

1955

Pacific States Cast Iron Pipe Company and Alvin T. Locke v. Harsh Utah Corporation et al : Reply Brief of Appellants

Utah Supreme Court

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Recommended Citation

Reply Brief, *Pacific States Cast Iron Pipe Co. v. Locke*, No. 8336 (Utah Supreme Court, 1955).
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Case No. 8336

IN THE SUPREME COURT
of the
STATE OF UTAH

PACIFIC STATES CAST IRON PIPE
COMPANY,

Plaintiff,

and

ALVIN T. LOCKE,

Intervening Plaintiff and Respondent,

— vs. —

HARSH UTAH CORPORATION, a cor-
poration, HARSH INVESTMENT COR-
PORATION, a corporation, and HAROLD
J. SCHNITZER, an individual,

Defendants and Appellants.

REPLY BRIEF OF APPELLANTS

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Case No.
8336

REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Throughout this reply brief, appellants, Harsh Utah Corporation, Harsh Investment Corporation and Harold J. Schnitzer, will be referred to either by name or as defendants and respondent, Alvin T. Locke, will be re-

ferred to as plaintiff or by name. Other parties to the action who have appeared from time to time but are no longer before this court will be referred to by the name of the party.

All italics are ours.

This reply brief is made necessary by the fact that there are many misstatements concerning the record and the proper inferences that may be drawn from testimony quoted in the brief of respondent. It is also necessary since in the brief of respondent, he is making claim to additional sums by way of a cross appeal. Damages are claimed to have been the result of inadequate financing of the Hill Field Housing Project. Defendants will not restate the facts for in their original brief a full and complete statement is made. However, it is not to be believed that by not stating again the facts in this reply brief defendants in any way are accepting the facts as set forth in the brief of plaintiff. As a matter of fact, defendants have discovered in the statement of facts and throughout the brief of the plaintiff a great number of inaccurate and false statements. These inaccurate and false statements refer primarily to the effect or inference which can properly be drawn from specific testimony which is set forth in the brief of plaintiff. Defendants state to the Court that it cannot accept on their face the references by plaintiff to the various sec-

tions of different witnesses' testimonies. The court must examine carefully those portions of the testimony to which the plaintiff refers for in many instances the referred to testimony does in no way support or justify the claim which is made for the testimony by plaintiff.

Throughout defendants' reply brief, reference will be made to the appendix of defendants' main brief on appeal and also to the appendix of the respondent's brief. In addition, defendants will attach to this brief an appendix setting forth an additional exhibit which the defendants feel is material and repeated references will be necessitated to said appendix material.

STATEMENT OF POINTS

POINT I.

THE BASIC DISAGREEMENT BETWEEN DEFENDANTS AND THE PLAINTIFF IS, WHAT COSTS DID THE PARTIES INTEND TO CONSIDER BEFORE A PROFIT COULD BE CALCULATED OUT OF WHICH A BONUS COULD BE PAID.

POINT II.

WHAT ITEMS OF INCOME WERE INTENDED BY THE PARTIES TO BE CONSIDERED IN CALCULATING THE PROFITS OR AS A BASIS FOR A BONUS.

POINT III.

THE HILL FIELD WHERRY HOUSING PROJECT WAS ADEQUATELY, COMPLETELY AND FULLY FINANCED BY HAROLD J. SCHNITZER.

ARGUMENT

POINT I.

THE BASIC DISAGREEMENT BETWEEN DEFENDANTS AND THE PLAINTIFF IS, WHAT COSTS DID THE PARTIES INTEND TO CONSIDER BEFORE A PROFIT COULD BE CALCULATED OUT OF WHICH A BONUS COULD BE PAID.

Defendants would like it clearly understood that they do not contend that there is not, in the parlance of accounting work, a definite distinction between direct construction costs and costs not directly connected with the actual construction work being carried forward. The indirect costs include all of the expenses of financing a project and the overhead which is incurred in supervisory and management expense. The accountant for plaintiff was correct in testifying that there is a difference between "construction costs" and "project costs."

The fundamental difference that exists concerns the interpretation of the October 4th agreement. Under the terms of that agreement did the parties Schnitzer and Locke have in mind distinguishing between "construction costs" and "project costs" or were they talking about the total costs of constructing the project upon which bids had been submitted.

Defendants believed that the October 4th agreement can stand only one logical interpretation and construction which is that when the parties discussed costs in

connection with construction of a housing project, they were talking about all of the costs that would reasonably be incurred.

