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Thorn Construction Company, Inc., A Utah Corporation v. Utah Department of Transportation : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THORN CONSTRUCTION COMPANY,
INC., a Utah Corporation,

Plaintiff and
Respondent,

vs.

UTAH DEPARTMENT OF TRANSPORTATION,

Defendant and
Appellant,

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THORN CONSTRUCTION COMPANY, :
INC., a Utah Corporation,

Plaintiff and :
Respondent,

vs. : CASE NO. 15647

UTAH DEPARTMENT OF TRANS- :
PORTATION,

Defendant and :
Appellant.

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

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ARGUMENT

INTRODUCTION

Respondent's brief makes certain allegations and representations which are simply untrue and therefore call for a response. In addition, Appellant believes that the recent decision of this Court in the case of L.A. Young Sons Construction Co. v. County of Tooele, et al., 575 P.2d 1034 (1978), is dispositive of this case.

This brief is therefore deemed necessary but will be limited in scope.

POINT I

RESPONDENT'S ASSERTIONS REGARDING REPRESENTATIONS BY VIRGIL MITCHELL ARE NOT SUPPORTABLE EITHER FACTUALLY OR LEGALLY AND THE COURT'S CONCLUSIONS REGARDING SAME ARE ERRONEOUS.

In its brief on pages 15 and 16 the Respondent alleges that "witnesses for Thorn . . . testified that Mr. Mitchell represented that material from the Utelite Pit was available and could be used as borrow on the project." Respondent then cites pages 38-39; 55-56 of the record as support for this allegation. Appellant's counsel has examined these two references and there is absolutely no

reference on the four cited pages to any statement by Virgil Mitchell concerning anything, let alone the borrow source in question.

The fact is, no witness in this trial ever testified that Mr. Mitchell said anything more than that the Utelite Pit was a "possible source." In fact, these words are the exact words used by Respondent's chief witness on this point, Grant Thorn, during his direct testimony. (R. 8, 9) On cross-examination, he again used the term "possible source of borrow" (R. 12).

He also stated in response to a question on cross-examination about the material as follows:

Question: In your conversations with Mr. Mitchell did you ask him whether the material had been tested?

Answer: No, we assumed that it had.
(Emphasis supplied.) (R. 11)

Obviously, if the trial Court concluded that Mr. Mitchell made a "positive representation" to Thorn regarding the Utelite material as Respondent alleges on page 17 of its brief, the Court's conclusion is not supported by the facts in evidence.

Legally, the Respondent cites the case of E. H. Morrill Co. v. State of California, 59 Cal.Rptr. 479, 423 P.2d 551 (1967) as authority for its position that Appellant is liable to Respondent for the alleged representation

of Appellant's employee Mitchell.

There are two problems with Respondent's reliance on Morrill. The first is that there was no "positive" representation by Appellant's employee Mitchell as already explained hereinabove. The second problem is that the Morrill case is not applicable to the situation we have here. The recent case of L.A. Young Sons Construction Company v. County of Tooele, et al., supra, is, however, directly applicable to this case. In that case the Court said the following at page 1039:

. . . Plaintiff's entire claim reduced to its basic elements is that defendant should bear responsibility for any condition which plaintiff did not subjectively anticipate and that defendant had a duty to assure that the conditions at the project site reached all of plaintiff's optimistic expectations. This theory is contrary to all the aforecited law.

This Court in the Young case, supra, also relied on Wunderlich v. State of California, 65 Cal.2d 777, 56 Cal. Rptr. 473, 423 P.2d 545 (1967). In said case it is stated as follows at page 550:

. . . Defendant had no knowledge of any impediments to performance and had made no misrepresentations as to conditions. To hold defendant liable under such circumstances would cast upon it responsibility for all conditions a contractor might encounter and make that cost of the project an unknown quantity.

From the facts and the foregoing legal authorities it is obvious that as stated by Grant Thorn, they assumed that the Utelite source was a suitable source. It is submitted that this assumption arose not from any representation or misrepresentation by Appellant's employee Virgil Mitchell, but from their own assumptions about the Utelite source and its suitability.

In the words of the L.A. Young case at page 10

. . . if statements honestly made may be suggestive only, expenses caused by unforeseen conditions will be placed on the contractor, especially if the contract so stipulates. . . .

The trial Court's conclusion that Respondent was entitled to recover for alleged misrepresentations by Virgil Mitchell is obviously in error.

Likewise, the Court's conclusion that language in Sections 102.05 and 106.02 of the Standard Specifications which requires the contractor to examine the construction site and determine the availability of material does not apply is clearly wrong as is apparent from a reading of the L.A. Young case, supra.

POINT II

RESPONDENT'S ANALYSIS OF THE PARSON CASE IS INCORRECT AND SAID CASE IS CLEARLY DISTINGUISHABLE FROM THIS CASE.

In its First Point on Appeal, Respondent goes into an involved argument regarding the case of Jack B. Parson Construction Company v. State of Utah, 552 P.2d 107 (Utah 1976).

While Appellant does not necessarily disagree with the quoted portions of that opinion set forth in Respondent's brief, Appellant does not agree that said case is in any way controlling on the issues of this case.

