one himself. The bonds in the meantime were issued by the company to conform to the contract date and were delivered subject to his promise to give

the required indemnity. He was told of the need for the indemnity agreement prior to the bonds being issued and had agreed to supply the same. About four months after the bonds had been delivered, the bonding company then, through its agent, insisted that Mr. and Mrs. Butcher complete their agreement by signing the indemnification and returning it to the company. This was done by the Butchers without objection. About one year later, the project became bogged down in unpaid bills and the bonding company was required to take over and complete the job, including payment of the unpaid bills.

At the conclusion of the respondent's evidence, the Butchers attempted to amend their pleadings by alleging lack of consideration because of the variance in dates on the instruments. The trial court refused to allow them to do so and specifically found that the Butchers had promised, with the others, to give indemnification for the issuance of the bonds and although they did not actually sign their agreement until after the bonds had actually been delivered, such late signing did not invalidate their agreement. The court further found that there was consideration given by the insurance carrier for issuing said bonds and that the Butchers promised to indemnify if the bonds were to issue.

The court chose to believe the testimony of the agent that indemnification was requested prior to the issuance of the bonds.

An indemnity agreement signed after the execution and delivery of the bond has the same force and effect as if it were executed at the time the bonds were issued if there was an understanding between the parties. Where the indemnitee and the indemnitor agree that indemnity will issue if the company provides its bond, such agreement is binding. See Fidelity & Deposit Company of Maryland vs. O'Bryan et al (Kentucky), 180 Ky. 277, 202 S.W.645. In the O'Bryan case, the defendants agreed to provide indemnity in the event a bond was issued. However, the indemnity agreement was not signed until sometime after the bond had been issued. The Court of Appeals of Kentucky, in what appears to be the leading case on the subject, stated:

"We, therefore, have no difficulty in ruling that the bond of indemnity was executed simultaneously with the bond of the surety company, or at any rate that the bond of indemnity, although it may not have been finally executed and delivered until April, 1904 (several months later), was then fully executed and delivered pursuant to an agreement, made before or at the time the bond was made by the surety company, that the

bond of indemnity would be executed. It is immaterial which of these view is correct because if the bond of indemnity was executed and delivered simultaneously with the bond of the surety company, or was afterwards executed and delivered pursuant to an agreement or arrangement made between the surety company and the indemnitors before or at the time it signed Blackwell's bond, there was sufficient consideration for the execution of the bond of indemnity. In other words, the execution of a bond of indemnity subsequent to the execution of the original undertaking will have the same force and effect as if it were executed simultaneously with the original undertaking, if its subsequent execution was pursuant to an arrangement or agreement, between the indemnitee and the indemnitors, at the time or before the indemnitee became bound, that there should be executed to it a bond of indemnity." (Emphasis ours.)

See also 50 AmJur, Suretyship, Section 19, Page 914.

Therein, the author states:

"If the original contract is induced by the promise of one of the parties that he will obtain the signature of the person who subsequently signs a surety in pursuance of such agreement, no new consideration is necessary to support the latter's undertaking. In such case, the execution of the instrument by the surety relates back to and takes effect the same as if it had been coincidental with the execution by the original debtor. Often the language of the decision is broad enough to make a promise by the principal to procure any signer in general, rather than some particular signer, sufficient to remove the case from the operation of the general rule and, of course,

no new consideration is necessary if the signer signs in pursuance of his own previous promise to do so." (Emphasis ours.)

Other more recent cases following the O'Bryan case maintain the same sound position. See the case of Wagner vs. Fireman's Fund Insurance Company (Colorado), CCA 10th, 1965, 352 Fed.2d 410. In the Wagner case, the indemnity agreement was not signed and delivered until at least two months after the bonds were delivered. The Court stated:

"The basis of liability for the judgment against all of the appellants is an indemnity agreement which was furnished to the surety company. This agreement was not executed and delivered until at least two months after the bonds had been delivered. The primary defense was lack of consideration in that the instrument was not a part of the original transaction and was not an inducement for the issuance of the bonds."

The Court then stated that it was the finding of the trial court that the defendants agreed, when they applied for the bond, that they would issue indemnity agreements in consideration for the company providing the bonds. The Appellate Court thereafter stated:

"The rule is well stated in Fidelity & Deposit Company of Maryland vs. O'Bryan, 180 Ky. 277 the execution of a bond of indemnity subsequent to the execution

of the original undertaking will have the same force and effect as if it were executed simultaneously with the original undertaking, if its subsequent execution was pursuant to an arrangement or agreement, between the indemnitee and indemnitors, at the time or before the indemnitee became bound, that there should be executed to it a bond of indemnity."

The Circuit Court further stated:

"The evidence is adequate to support the findings that the indemnity agreement was contemplated by the original undertaking and did not require new consideration."

See also the case of Engbrock vs. Federal Insurance Company (Texas 1967), CCA 5th, 370 Fed.2d 784. In the Engbrock case, the indemnity agreement was not signed and delivered to the surety for over four months after the bonds were issued.

The Fifth Circuit Court stated:

"In the trial against Engbrock, as an individual, a question was raised in regard to an agreement under which Engbrock was to indemnify surety for losses sustained under bonds issued to Encon on the Eagle Lake job. Engbrock contends that the indemnity agreement fails for lack of consideration because he signed the agreement four months after the bond had been issued. The trial judge recognized this contention would have force if the signing of the agreement had constituted a new promise by Engbrock. But, to the contrary, the judge found that prior to the execution of the bonds in May, 1962, Engbrock had promised orally to execute the

indemnity agreement before or contemporaneously with the execution of the bonds. This finding is supported by ample evidence In such circumstances, the execution of the indemnity agreement is in pursuance and consummation of a prior arrangement between the parties and it is not necessary that the written promise carrying into effect the prior oral promise to execute the writing be supported by new or additional consideration."