The background for the preparation of the October 4th agreement and the circumstances surrounding its preparation were properly received to place the contract in a setting which would give the court a definite insight into the meaning of the terms used. However, when all of the background material is in and the setting of the contract is before the court, the fundamental question of the meaning of the contract is a question of law. Throughout the history of the common law in Oregon and in the State of Utah, the meaning of a contract and the language used therein, has always been a question of law. On legal propositions, this court has full scope of review.

This court should determine anew the legal effect of the October 4th agreement. It should establish the various rights, duties and liabilities of the parties after determining the meaning of the agreement.

In determining the meaning and legal effect of a contract no evidence either expert or otherwise could be received from any source. A legal document such as the October 4th agreement is a subject upon which judges are the highest authorities and are the most acceptable experts. No evidence or opinion is acceptable or could be received to set forth the effect of the language con-

tained in a legal document: See: *W. H. Walker v. J. W. McCloud*, 204 U.S. 302, 51 L. Ed. 495, 27 S. Ct. 293; *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah 41; 29 Pac. 826; *Gardine v. Cottey*, 360 Mo. 681, 230 S.W. (2d) 731, 20 Am. Jur. 672, 18 A.L.R. (2d) 1100.

This particular concept is important for the only evidence there is in the record concerning the distinction between "construction costs" and "project costs" comes from the certified public accountant employed by plaintiff, one Goldberg.

Goldberg's testimony that there was and is a distinction between "construction costs" and "project costs" was not specifically applied to the October 4th agreement. By innuendo and inference, it would appear that the plaintiff requests this court to accept the Goldberg distinction between "construction costs" and "project costs" as being a distinction which the parties had in mind in the preparation of the October 4th agreement. Neither the phrase "construction costs" nor "project costs" was used by the parties in the contract. Defendants submit that all of the conduct of the parties, all of the language of the agreement, all of the legal principles and common sense, indicates beyond doubt that the parties to the October 4th agreement were talking about the total costs of constructing the Wherry Housing Projects.

Throughout the record there is not one act of either party which is inconsistent with the idea that all costs were to be considered before any profit or bonus was to be calculated.

The basic figures on which the bonuses were to be calculated was a figure which the constructing corporation was in no way concerned with. It was the bid figure accepted by the government. The bid figure accepted by the government was only the concern of the sponsoring corporation.

The testimony of all the parties show that prior to the acceptance of the bids and prior to the organization of the Harsh Utah Corporation, plaintiff received from Schnitzer personally his \$1,000 per month pay check and at no time did he consider that he was other than an employee of Harold J. Schnitzer. Under oath plaintiff has stated he considered himself an employee of Schnitzer. Schnitzer was always concerned with all costs since in the final analysis he had to pay all of the costs.

It would seem to be an established principle of law from which there is no dissent that the construction and interpretation of a contract that is in writing, clear, unambiguous and uncertain in its terms is a strict question of law for the court to decide. The appellate court has the unrestricted right to review and determine the correctness of the legal solution which the trial court decreed.

This principle has been clearly set forth in the cases from Oregon where the contract of October 4, 1951, was drawn. They hold that the interpretation of a written instrument is a matter of law.

In *Henry v. Harker*, 61 Ore. 276, 122 Pac. 298, the Supreme Court of Oregon had a situation before it where a party made an attempt to vary and change the terms of a written instrument by evidence of an oral modification. In setting forth the principle which defendants seek to apply to the October 4th contract, the court there stated (p. 299):

“It is claimed that this contract is ambiguous, and that, therefore, its construction is left as a question of fact, and that, the court sitting as a jury having found the fact for the plaintiff, such finding is conclusive upon this court. The construction of a contract is always a matter of law for the court. If technical words or terms of art or local phrases not in common use are introduced, or if it is uncertain to what person or what thing a writing refers, oral evidence may be introduced to explain the language used, or if the language itself is not clear, and it can be shown that both parties placed a particular interpretation upon it and acted upon that interpretation, evidence showing such interpretation may be admitted. But when, as in this case, the contract consists wholly of a writing or series of writings all admitted to be genuine and containing no technical terms, the construction of the writings becomes a matter of pure law for the court. *Hutchinson v. Bowler*, 5 M. & W. 535; *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589. And this rule is even applied to oral

contracts where their terms are not disputed. *Globe Works v. Wright*, 106 Mass. 207; *American Towing & L. Co. v. Baker-Whitely Coal Co.*, 111 Md. 504, 75 Atl. 341."

