

1980

## Schocker Construction Company v. State of Utah : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SCHOCKER CONSTRUCTION :  
COMPANY,

Plaintiff- :  
Appellant,

vs. :

STATE OF UTAH, :

Defendant- :  
Respondent

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BRIEF OF DEFENDANT

APPEAL FROM  
OF THE DISTRICT COURT  
THE HONORABLE JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SCHOCKER CONSTRUCTION :  
COMPANY,

Plaintiff- :  
Appellant,

vs. : Case No. 16670

STATE OF UTAH, :

Defendant- :  
Respondent

-----oo0oo-----

BRIEF OF DEFENDANT-RESPONDENT

-----oo0oo-----

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

-----oo0oo-----

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IN THE SUPREME COURT OF THE STATE OF UTAH

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COMPANY,

Plaintiff- :  
Appellant,

vs. : Case No. 16670

STATE OF UTAH, :

Defendant- :  
Respondent.

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BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT OF KIND OF CASE

This is an action by Schocker Construction Company (hereinafter "Schocker") on a contract for repair and construction of a section of highway located on Interstate 80 in Tooele County between Low and Clive. Schocker sought recovery for damages resulting from alleged extra work, misrepresentation, changes in the design or character of construction, and for failure to pay amounts due under the contract.

## DISPOSITION IN LOWER COURT

The Trial Court found for Plaintiff on the question of additional work and awarded the total sum of \$93,566.36 plus interest. The Court found adverse to Schocker on the question of payments withheld for failure to meet contract specifications. The Court determined that Schocker's claimed extra paving costs were to a large extent the fault of Schocker and awarded Schocker 16% of its total claimed damages related to asphalt removal and paving.

## RELIEF SOUGHT ON APPEAL

Defendant seeks an Order of this Court affirming the judgment of the Trial Court.

## STATEMENT OF FACTS

Defendant considers the statement of facts set out in Plaintiff's Brief to be insufficient, and for this reason sets forth the following as a statement of facts pertinent to a reasonable review of the decision of the Trial Court:

1. The parties entered into a contract dated August 11, 1975 for work on I-80 between Low and Clive

in Tooele County, to remove portions of the existing plant mix seal (minimum of 3/4") due to excessively rich asphalt; also for the removal of "ridges, ripples and corrugations" and for the placement of asphalt with a compacted depth of 2 1/2" over the entire roadway. In those areas where more than 3/4" of asphalt was removed, additional asphalt was to be placed in a "single lift" to restore the entire planned depth of asphalt. (Ex. P-1 & P-2)

2. Said contract covers a highway section approximately 20 miles in length with work to be done on both east- and westbound lanes making a total of approximately 80 lane miles.

3. The contract is a unit price contract with the estimated bid price being \$2,182,198. (Ex. P-1)

4. The existing surface varied considerably as to its condition with the worst rippling and rutting as well as saturated oil condition existing on the western slope of the area known as Grassy Mountain. (T. 352)

5. The oil-rich bituminous material was removed from the roadway surface in areas designated by the Defendant's Project Engineer.

6. The material removed was removed by the use of a "heater-planer" and was operated by L. C. Nelson,

the owner of said equipment under a subcontract.

7. The amount of asphalt removed was increased by direction of Defendant's Engineer, Don Wright, and Plaintiff was paid the unit price for all material removed from the roadway.

8. The depth of removal varied from 3/4" to as much as four to six inches. (T. 246, T. 622, Findings of Fact No. 8)

9. The contract contained a provision requiring that the asphalt be placed in a "single lift." (T. 245, P. 1)

10. Plaintiff had difficulty in complying with the "single-lift" provision, particularly in 1975. (T. 246, T. 387, 403)

11. Plaintiff was allowed to use a "levelling course" both in 1975 and 1976, but the results were not materially better when said "levelling course" was used than when the material was placed in a single lift. (T. 578-579, T. 803)

12. Due to surface irregularities, particularly those resulting from Plaintiff's work in 1975, the Plaintiff used the "heater-planer" to correct said surface irregularities in 1976 at a claimed cost of \$15,000. (T. 402-403)



13. The cost of removal of asphalt from Plaintiff's subcontractor L. C. Nelson was substantially less than the unit bid price, leaving Plaintiff with an apparent profit. (Ex. P-1 and T. 439)

14. Plaintiff's unit price for the contract item of bituminous surface course 3/4" maximum included the cost of the mineral aggregate production and the hauling, placing and compacting of the material as well. (P. 3, Sec. 403.15)

15. Placement of material at varying depths would not increase the costs of producing or hauling the material, but could increase the costs of placement and of compaction.

