

1980

Schocker Construction Company v. State of Utah : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SCHOCKER CONSTRUCTION COMPANY,)

Plaintiff-Appellant,)

vs.)

Case No. 16670)

STATE OF UTAH,)

Defendant-Respondent.)

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALE LAKE COUNTY,
THE HONORABLE ERNEST F. BALDWIN, DISTRICT JUDGE.

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Clerk Supreme Court Utah

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IN THE SUPREME COURT
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SCHOCKER CONSTRUCTION COMPANY,)

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vs.)

Case No. 16670)

STATE OF UTAH,)

Defendant-Respondent.)

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF KIND OF CASE

This is an action by Schocker on a highway construction contract with the State of Utah for damages resulting when the State required removal and replacement of an excessive amount of asphalt paving originally installed by others on a particular portion of the project (Grassy Hill area, I-80, Tooele County) which caused Schocker substantial additional costs for that portion of the project. The lower court found for Schocker, but did not properly calculate Schocker's damages.

DISPOSITION IN LOWER COURT

The lower court awarded Schocker \$93,566.36 on two

of its claims determining (1) that the State had insisted on removal and replacement of asphalt paving in amounts substantially greater than required by the contract and awarded plaintiff \$51,711.36 for that claim, and (2) awarded Schocker \$41,855.00 for separate additional work which second award Schocker is not contesting.

RELIEF SOUGHT ON APPEAL

In regard to the claim based on the excessive removal and replacement the lower court awarded damages of \$51,711.36 which is 16% of the total \$323,196 claimed by Schocker, apparently for the reason that the particular area where the excessive removal and replacement occurred (Grassy Hill) was 16% of the total project. Schocker objects to the lower court's calculation because its entire damage of \$323,196 occurred only in the area of excessive removal and replacement and not over the entire project. Thus, no percentage reduction was proper, and Schocker asks this Court to award it the amount claimed, plus its lost profits.

STATEMENT OF FACTS

1. On August 11, 1975, Schocker contracted with the State of Utah for the removal of asphalt paving by others and the resurfacing of the roadway known as Interstate Highway 80 from Knolls to Low, Utah, a distance of

20 miles (T.17) for a total contract amount of \$2,182,198 (Exhibit P-1) which included an amount for profit of \$120,119. (T.92).

2. The project was completed by Schocker during 1975 and 1976 within the time prescribed by the contract as extended by Utah during the course of performance and was accepted. (T.320).

3. During construction the State required Schocker to remove and replace excessive amounts of asphalt paving in the Grassy Hill area, (Findings of Fact Nos. 9, 10, and 11 and Conclusions of Law No. 2), (T.15) which requirements substantially increased Schocker's cost above the contract amount (T.83) and thus eliminated Schocker's expected profit. (T.92).

4. The lower court found the area of excessive removal and replacement to be approximately 16% of the entire project. (Findings of Fact Nos. 9 and 10).

5. Because of the excessive removal and replacement in the Grassy Hill area (T.8,14-17) Schocker incurred additional costs above the contract of \$323,196 (T.82-83) and not \$51,711.36 as found by the lower court.

ARGUMENT

POINT I.

THE LOWER COURT ERRED IN LIMITING DAMAGES FOR THE EXCESSIVE REMOVAL

AND REPLACEMENT TO 16% OF SCHOCKER'S COSTS.

If the lower court's award is based on an incorrect calculation or computation it should be changed by the reviewing court to reflect the proper amount. Bell v. McCann, 535 P.2d 233 (Colo. 1975); Cagle v. Carr, 418 P.2d 381,384 (Ariz. 1966); Zancanaro v. Cross, 339 P.2d 746, 751 (Ariz. 1959) and 5A C.J.S. § 1659, p. 573. Cf. Stamp v. Union Pacific Railroad Company, 303 P.2d 279 (Utah 1956), and Baker v. Wycoff, 79 P.2d 77, 95 Utah 199 (1938). In this case, the lower court simply miscalculated Schocker's damages.

In Finding of Fact No. 10 and Conclusion of Law No. 2, the lower court determined that Schocker's damages related to that portion of the road where excessive removal and replacement occurred. But instead of awarding Schocker the actual amount of damage, the court erroneously awarded Schocker only 16% of \$323,196. Such calculation thus wrongly related Schocker's claim to the entire project rather than just the Grassy Hill area.

POINT II.

SCHOCKER IS ENTITLED TO THE PROFIT IT LOST AS A RESULT OF ADDITIONAL COSTS INCURRED TO COMPLETE THE PROJECT AND REASONABLE PROFIT ON SUCH ADDITIONAL AMOUNTS.

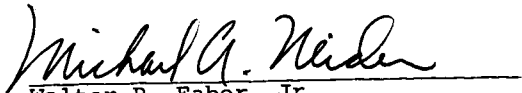
Because of the additional costs incurred by Schocker it lost its expected profit of \$120,119. Schocker is entitled to such amount and the lower court erred by denying such damages. United States v. Callahan Walker Construction Co., 317 U.S. 56, 61, 63 S.Ct. 113, 115, 87 L.Ed 49, 53 (1942); Whitmyer Bros., Inc. v. State, 406 N.Y.S.2d. 617, 620 (1978), and Sornsins Construction Co. v. State, 590 P.2d 125, 133 (Mont. 1978).

Schocker is also entitled to a reasonable profit of at least its contract rate of 5.94% or \$19,197.84 on the additional costs incurred to complete the excessive removal and replacement. Id.

CONCLUSION

Schocker should be awarded \$323,196 and should not be limited to 16% of that amount and should be awarded its lost profit in the amount of \$120,119 and profit on the costs of the additional work in the amount of \$19,197.84.

RESPECTFULLY submitted this 11th day of April, 1980.



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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to Leland D. Ford, Assistant Attorney General, 115 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, this 11th day of April, 1980.

Michael A. Weiden