The Oregon Supreme Court had another occasion at a later date to restate and apply the principle that a written instrument is to be interpreted and construed as a matter of law. In *Rose v. U.S. Lumber & Box Co.*, 107 Ore. 513, 215 Pac. 171, the defendant and plaintiff were attempting to give great stress to oral statements concerning the terms and conditions of the contract which the court was interpreting. The Oregon Supreme Court explained the rule and the language there, which defendant respectfully submits is applicable to the present case (p. 174):

"Much stress was laid in argument by the defendant on some testimony given by the plaintiff, where he said in substance, that he never agreed to deliver any fixed quantity of lumber per month under this contract. The contention of the defendant is that this amounted to a construction of the contract by the plaintiff himself in a way that disclosed its want of mutuality. The argument is fallacious. True it is that the contract itself does not specify any particular number of feet of lumber to be delivered per month. The measure of the quantity to be delivered is the output of the mill resulting from a continuous run. What that might amount to probably would vary, so that the plaintiff was justified in saying that no particular amount per month was agreed upon. The contract being in writing, its construction is a question of law for the court,

with the result, in this instance, that the contract is plainly one containing mutual covenants of the parties, one being the consideration for the other."

The latest authority which comes out of the State of Oregon and succinctly sets forth the principle which defendants request be applied to the contract before this court, is *Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co.*, 145 Ore. 96, 25 P. 2d 911. The Oregon Supreme Court there stated the rule of law in the following language (p. 916):

"Defendant predicates error upon the charge of the court leaving the question to the jury as to whether this Readymix was within the contract for the reason that it leaves the construction of the contract to the jury and not to the court. The construction of a written contract is for the court, and should not devolve upon the jury. Section 9-214, Oregon Code 1930; *Henry v. Harker*, 61 Or. 276, 118 P. 205, 122 P. 298; *City of Seaside v. Randles*, 92 Or. 650, 180 P. 319; *Rose v. U. S. Lbr. & Box Co.*, 108 Or. 237, 215 P. 171; *Wallace v. American Life Ins. Co.*, 111 Or. 510, 225 P. 192, 227 P. 465."

This court has had occasions very recently to pass upon the rules covering the duties of the finder of the fact and the court in determining the meaning of the language of a written instrument. *Mathis v. Madsen*, 1 Utah 2d 46, 261 P. 2d 952, concerned a contract which all of the court conceded was ambiguous and uncertain in its terms. The court applying the rule that the meaning and interpretation of a contract is a question of law

set forth the principles applicable, even if it were conceded as defendant does not concede that the October 4th agreement is ambiguous and uncertain in its terms (p. 52):

“ * * * That fact alone, however, does not relieve the Court (nor this Court) of its responsibility to ascertain its meaning if that can be done under the provisions of law respecting this type of instrument. In searching for the meaning the Court must first examine the language used in the instrument itself and accord to it the weight and effect which the instrument itself may show that the parties intended the words to have. If then its meaning is still ambiguous or uncertain, the Court may consider other contemporaneous writing concerning the same subject matter, and may, if it is still uncertain, consider parole evidence of the parties' intention. See *Burt v. Stringfellow*, 45 Utah 207, 143 P. 234; *Beagley v. United States Gypsum Co.*, Utah, 235 P. 2d 783.”

The holding in the *Mathis* case has apparently always been the law of the State of Utah. In *Armstrong v. Larsen*, 55 Utah 347, 186 Pac. 97, the principle was set down in the following language (p. 98):

“The terms of the written contract are neither ambiguous nor uncertain. It was therefore the duty of the court to construe the contract and advise the jury of the respective rights of the parties thereunder. The request embodied a correct interpretation of the contract. It was the duty of the court to give that or similar instructions. The failure to do so, in our judgment, con-

stituted prejudicial error. *Bank v. Peterson*, 33 Utah 209, 93 Pac. 566, 126 Am. St. Rep. 817; *Lowry v. Megee*, 52 Ind. 107; *Kamphouse v. Gaffner*, 73 Ill. 453; *Gage v. Meyers*, 59 Mich. 300, 26 N. W. 522."