16. Of the total of 80 lane miles, approximately 15 lane miles or 16.67% of the total contained material which was removed to a depth greater than the minimum depth specified in the contract. (T. 722 and 795)

17. Plaintiff's testimony showed that it incurred additional costs for problems associated with the excess asphalt removal or placement of material to varying depths in the total sum of \$323,196. (Ex. P-17)

18. The evidence at the time of trial disclosed that much of Plaintiff's extra costs as claimed by Plaintiff were the result of internal problems attributable to poor planning and judgment by Plaintiff or were

associated with weather problems, most of which were not the fault of Defendant. (D-87, D-89, T. 380, 387, 414-427, 548, 582, 617, 620-622, 726-730, 744-783, 803)

19. The Trial Court after considering the evidence determined that Plaintiff was entitled to 16% of its claimed total amount of extra costs amounting to the sum of \$51,711.36. (Findings of Fact No. 9 and 10)

20. The Trial Court found that Plaintiff was entitled to an award of extra costs for the paving of approaches and ramp roads not shown on the plans both for bituminous surface course and seal coat and determined said amount to be \$41,855. (Findings of Fact No. 22 and Conclusions of Law No. 1)

21. The Plaintiff is appealing only that portion of the Trial Court's award based on alleged extra costs associated with paving in areas of varying depth. The Defendant elected not to appeal the judgment of the Court.

22. Plaintiff filed a Motion to Amend the Findings of Facts, Conclusions of Law and For Reconsideration and argued the same theory advanced in its brief on appeal to the Trial Judge. The Trial Judge

denied Plaintiff's Motion after hearing argument.  
(T. 227 and 231)

## ARGUMENT

### POINT I

THE TRIAL COURT'S AWARD OF DAMAGES TO  
PLAINTIFF FOR EXCESSIVE COSTS OF PLACING  
ASPHALT IS PROPER.

There was considerable conflict in the testimony before the Trial Court as to the amount of damage allegedly sustained by the Plaintiff for work associated with removing an existing asphalt surface and replacing same to the preexisting level and then overlaying the entire surface with an additional layer of asphalt. Plaintiff calculated its damages based on a "total cost theory" of damages which theory Defendant objected to. Plaintiff asserts its damages amount to the sum of \$323,196. (Ex. P-17) The evidence before the Court shows that Plaintiff and Defendant entered into a supplemental agreement in late 1975 to increase the estimated quantity of the bid item for removal of bituminous material by 10,000 tons at the same unit price. The actual removal was performed by a subcontractor.

The Standard Specifications provide that in the placement of bituminous asphalt that if the depth

of placement exceeds four inches it shall be done in two lifts. (P. 3 Sec. 303.09) There was a conflict in the testimony as to whether the Plaintiff in fact was allowed to use more than one lift in 1975. The Defendant's Engineer who was on the project every day said they were allowed to do so. (T. 798) The Plaintiff asserted it was only permitted to lay a "skin patch" which the Plaintiff's witnesses argued did not constitute a "levelling course." Plaintiff contended that without being allowed to lay a "levelling course" it could not achieve specification compliance.

In analyzing the evidence before the Court related to the damages claimed by Plaintiff it is obvious that the Trial Court discounted Plaintiff's damage claims as exaggerated. The Plaintiff was adequately compensated for the actual removal of the existing asphalt as is evident from its acceptance of the work order increasing the quantity at the same unit price after operations ceased in 1975. (Ex. D-9)

The unit price for "bituminous surface course" would only be affected by the increased depth of removal in two possible areas; the cost of placing the material and the cost of compacting the material. The other costs involved, which are the production of

the mineral aggregate, and the mixing and hauling were obviously not adversely affected by the increased amount needed to replace the excavated material since costs associated with these operations are relatively fixed.

