

1979

Koppers Company, Inc v. Acord-Harris
Construction Company, A Corporation and
Fireman's Fund, A Corporation : Respondent's
Brief In Opposition To Appellant's Petition For
Rehearing

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. :

RESPONDENT'S BRIEF IN OPPOSITION
TO APPELLANT'S PETITION FOR REHEARING

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

STEPHEN B. NEBEKER
PAUL S. FELT
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiff-
Respondent
400 Deseret Building
Salt Lake City, Utah 84111

ELLIOTT LEE PRATT
CLYDE & PRATT
Attorney for Defendants-
Appellants
351 South State Street
Salt Lake City, Utah 84111

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:

Plaintiff-
Respondent,

:

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ACORD-HARRIS CONSTRUCTION
COMPANY, a corporation and
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STEPHEN B. NEBEKER
PAUL S. FELT
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiff-
Respondent
400 Deseret Building
Salt Lake City, Utah 84111

ELLIOTT LEE PRATT
CLYDE & PRATT
Attorney for Defendants-
Appellants
351 South State Street
Salt Lake City, Utah 84111

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IN THE SUPREME COURT
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KOPPERS COMPANY, INC., :
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COMPANY, a corporation and :
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Defendants-Appellants.

RESPONDENT'S BRIEF IN OPPOSITION
TO APPELLANT'S PETITION FOR REHEARING

POINT I

IT IS IMPLICIT IN THIS COURT'S DECISION THAT
THE JUDGMENT FOR THE UNDISPUTED AMOUNT OF THE
SUBCONTRACT PRICE DUE AND OWING TO RESPONDENT
IS A FINAL JUDGMENT.

Respondent, Koppers Company, Inc., the roofing subcontractor, filed an action against Acord-Harris Construction Company, the general contractor for the construction of the Dee Special Events Center at Weber State College and its bonding company, Fireman's Fund. The action seeks to recover the unpaid balance of the subcontract in the sum of One Hundred

Fifty Thousand Six Hundred Seventy Eight Dollars (\$150,678.00) plus interest. Defendant Acord-Harris Construction Company claims offsets in the sum of Eighty Eight Thousand Nine Hundred and Sixty Six Dollars (\$88,966.00). The trial judge granted partial summary judgment for the balance due in excess of the claimed offsets (\$60,862.00) and left the matter of the validity of the offsets for trial. Defendants appealed the trial judge's decision, and this Court affirmed per curiam on December 19, 1978.

Appellants have now petitioned for rehearing claiming that this Court did not decide that the partial summary judgment constituted a final judgment. However, it is clear from the decision that this Court affirmed the partial summary judgment, and ruled that Appellants' claimed offsets give them the opportunity to litigate the remaining issues at trial. This Court stated on p. 2 of the decision:

It appears that Defendant's assertions are based on speculation and on what it 'thinks' may be become factual issues in the future. We are of the opinion that upon trial of the remaining issues, the \$89,000.00 balance claimed by Plaintiff will afford a means of resolving any further conflict of claims that may arise without appreciable loss to the parties.

Koppers Company, Inc., v. Acord-Harris Construction Co.,
unreported decision dated December 19, 1978.

The issue concerning whether Appellants' affidavit submitted five days before the summary judgment hearing constituted actual factual matter or merely speculation was

thoroughly discussed in the brief submitted herein and was decided by the Court. This Court agreed with the trial judge that the affidavit was speculative, and there existed an undisputed balance due and owing to Respondent. The remainder alleged by the Respondent to be due and the corresponding offsets claimed by Appellants are left for the trial court, but this Court's decision creates a final judgment as to the undisputed balance over and above any claimed offsets. This amount should be paid to Respondent without further delay.

The alternative for which Appellants argue is simply not logical. If a judgment for the undisputed balance of the subcontract is not a final judgment which can be collected, what purpose would such a judgment serve? Lawsuits should be tried upon contested issues. This Court has affirmed the trial court's ruling that the balance due on the roofing subcontract over and above the claimed offsets is undisputed. Judgment was rendered in favor of Respondent in that amount. The partial summary judgment would be a nullity if Respondent were forced to wait the outcome of the trial, still unset at this time, in order to collect the sums which this Court has ruled are owed by Appellants.

CONCLUSION

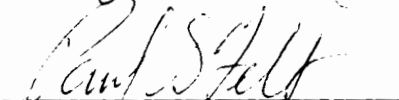
In order to collect an undisputed amount due and owing on this subcontract, Respondent has been forced to file and argue a Motion for Summary Judgment, defend an appeal, and now

the trial court's partial summary judgment through the appellate process and have lost. Respondent respectfully submits that there must now be an end to the argument over the undisputed contract balance, and that Appellants' Petition for Rehearing must be denied.

Respectfully submitted,

RAY, QUINNEY & NEBEKER


Stephen B. Nebeker


Paul S. Felt
Attorneys for Respondent
400 Deseret Building
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief in Opposition to Appellant's Petition for Rehearing was mailed, postage prepaid, this ____ day of February, 1979 to:

Elliott Lee Pratt
Clyde & Pratt
Attorneys for Defendants-Appellants
351 South State Street
Salt Lake City, Utah 84111
