

1988

# Western Coating Inc. v. Gibbons and Reed Company, American Insurance Company : Brief of Respondent

Utah Supreme Court

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DOCKET NO: 880289

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN COATING, INC., an Oregon )  
corporation, )

Plaintiff and Appellant, )

v. )

GIBBONS AND REED COMPANY, a Utah )  
corporation; and AMERICAN )  
INSURANCE COMPANY, a Utah )  
corporation, )

Defendants and Respondents. )

Case No. 880289

BRIEF OF RESPONDENTS

Appeal from a final judgment of the  
Third District Court of Salt Lake County  
The Honorable John A. Rokich, presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Appellant,	)	
	)	
v.	)	
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ADDITIONAL PARTY IN TRIAL COURT  
CONTINENTAL-HAGEN, a Utah corporation

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BRIEF OF RESPONDENT

JURISDICTION

This Court has jurisdiction under the provisions of Article VIII, Section 3, Utah Constitution, and 78-2-2(3)(j), Utah Code Annotated.

NATURE OF PROCEEDINGS BELOW

Appellant, Western Coating, sued Gibbons and Reed Company, as principal, and American Insurance Company, as surety, on a payment bond furnished to the Utah Department of Transportation in connection with a road-building project, for the value of reinforcing steel sold to defendant Continental-Hagen, a supplier to a subcontractor of Gibbons and Reed. Gibbons and Reed cross-claimed against Continental-Hagen. A default judgment was taken by Western Coating against Continental-Hagen. Thereafter, on motion of Gibbons and Reed and American Insurance, the court granted summary judgment dismissing Western Coating's action



against them, and Gibbons and Reed's cross-claim against Continental-Hagen. Western Coating filed a timely appeal.

#### **STATEMENT OF ISSUE PRESENTED ON APPEAL**

Whether Western Coating, a supplier to a supplier to a subcontractor of Gibbons and Reed Company was a beneficiary of the payment bond provided to the Utah Department of Transportation.

#### **CONTROLLING STATUTE**

The controlling statute is Section 63-56-38, Utah Code Annotated, a part of the Utah Procurement Code.

#### **STATEMENT OF FACTS**

Respondents agree with the statement of facts of Western Coating except the statement that the bond was for the protection of "those supplying labor and materials to the project," the extent of that protection being the issue in this case. An additional fact, not mentioned by Western Coating, is that all sums that were due to Gibbons and Reed's subcontractor, Pacheco & Martinez, were paid (R.38, par.11, R.60).

#### **SUMMARY OF RESPONDENTS' ARGUMENT**

Between 1963 and 1980, when the Utah Procurement Code was adopted, the requirements for payment bonds on public construction contracts were set out in Section 14-1-6, Utah Code Annotated. The section was repealed in 1980 when a modified

provision relating to bonding for public contracts was enacted and incorporated into the Utah Procurement Code as Section 63-56-38.

The Utah Procurement Code provision made substantial changes in language, indicating an intention on the part of the Utah legislature to limit the class of beneficiaries of payment bonds. Prior to adoption of Section 14-1-6, federal decisions under the Miller Act (40 U.S.C. §§ 270a-270d) did not protect every person who furnished labor and materials for a public project, but only those who had a contract with the contractor or the contractor's subcontractor. The federal law on payment bonds was well known prior to adoption of the procurement code, and the language used in the procurement code suggests that the code provisions were meant to have a scope similar to that of the Miller Act. Although the federal decisions are not controlling, they are very persuasive with respect to legislative intent.

The inability of a contractor to anticipate the claims that it may have to pay if the bonding statute reaches too far, and the fact that the contractor's property is not improved differentiate bond cases from mechanics' lien cases.

Although a few other states have interpreted payment bond statutes as protecting lower tier suppliers, the wording of state statutes varies, as does their legislative history, and Utah

courts should attempt to find to the intention of the Utah legislature under accepted rules of statutory construction.

#### ARGUMENT

##### I.

Interpretation of the Miller Act by the Federal Courts, Though Not Conclusive, is Persuasive and Should be Followed.

The federal Miller Act (40 U.S.C. §§ 270a-270d) was enacted in 1935, and in 1944 the United States Supreme Court in Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163, placed a significant limitation on the types of suppliers who are beneficiaries of Miller Act payment bonds. The issue presented in MacEvoy was whether a person supplying material to a materialman of a government contractor could recover on the payment bond, and the United States Supreme Court said he could not, noting that although the payment bond was ostensibly for the protection of "all persons supplying labor and material in the prosecution of the work" the notice provision of Section 2(a) limited rights under the payment bond to (1) those materialmen, laborers, and subcontractors who dealt directly with prime contractors, and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with prime contractors, had direct contractual relationships with subcontractors of prime contractors.

The court said that to allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and the express will of Congress, and would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor, but not requiring notice from more remote claimants. The court observed that in the established usage of the building trades, a subcontractor is one who performs for, and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen.

After MacEvoy, a large majority of the United States courts of appeal and district courts took the position that suppliers or subcontractors of sub-subcontractors were not covered by the provisions of the bond. See Annotation, Protection Under Bond Given Under Miller Act [40 U.S.C., §§ 270a-270e] of One Supplying Labor or Material to One Other than the Prime Contractor or his Immediate Subcontractor, 79 A.L.R.2d 852.