Plaintiff knew of the increase in quantity of the bituminous surface course item in time to crush the additional aggregate. The increased quantity should have resulted in a benefit to the Plaintiff since the mobilization cost of its crushing equipment would have already been recovered in the planned quantity and its production costs reduced accordingly.

The Defendant through at least five different witnesses established that most of the difficulty the Plaintiff encountered, particularly in 1975, was the result of mismanagement, incompetence, adverse weather and other factors not the fault of Defendant. (Exs. D. 87 & 89) It was further evident from the testimony that Defendant through its employees, notably Bob Charlesworth, assisted Plaintiff in working out internal problems during 1976. (T. 578, 579, 803)

It was also apparent that Defendant's actions in 1975 were an attempt to require the Plaintiff to comply with the contract requirements. (T. 264, 459) It was further apparent that Defendant allowed modifications

to the contract which were of substantial benefit to the Plaintiff. (T. 793, 794, 799)

The Court therefore rejected the Plaintiff's claims as to the amount of its damages and chose, on the basis of substantial evidence in the record, to award the Plaintiff damages based on a percentage of the amount claimed by Plaintiff,

In the case of Even Odds, Inc. v. Nielson, 22 U.2d 49, 448 P.2d 709 (1968), this Court said the following regarding the method adopted by the Trial Court in that case to assess damages as follows:

. . . Speaking generally about damages, the desired objective is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed.

. . .

We have no disagreement with the proposition that the fact-trier should not be permitted to arbitrarily ignore, competent, credible and uncontradicted evidence. Nevertheless, he is not bound to slavishly follow the evidence and the figures given by any particular witness. Within the limits of reason it is his prerogative to place his own appraisal upon the evidence which impresses him as credible and to draw conclusions therefrom in accordance with his own best judgment. (Citations omitted) . . .

In the case of Gardner v. The Calvert, 253 F. 395, 399, the Court speaking about the amount of damages to be awarded after the fact of loss is established, s

the Court can estimate the amount of damages:

. . . from the facts in evidence,  
including the inferences to be drawn  
from them, and the probabilities which  
they suggest.

It is respectfully submitted that the Court has adopted a practical method of determining the damages which Plaintiff is entitled to for costs associated with paving portions of the roadway in areas where the excavation varied more than could reasonably have been anticipated by the Plaintiff at the time of bidding.

Plaintiff in its brief apparently misconstrues the meaning and intent of the Court's conclusion regarding damages to be awarded for the "overrun in bituminous surface course including specifically those alleged problems involved with excessive removal of existing asphalt," as set forth in Conclusion of Law No. 2. Plaintiff also apparently forgot that Exhibit P-17 was the subject of considerable interest to the Trial Court and prompted several questions by the Trial Judge of Plaintiff's principal witness, Robert Schocker. (See T. 320 to 323) In the interchange between the Court and Mr. Schocker, the following took place beginning at the bottom of page 320 of the trial transcript:

Schocker: Okay, the \$323,196 is based on the time it took to pave the project. In other words, we added up all our equipment costs and got so many

hours, and so many dollars, and overrun from what we bid of \$323,196.00.

The Court: Allright.

Schocker: Then you want me to continue down?

The Court: No, your counsel will go on from now. I didn't know what you meant by the word, I realize in your business, your trade, there are some terms that have a meaning and I just wasn't sure what you meant by overrun. Just shows the surface cost you \$323,196.00 more than you bid.

Schocker: You are right, Your Honor.

Schocker later recounts how Plaintiff's costs were totaled and the payment received from the State deducted to arrive at the above figure.

It is clear, therefore, that the Court based on the testimony of Bob Schocker understood the amount shown on Exhibit P-17 of \$323,196.00 to be Schocker's claimed extra costs for the bituminous surface course "overrun on the total project and not just that amount required for the excess removal area as now asserted by Plaintiff in its brief.

The justification for extra compensation over the contract amount is to be found in the Standard Specifications, Section 104.02(4). (Ex. P-3) The Specification allows a supplemental agreement to cover a "change in plan or in the character of construction." The Defendant objected to any allowance on the basis that Plaintiff



had not served notice of its claim in writing until after the fact. The Court in its Conclusion of Law No. 2 concluded that Plaintiff was excused from this procedural requirement, which point the Defendant concedes. The Court concluded that removal of asphalt to excess depths on 16% of the roadway was to be recognized as either a "change of plan" or a "change in the character of construction."

