

1979

Koppers Company, Inc v. Acord-Harris
Construction Company, A Corporation and
Fireman's Fund, A Corporation : Appellants'
Petition For Rehearing and Brief In Support thereof

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KOPPERS COMPANY, INC., :
Plaintiff-Respondent, :
vs. : Civil No. 15612
ACORD-HARRIS CONSTRUCTION :
COMPANY, a corporation and :
FIREMAN'S FUND, a corporation. :
Defendants-Appellants. :

APPELLANTS' PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment of the 2nd
District Court for Weber County
Hon. J. Duffy Palmer, Judge

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Clk. Supreme Court Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KOPPERS COMPANY, INC., :
Plaintiff-Respondent, : Civil No. 15612
vs. :
ACORD-HARRIS CONSTRUCTION :
COMPANY, a corporation and :
FIREMAN'S FUND, a corporation. :
Defendants-Appellants. :

APPELLANTS' PETITION FOR REHEARING

PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT
OF THE STATE OF UTAH:

Defendants--Appellants, Acord-Harris Construc-
tion Company and Fireman's Fund, a corporation, respect-
fully petition this Court for a re-hearing in the above
entitled matter upon the following grounds:

POINT I.

THE COURT DID NOT DECIDE AN ESSENTIAL ISSUE
IN THE CASE: WHETHER OR NOT THE PARTIAL
SUMMARY JUDGMENT WAS A FINAL JUDGMENT.

Petitioners submit that the failure to decide
the above issue leaves the parties uncertain as to the

effect of the Court's opinion because it is now uncertain as to whether or not execution can issue upon said partial summary judgment of \$60,862.00.

Wherefore, Appellants petition this Court to make a determination that said Partial Summary Judgment is not a final judgment. Appellants submit their Brief in support thereof below.

CLYDE & PRATT

By 

Elliott Lee Pratt
Attorneys for Appellants--
Petitioners

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Petitioners submit the following Brief in support of this petition seeking a determination that the Partial Summary Judgment is not a final judgment.

POINT A.

THE ISSUE AS TO THE FINALITY OF THE PARTIAL SUMMARY JUDGMENT WAS RAISED IN APPELLANTS' BRIEF AND AT THE HEARING BEFORE THIS COURT.

Appellants argued two general reasons for overturning the Partial Summary Judgment entered by the lower Court:

- (a) That the Partial Summary Judgment should not have been issued because there were material issues of fact to be decided by the Court; and

(b) That the Partial Summary Judgment was not a final judgment and was in the nature of a pre-trial order.

This Honorable Court affirmed the lower court's judgment upon the first ground, but did not address itself in the opinion to the second ground.

At pages 16 and 17 of Appellants' Brief, appellants' Brief, appellants urged that under Rule 54(b) Utah Rules of Civil Procedure any order such as was entered in this case did not terminate the action as to any of the claims or parties and was subject to revision at any time before the entry of judgment adjudicating all the claims. The relevant portion of Rule 54(b) is as follows:

"...any order or other form of decision however, designated, which adjudicates fewer than all the claims of the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The Partial Summary Judgment entered in this case did not comply with this rule and as we urged in our Brief, at page 17, "such a decision cannot be final, because the judgment does not dispose of one of the claims, or one of the parties, and is not stated in the specific language required under the rule."

See the case of Leonard vs. Socony-Vacumn Oil

Company, 130 F.2d 535, (CAA 7th, 1942) wherein the Court states:

"This problem of Partial Summary Judgment is very similar to that arising upon orders allowing Motions to Strike, used to eliminate certain matters before trial by having them determined preliminary to trial. The Federal Courts have uniformly held that Orders upon such motions are not, in themselves, such final orders as to be appealable."

Thus although the Court has sustained the lower court in the entry of the Partial Summary Judgment, without determining as to whether this Partial Summary Judgment was appealable or not, the Court leaves in doubt the actual effect of the granting of such summary judgment. Thus as to the question of appealability upon said judgment.

At the hearing before this Court, the question was raised by the Chief Justice and two other justices as to whether or not the Partial Summary Judgment was a sufficiently final judgment to justify the appeal being taken. In fact appellants' counsel was given to understand that the case should not have been appealed and that no further argument upon the other matters in the Briefs would be appropriate at that time. Thus no argument was had upon the basis upon which the Court decided this case per curiam.

POINT B.

JUSTICE WILL BEST BE SERVED BY DECIDING THE

QUESTION OF THE FINALITY OF THIS PARTIAL SUMMARY JUDGMENT.

As the opinion of the Court now stands, the judgment for \$61,000.00 has been sustained but there is no determination as to whether or not the judgment is a final judgment. The effect of this uncertainty is simply to permit the plaintiffs to undertake execution upon the judgment and to thus require the defendants--appellants to seek to stay such execution and thus to raise again the question as to whether or not the judgment is final, and one upon which execution can lie.

If the Court will now make such a determination, and obviously Appellants urge that the Judgment should not be final, such uncertainty will be eliminated and further needless piecemeal appeal will be prevented.

The above matters were raised in the original Brief for Appellant and therefore are properly before this Court in this Petition for Rehearing. (Pingree National Bank vs. Weber County, et al, 54 Utah 599, 183 Pac. 334; and Cummings vs. Nielson, et al, 42 Utah 157, 129 Pac. 619.) This Honorable Court has inadvertently failed to take into consideration and decide this issue. A decision on the issue determining the finality of this Partial Judgment is essential at this point in the proceeding.

SUMMARY

Consistency between the Rules of Civil Procedure and the Court's opinion would dictate that the Court

determine that the Partial Summary Judgment in this case, is not a final judgment. In the alternative, of course, even a decision to the effect that the Partial Summary Judgment is final, although contrary to Appellants' argument, nevertheless, would eliminate the uncertainty which will necessarily result if the opinion is left in its present status.

Thus Appellants respectfully petition that the Supreme Court rehear the matter and by appropriate opinion determine that the Partial Summary Judgment is not a final judgment.

Respectfully submitted,

CLYDE & PRATT .

By 

Elliott Lee Pratt

Attorneys for Appellants--
Petitioners