Utah's Section 14-1-6, adopted 19 years after the decision in MacEvoy, contained language essentially the same as that relied upon by the United States Supreme Court in deciding MacEvoy. Compare the following excerpts:

Miller Act [40 U.S.C. § 270b]

Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, \* \* \* .

Little Miller Act [14-1-6, U.C.A. 1953]

Every claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this act, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final judgment for the sum or sums justly due him and have execution thereon; provided, however, that any such claimant having a direct contractual relationship with a subcontractor of the contractor furnishing such payment bond but no contractual relationship expressed or implied with such contractor shall not have a right of action upon such payment bond unless he has given written notice to such contractor within ninety days from the date on which such claimant performed the last of the labor or furnished or supplied the last of the material for which such claim is made, \* \* \* .

It is clear that the foregoing provisions of the earlier Utah statute were copied from the federal legislation, the only material change being use of "claimant" instead of "person," and it is clear that the interpretation of the Miller Act by the United States Supreme Court should be followed even if 14-1-6 had not been replaced by 63-56-38. Because of the similarity of the language and the fact that MacEvoy was decided 19 years before adoption of 14-1-6, the federal interpretations of the Miller Act prior to 1963 should be very persuasive in interpreting the Utah provision.

In City of Weippe v. Yarno, 96 Ida. 319, 528 P.2d 201, 203 (1974), the Idaho Supreme Court was called upon to determine whether items furnished for a construction project were "materials" within the meaning of the Idaho statute based on the Miller Act. The court relied on prior federal decisions, saying:

A statute which is adopted from another jurisdiction, including federal statutes adopted by a state, will be presumed to be adopted with the prior construction placed upon it by the courts of the other jurisdictions.

The case was followed by the United States Court of Appeals of the Ninth Circuit in Interform Co. v. Mitchell, 575 F.2d 1270, 1279 (1978), a diversity case.

Another question of statutory construction was before the Arizona Supreme Court in Western Asbestos Co. v. TKG Construction

Co., Inc., 121 Ariz. 388, 590 P.2d 927, 929 (1979). The court said:

\* \* \* \* we note that our statute is modeled after the federal statute, the Miller Act, 40 U.S.C. § 270a, et seq., and decisions concerning notice under the federal statute are persuasive in interpreting our so-called "Little Miller Act."

We have found no Utah cases dealing with the effect to be given to the Miller Act in interpreting Utah's public bonding statute, but the court has considered and relied upon federal decisions in construing Utah statutes based upon the federal labor and tax statutes. Southeast Furniture Co. v. Industrial Commission, 100 Utah 154, 111 P.2d 153, 154 (1941); American Foundry and Machine Co. v. Utah Labor Relations Board, 105 Utah 83, 141 P.2d 390, 391 (1943); and Bennett Association v. Utah State Tax Commission, 19 Utah 2d 108, 426 P.2d 812, 814 (1967).

In Jensen v. Intermountain Health Care, 679 P.2d 903, 904 (Utah 1984), this court stated:

We recognize that when the legislature adopts a statute from another state, the presumption is that the legislature is familiar with that state's judicial interpretations and statutes and intends to adopt them also.

The court, however, declined to follow Wisconsin comparative negligence decisions, pointing out that the rule does not apply in certain instances, as where the adopting legislature has made material changes in the statute, or where construction of the

statute by the other state was subsequent to its adoption by the Utah legislature -- circumstances not present here.

The Colorado, New Mexico and Massachusetts cases cited by Western Coating should not be taken as suggesting a different approach to application of Miller Act decisions. In South-Way Construction Co. v. Adams City Service, 169 Colo. 513, 458 P.2d 250, 251 (1969), the Colorado court was dealing with a statute that had been enacted not later than 1923, 12 years before the Miller Act and had been construed by the Colorado court in 1925. Peters v. Hartford Accident & Indemnity Co., 389 N.E.2d 63 (Mass. 1979) refused to limit the term "subcontractor" to one having a contractual relationship with the contractor, but this was because of the 1910 case of Friedman v. County of Hampden, 204 Mass. 494, 501-502 (1910), and a series of cases that had followed it in which "subcontractor" was defined as "one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance." The Massachusetts statute was not based on the Miller Act, and a long line of Massachusetts cases had made no distinction between tiers of subcontractors, sub-subcontractors and materialmen. In State of New Mexico ex. rel. W. M. Carroll & Co. v. K.L. House Construction Co., Inc., 99 N.M. 186, 656 P.2d 236 (1982), the New Mexico Supreme Court decided that a third-tier



supplier was entitled to protection under New Mexico's Little Miller Act. One of the sections of the New Mexico statute, however, had language, unlike anything in the Utah statutes, which suggested a legislative intent to satisfy "all just claims" for materials and supplies furnished to the contractor or any subcontractor. It is recognized that the statutes requiring payment bonds on public contracts have purposes similar to the mechanics lien statutes, but the statutes are not parallel. Some persons are protected under mechanics lien statutes who are not protected under bonding statutes, and some are protected under bonding statutes that are not protected under lien statutes.