The testimony, apparently believed by the Court, tended to show that while the excess removal created problems for the Plaintiff it was by no means the only problem, and the Court apparently elected to use a percentage factor multiplied against Plaintiff's total claimed costs to arrive at an amount of damages to be awarded for the "overrun" claimed by Plaintiff.

The Trial Court clearly understood what it was doing in calculating damages due Plaintiff, and the assertion by Plaintiff that the Trial Court "simply miscalculated Schocker's damages" is simply not true. This is further obvious since the Plaintiff's assertion is essentially the same argument advanced in its Motion to Amend the Findings of Fact, Conclusions of Law and For Reconsideration, which Motion the Trial Court heard and denied.

## POINT II

SCHOCKER IS NOT ENTITLED TO A  
GUARANTEED PROFIT.

Schocker's contention that "because of its additional costs incurred by Schocker it lost its expected profit of \$120,119.00" and is entitled now to recover it, is to say the least a novel approach. The fallacy of this argument is certainly obvious.

To have any hope of recovery, the Plaintiff would have to prove that its profit projection in its bid was reasonable and that it would have in fact made such a profit. Secondly, Plaintiff would have to show that none of its additional costs were in any way the fault of Plaintiff or were attributable to the actions of Plaintiff. Defendant does not question that Plaintiff's "contract rate" of 5.94% profit is a reasonable percentage of profit which a contractor would hope to recover, but there is certainly insufficient evidence before the Court to establish that Plaintiff has ever in fact earned such a profit or that Plaintiff could have done so in this case. The evidence further fails to establish that Plaintiff did not create most of the problems it encountered.

There is an additional problem with Plaintiff's claim, and that is the fact that Plaintiff's witness

Robert Schocker admitted that Plaintiff's bid on the item of "bituminous surface course" is "unbalanced." (T. 322) This means the actual bid item unit price is reduced from the amount the Plaintiff determined the bid for that item should be, and the amount of the reduction is then placed in another bid item. We do not know the amount by which the item was reduced nor where that amount was placed in the bidding schedule. It is thus obvious that with the evidence before the Court an additional award to Plaintiff for "profit" on the "bituminous surface course" bid item might result in a windfall to the Plaintiff.

Schocker has cited the case of Whitmeyer Bros. Inc. v. State, 406 N.Y.S.2d 617 (1978) as authority for recovery of profit. The decision in that case is proper since the Court under the fact situation therein decided to award the full amount of the plaintiff's claimed extra costs and the "overhead and profit" would properly apply to the full amount as an additional element of cost. In this case, the Trial Judge was aware of what the figures on Exhibit P-17 represented. The question of profit and how it was to be handled was discussed in the trial. (T. 319, 330-335) The Trial Judge knew exactly what he was doing, and his failure to add an additional sum for profit to the amount awarded the Plaintiff is intentional.

This contention was again argued to the Trial Judge in Plaintiff's Motion to Amend Findings of Fact, Conclusions of Law, Judgment and For Reconsideration and denied by the Court.

In the case of Sornsin Construction Co. v. State of Montana, 590 P.2d 125 (1978), also cited by Plaintiff in its brief, the Court again determined that the Plaintiff's actual costs were "presumed to be reasonable" and that the State failed in proving the costs were unreasonable. In this case, there was an abundance of proof to show that plaintiff's costs were "unreasonable" and that they did not relate solely to work associated with the excess thickness but that they also related to the cost of paving generally. (Exhibits D. 87 and D. 89, T. 414, 415, 417, 420, 427, 548, 620, 645, 726-730, 775, 777-783.) The Court quite properly rejected the claim of Plaintiff regarding profit. Since the Court opted to award Plaintiff less than the amount claimed and was fully cognizant of Plaintiff's claimed costs including profit, the award of damages by the Trial Court in a lesser amount obviously include profit as an element of those damages as determined by the Court.