See also an annotation on the subject at 167 ALR 1203, wherein the author states:

"Where antecedent promises to execute a collateral or supplemental undertaking with respect to a principal contract is made directly by the one who becomes the undertaker, as an inducement to the execution thereof, it is sufficient to supply the necessary legal consideration for the undertaking, in whatever form the promise may be evidenced."

The evidence is clear that by the testimony of the agent and appellants Butcher, indemnity was to be required of Butcher and the other persons involved with the corporation because of the fact that the corporation was new and lacked financial stability. Based upon Butcher's promise of indemnity, together with the other defendants herein, the bonds were issued. The court so found and entered judgment accordingly. Had the Butchers not intended to give indemnity for the issuance of said bonds, they should have so stated upon applying for the bonds. Had they

done so, undoubtedly, the bonds would have been rejected because of the instability of the company making application. Instead, the opposite occurred. They not only understood that they were required to give indemnity but Mr. Butcher obtained the signatures of the other parties himself and he later on also signed an indemnity agreement without objection. Undoubtedly, the agent was tardy in not following up the signing of the Butcher indemnity agreement at an earlier date but such did not invalidate the intent of the parties or their agreements. The court's findings are amply supported by the evidence and should not be disturbed.

POINT II

APPELLANTS BUTCHER FAILED TO RAISE THE DEFENSE OF LACK OF CONSIDERATION IN THEIR ANSWER AND SHOULD BE PRECLUDED FROM NOW SO DOING.

Lack of consideration, being an affirmative defense, should have been pleaded in the initial answer which was not done (Rule 8c, U.R.C.P.). Had Mr. and Mrs. Butcher honestly believed that there was no agreement in advance of the issuance of the bonds to give indemnification, they certainly would have informed their counsel of such information and would have refused to give indemnity when so requested. The court found from the evidence that the various information concerning the date of the bonds

and the date of the Butcher indemnity agreement was available to them months before the matter came to trial. In spite of this, however, no such defense was ever raised. Wendell Butcher signed the contractual paper and the bond that was prepared by the Government and therefore, had to have been aware of the date of its execution. He also knew that when he finally got around to signing his own indemnity agreement, several months had elapsed since the bond had been issued. If it were not his intent to give indemnity in consideration for the issuance of said bonds, he certainly was obligated to raise such an objection rather than sign. The court so found. The court further found by the evidence, as testified to by Mr. Mills and by Mr. Butcher, that indemnification was discussed and was a prerequisite before the company would issue its bond to this newly activated and apparently somewhat financially unstable corporation. The facts clearly indicate that both Mr. Mills so testified as did Mr. Butcher.

Had it been the intention to raise such a defense, the same should have been done when it was raised by defendants Isaac. When they denied the indemnification agreement, immediate discovery was commenced. After seeing their indemnity agreement and having their memories refreshed, the Isaacs then admitted

signing the agreement. This issue was then put to rest immediately. It was obvious that the Butchers executed the agreement of indemnity as orally agreed upon.

Nevertheless, the Butchers requested the court to allow an amendment of the pleadings at the conclusion of the respondent's evidence and at a time when it was virtually impossible for the respondent to have rebutted said evidence as it had not been an issue in the case until that time and there was no way witnesses could be made available. This court correctly stated the general principles in the case of Goeltz vs. Continental Bank & Trust Company, 5 Utah 2d 204, 299 P.2d 832. In this case, it was claimed by the defendant that a motion to amend its answer to include the defense of the Statute of Limitations should be allowed. The Court stated:

"Here defendant seeks leave to amend after all the evidence is in, even though all of the facts on which this defense is based have been fully known by the bank since the original certificates were deposited with it in March of 1947 and no new evidence was discovered during the trial which made the defense available where it had not been available under the facts known by the bank in the first instances."

The Court then properly ruled that such an amendment should not be permitted.

In the instant case, the insurance agent, Joe Mills,

testified that at this late date, he could not recollect all of the details as to the documentation of the file by correspondence, etc. as he did not have the facilities to keep records for such a period of time. It was also pointed out to the court that certain people involved in the Bonding Department of the respondent company were no longer employed by it and their whereabouts was unknown at the conclusion of the trial.

This Court aptly presented the plaintiff's position in its commentaries in the case of Buehner Block Company vs. Glezos, 6 Utah 2d 226, 310 P.2d 517. In interpreting the Rules of Civil Procedure bearing upon the right to amend pleadings, this Honorable Court stated:

"Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it." (Emphasis ours.)

Respondent herein respectfully submits that the Court correctly concluded that the evidence clearly indicated that the bonding company asked for indemnification from the Butchers and other parties of the corporation as a prerequisite to its issuing its bonds. The record shows, as was found by the court, that Butcher, as did the other defendants, agreed to give this

indemnification at the time the bonds were requested.

Clearly, where a party fails to deny a material allegation of a complaint and fails to plead an affirmative defense, it can only be interpreted by the court and the opposite party that such is not an issue in the case and treat it accordingly. No party to a law suit should be required to anticipate that its opponent will move to amend his pleadings after all of the evidence has been presented, allowing no opportunity to overcome the allegations contained within the proposed amendment at the conclusion of trial. It is respectfully submitted that the court properly so ruled.

CONCLUSION

The appellants herein have failed to make an affirmative showing of error. The evidence, and all inferences that fairly and reasonably may be drawn therefrom, and viewed in a light most favorable to the respondent, support the court's Findings of Fact and Judgment herein and should not be disturbed.

Respectfully submitted,

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