Thus, to recognize that the mechanic's lien statutes and the payment bond statutes have similar objectives, does not resolve questions as to the coverage of statutory payment bonds. As this court said in Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207, 210 (1959):

While it is true that our statutes are to be liberally construed to give effect to their purpose and to promote justice, it is equally true that they should not be distorted beyond the intent of the legislature. This principle is particularly applicable in a situation of this kind where a liability is imposed upon the property owner beyond what he contracted to bear for the improvement of his property. In order to impose upon him such additional burdens, the law must clearly spell out the responsibility. Otherwise, the entering into a contract for the improvement of one's property might open the door to unforeseeable risks for the property owner.

A similar approach was taken by the United States Supreme Court in Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1164, 1167 (1944), in which it was recognized that the Miller Act was entitled to a "liberal" construction to protect laborers and materialmen, but with a caveat that "such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds."

In Graco Fishing and Rental Tools, Inc. v. Ironwood Exploration, Inc., 98 Utah Adv. Rpts. 28 (1988), this court noted that the purpose of the mechanics' lien statute is to prevent a windfall to property owners at the expense of equipment, material and labor suppliers. But a contractor is not in the same position as the owner of property, and does not ordinarily have a "windfall" if a supplier or laborer is not paid. In the present case, for instance, one of the established facts is that all of the amounts that were earned by Gibbons and Reed's subcontractor were paid, and if Western Coating's argument is accepted, the contractor will have to pay twice. It is common knowledge that surety companies in writing payment bonds require indemnity from the contracting principal.

## II.

### Payment Bonds Furnished Pursuant to the Utah Procurement Code are not Intended to Protect Third-Tier Materialmen.

Section 14-1-6, Utah Code Annotated, having been taken almost verbatim from the Miller Act, MacEvoy and its progeny, decided prior to adoption of 14-1-6, should be given considerable weight in determining the intent of the Utah legislature. If this case had been governed by 14-1-6, the trial court would have been correct in holding that Western Coating, a third-tier supplier, was not a beneficiary of the payment bond furnished to the Department of Transportation.

In 1980, 14-1-6 was repealed when the Utah Procurement Code was enacted, and although many of the provisions of 14-1-6 were carried over into the Utah Procurement Code, there were some significant changes.

Section 14-1-6 provided:

Every claimant who has furnished labor and material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this act, and who has not been paid in full therefor \* \* \* shall have the right to sue on such payment bond. \* \* \*

Section 63-56-38 of the Utah Procurement Code provides:

(1) When a construction contract is awarded, the following bonds or securities shall be delivered to the state and shall be binding upon the parties upon execution of the contract:

(a) A performance bond \* \* \*; and

(b) A payment bond \* \* \* for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract.

(2) [Provision for waiver of bond.]

(3) Any person who has furnished labor or material to the contractor or subcontractor for the work provided for in the contract, in respect of which a payment bond is furnished under this section \* \* \* may sue on the payment bond \* \* \* .

Two years prior to Utah's adoption of its Procurement Code, the United States Supreme Court had decided J. W. Bateson Co. v. Board of Trustees, 434 U.S. 586, 98 S.Ct. 873, 55 L.Ed.2d 50, 55 (1978). In that case recovery under a payment bond had been sought for an employee of a sub-subcontractor who had worked very closely on the construction project, and the United States District Court and the Court of Appeals had held in favor of the employee. The United States Supreme Court reversed, saying:

As we observed in Clifford F. MacEvoy Co. v. United States, ex rel. Calvin Tompkins Co., supra, Congress used the word "subcontractor" in the Miller Act in accordance with the "usage in the building trades." [Citations omitted.] In the building trades,

a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract. [Citation omitted.]

It thus appears that a contract with a prime contractor is a prerequisite to being a "subcontractor." [Emphasis by the court.]

Whatever else can be said about the meaning of the Utah Procurement Code, it cannot be said that it was intended to broaden the class of persons protected by payment bonds furnished in connection with public contracts. The changes in language, however, make it unnecessary to determine whether Section 14-1-6 protected third-tier suppliers. It may be presumed that the legislature intended either to clarify the existing legislation relating to payment bonds or to change it. See 73 Am.Jur.2d, Statutes, § 166. The new language indicates an intention on the part of the legislature to adopt federal interpretations of the Miller Act and to provide a cutoff point for contractor and surety liability.

Under the necessary interpretation of the statute, Continental-Hagen was not a "subcontractor", and Western Coating cannot recover for materials furnished to Continental-Hagen.

#### CONCLUSION

Utah statutes requiring payment bonds for public projects, do not benefit third-tier suppliers of material. Inasmuch as the claim of Western Coating against Gibbons and Reed Company and American Insurance Company is based only on the payment bond (R.38, par.10, R.60), Western Coating is not entitled to recover,

and the summary judgment granted by the Third District Court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of January 1989,  
I caused to be mailed, first class, postage prepaid, four true  
and correct copies of the foregoing BRIEF OF RESPONDENT, to:

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