Plaintiff also cited the case of U.S. v. Callahan Walker Const. Co., 317 U.S. 56, 63 S. Ct. 113

(1942). This case does not apply, however, for the reason that it involves different contractual provisions involving "changes" or "disputes" which are not included in the contract between the parties to this litigation. As a point of information, the ruling of the Supreme Court in said case resulted in a denial of recovery by the Plaintiff. The Defendant does not dispute that the Trial Court could have awarded additional damages consisting of "profit," but the Court failed to do so with full knowledge that Plaintiff claimed to be entitled to same.

In any event, there is substantial evidence in the record to support the Trial Court in awarding less than the amount sought by Plaintiff. There is equally as much evidence in the record to support the Court in not awarding an additional element of damage for Plaintiff's claimed profit. The Plaintiff simply failed to prove by a preponderance of the evidence that it earned a profit or could have done so in the absence of the claimed extra paving effort by the Plaintiff. In fact, the Court specifically concluded in Conclusion of Law No. 5 "that Plaintiff failed to prove by a preponderance of the evidence that it was entitled to recover damages other than those specified in paragraphs 1 and 2 of these Conclusions

of Law." (Paragraph 1 dealt with the ramps and approaches and paragraph 2 allowed recovery for 16% of Plaintiff's claimed costs associated with excessive removal of asphalt.) The Court then went on to find and conclude in said paragraph 5 that:

The Court further finds that damages alleged by Plaintiff under its total cost approach were not the fault of the State but were the result of such things as problems in the setting up and internal operations of Plaintiff's plant and improper equipment or were associated with the weather or other factors not the responsibility of Defendant.

Finally, the Court concluded in Conclusion of Law No. 6 that Plaintiff was "not entitled to its claim for profit as set forth in its exhibits since profit, if any, is a part of the unit cost of individual items set forth in the contract."

Certainly no contractor who operates under the competitive bid process is entitled to a guaranteed profit. If a contractor encounters conditions in the performance of a contract which are other than those presented in the plans and specifications, and if the contractor follows the procedural requirements of notice to the contracting agency and follows procedures designed to properly account for the extra effort, then the contractor is entitled to relief. Under the situation outlined, the contractor should recover his "reasonable

costs" of performing the extra work. If on the other hand the contractor is already in a situation where the contractor is losing money in performance of the contract due to internal problems such as inefficiency, incompetence, lack of diligent prosecution or other factors not the fault of the contracting agency, then the contractor must stand the loss without expecting the contracting agency to indemnify that loss. If in the latter situation, the contractor encounters conditions which were not as represented, then the contractor is entitled to recover those additional "reasonable costs" but not those costs attributable to the contractor's own internal problems. To compensate a contractor for all costs incurred without distinguishing between the source of the fault does violence to the theory of competitive bidding. Defendant respectfully submits that the Trial Court has distinguished between those costs Plaintiff incurred as a result of internal problems and those resulting from unforeseen circumstances and has compensated Plaintiff for its "reasonable costs" (including profit thereon) of performing extra work.

#### CONCLUSION

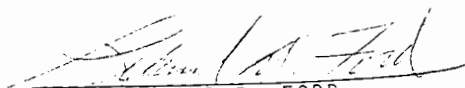
Defendant respectfully submits that the judgment of the Trial Court is amply sustained by the record.

The Court adopted a reasonable and practical method of awarding Plaintiff recovery for work items not shown on the plans. The ramps and approach road cost Plaintiff additional amounts to complete, and the Court accepted Plaintiff's evidence fully on these items. The Court because of the conflict in the evidence chose not to accept Plaintiff's evidence on the excess paying costs. The Court greatly discounted Plaintiff's evidence and elected to compensate Plaintiff on the basis of a percentage of the claimed amount. Finally, the Court specifically rejected Plaintiff's claimed profit amounts. The evidence supports the Court in this determination. The record discloses that Plaintiff's own internal operations were the cause of most of Plaintiff's inefficiency and failure to earn a profit. Obviously, the public should not indemnify Plaintiff for its own inefficiency.

Defendant respectfully requests that this Court sustain the decision of the Trial Court.

Respectfully submitted,

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Attorney General

  
LELAND D. FORD  
Assistant Attorney General  
Attorney for Respondent



CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Walter P. Faber, Jr. and Michael A. Neider of the firm of Watkins & Faber, Attorneys for Appellant, 606 Newhouse Building, Salt Lake City, Utah 84111, this 12th day of May, 1980.

Caroline Harris