On page 11 of its brief, Respondent asserts that "Thorn attempted to negotiate a supplemental agreement." The record does not show that Respondent made a serious effort to negotiate a supplemental agreement at any time during the project. The record does show that Respondent refused to provide cost data as requested by Appellant. The record further shows that Respondent's so-called attempt to "negotiate" was a claim based on a total cost approach using rental rates obviously not related to Respondent's actual costs. This approach, if accepted, would simply indemnify Respondent for its entire costs regardless of whether these costs were necessary or whether the work was accomplished in an economical fashion.

Appellant submits that Section 104.02 of the Standard Specifications and particularly subsection 2 is

intended to protect the contractor in the event an item underruns in excess of 25%. It is further obvious from the language of the specification that profit on the portion of the item which underruns is not to be considered. It is further obvious that the first 25% of the alteration in quantity is not to be considered. The specification says " . . . In the event of a decrease, any adjustments in payment shall apply to the quantity or quantities of work actually performed." Appellant submits that this does not give carte blanche authority to turn a bid which may have been erroneous or insufficient into a profit making item.

In the instant case the Respondent bid \$1.20 per ton. His projected costs for loading, hauling, placing and compacting the material was \$0.95. No matter what approach is used to deal with the quantity that the item underruns can justify payment of any portion of this amount to Respondent. These operations are all direct charges which he did not incur as a result of a reduction in the item. They represent such items as labor, fuel and equipment charges which he did not incur. In round figures the estimated quantity of the item was 28,000 cubic yards. A 25% underrun would be 7,000 cubic yards. The actual used quantity was 15,000 cubic yards.

The underrun quantity was 6,000 cubic yards. The Appellant's interpretation of the specification is that to the extent of said excess underrun of 6,000 cubic yards the Respondent should recover anything it would otherwise realize had the item not underrun. Since the \$0.95 direct charges would not benefit Respondent, he should recover the balance of the price of the item over and above the direct charges less profit which is specifically excluded from the computation.

It is conceivable that the item actually costs the Respondent more than his bid price. This often results from miscalculation or in some instances results from what is called an "unbalanced bid." This means the contractor reduces his calculated price by a certain amount and adds it to another bid item such as "mobilization" or some item which is paid at an earlier point in the contract.

If Respondent's figures as to its actual costs are correct, then it would appear that Respondent made a "bad bid" or has "unbalanced" its bid. In either event, Appellant submits that its responsibility under the contract specification ends at the point Respondent recovers its bid price less direct costs and profit on the 6,000 yards underrun in quantity, which Appellant

asserted previously in its brief amounts to \$1,791.30. To award anything over and above said amount results in a windfall to Respondent.

Appellant submits that the Parson case, supra, deals with an overall underrun in the total contract and not just one "major item" as we have in this situation. The two cases do not equate.

For these reasons Appellant submits that the award by the trial Court is excessive to the extent that it allows Respondent relief for an underrun in the quantity of "granular borrow" in excess of \$1,791.30.

POINT III

RECENT DECISIONS SUPPORT ARGUMENTS URGED IN APPELLANT'S BRIEF UNDER POINT II.

In Point II of Appellant's brief, the Appellant has argued that Respondent's failure to timely notify Appellant of its intention to file a claim for additional compensation as required by the contract specifications is a waiver of any right to recover for the items claimed.

The Tennessee Court has recently construed a similar provision in the case of W & O Construction Co., Inc. v. City of Smithville, 557 S.W.2d 920 (1977). In that case a contractor brought suit against a municipality

to recover extra costs incurred in rock removal while constructing a wastewater treatment plant. The Supreme Court held that such recovery was barred where the contractor failed to comply with the contractual requirement that it obtain a written change order to obtain extra compensation. Furthermore, the Court found no facts showing a waiver, modification, or abrogation of that express contractual requirement.

This failure to give timely notice was also held to deny compensation in Pennsylvania in the case of Central Penn. Industries, Inc. v. Penn DOT, 358 A.2d 445, (1976). This case is somewhat similar to the instant case. In this case the contractor was required under the contract to obtain granular material to complete the top of the project's embankments. After performing almost no investigation to locate such material on the project site, the contractor went to off-site borrow pits to locate the material. They then sought to recover the additional expense from the commonwealth. The contractor was awarded the costs by the Board of Arbitration of Claims, the evidence, ignored by the board, however, showed that the contractor made no mention of a claim until four years after it secured the borrow excavation. The Commonwealth Court noted that the proper ten-day written notice was not given and reversed the decision of the board.

Needless to say, the trial Court in the instant case has ignored the required notice provisions of Section 104.02 of the Standard Specifications.

CONCLUSION

Appellant submits that the relief requested previously in its brief is appropriate and submits that the Respondent has not refuted those arguments in its brief. Appellant further submits that Respondent has attempted to confuse and mislead the Court as to the actual state of the record regarding the testimony concerning alleged representations involving a materials source by Appellant's employee Virgil Mitchell. Finally, Appellant respectfully urges the Court to reverse the ruling of the District Court and award judgment against Appellant for \$1,791.30 or alternatively for a new trial.

Respectfully submitted,

ROBERT B. HANSEN, Attorney General

By, 

LELAND D. FORD

Assistant Attorney General
Attorney for Appellant

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Appellant's Reply Brief were mailed, postage prepaid, to Steven H. Stewart, Attorney for Respondent, 220 South Second East, Suite No. 450, Salt Lake City, Utah 84111, this 12th day of September, 1978.

Cerline Harris