Additional cases which clearly show that the principle of law under our Utah decisions and under the decisions of the State of Oregon are the same as *Bailey v. Spalding-Livingston Investment Co.*, 43 Utah 535, 136 Pac. 962, and *Penn Star Mining Co. v. Lyman*, 64 Utah 343, 231 Pac. 107.

POINT II.

WHAT ITEMS OF INCOME WERE INTENDED BY THE PARTIES TO BE CONSIDERED IN CALCULATING THE PROFITS OR AS A BASIS FOR A BONUS.

(a) Rental Income from Harsh Utah Corporation was Improperly Included in Calculations of the Bonus to Locke.

An additional difference in interpretation of the October 4th agreement by plaintiff and defendants arises out of the inclusion of the net rental, which was received by Harsh Utah after Harsh Investment was through with the construction phase, in the amounts which are to be denominated income.

The trial court included in the income of the Harsh Investment the rental income which Harsh Utah had actually received. It held that this income was properly a construction income under the contract of October 4th.

The subject matter of rental income and interest in the ownership and management of the Project after construction was covered specifically. See appendix of defendants' brief, at page 10, second paragraph. It is there set forth specifically that Locke shall have no interest in and to the ownership or management of the projects mentioned or in connection with any profits that may be derived therefrom. The language is clear that the interest of Locke would be limited to the construction of the projects.

The basic concept upon which plaintiff attempts to claim an interest in the rental income seems to be a twofold proposition. First, he claims that he is entitled to participate in the rental income by reason of the fact that the project was finished in less time than the maximum permitted under the agreement with the Air Force and F.H.A. He claims the remaining months which were allowed should be considered as a construction period and any income earned should be allotted to the Harsh Investment. Second, plaintiff claims a right to have rental income allotted to him by reason of an oral agreement between himself and Schnitzer that income from rentals during the 24-month period of construction should be included in computing his bonus.

Apparently plaintiff is of the opinion that he can on the basis of his testimony alone show an oral modification of a written instrument. At page 61 of respondent's brief, there is cited for the court the proposition

of the oral modification of a written instrument and the record is referred to substantiate the claim. The record reference is T. 42M-45M 797.

The referred to testimony of Locke indicates that on an occasion, when he and Schnitzer were riding on the train to Great Falls, Montana, Schnitzer requested that the employees at the Great Falls Project be placed on an overtime schedule and at that time in discussing the Great Falls project, Locke claims that Schnitzer agreed that rental income on the Great Falls project would be included in determining whether or not there was any profit from the construction of the project. Again when Schnitzer and Locke were returning from Washington, D.C. in 1953 and it appeared that the costs of the Montana project were very close to the amount of funds available to construct the project, Locke again states that Schnitzer agreed that the rental income on the Great Falls Montana job would be included in income for determining whether or not there was any bonus from the construction of the Great Falls job.

Plaintiff's attorney attempted to get from his client a statement that these conversations which he refers to also pertained to the Hill Field Project in Utah but failed. It is submitted that even if this court accepts the proposition (which it cannot) that specific terms of a written instrument may be varied by an oral agreement made in informal conversation, still the oral agreement referred to did not concern in any way the Hill Field project but concerned only the Great Falls Project in Montana.

Under the case law both in Utah and Oregon an oral modification of a written instrument must be executed for consideration or shown by clear, convincing and conclusive evidence. *Craswell v. Biggs*, 160 Or. 547, 86 P. 2d 71; *Mawhinney v. Jensen* (Utah) 232 P. 2d 769; *Bamberger Co. v. Certified Productions, Inc.*, 88 Utah 194, 48 P. (2d) 489.

This oral agreement which plaintiff is claiming exists between Schnitzer, the individual, and Locke. At no place does plaintiff claim that Harsh Investment agreed with Locke that he would be paid a bonus based on rental income which Harsh Utah earned at Hill Field. At no place in the record is there a clearer demonstration of the concept which defendants have of the relationship which existed between the two corporations, Harsh Utah, Harsh Investment and Schnitzer than in this recitation by the plaintiff concerning rental income.

All of the parties to the October 4th agreement understood that Harsh Utah and Harsh Investment and the various other corporations which were organized by Schnitzer were the means to an end. The end was the construction of certain Wherry Housing Projects. What the parties had in mind was not a profit to various segments or individual units in the group of instruments but a profit for the overall project and a profit to Schnitzer.

The basic inconsistency in plaintiff's arguments is demonstrated by the proposition that an oral modification can be effective between Schnitzer and Locke on the Montana project and without more made applicable to the Utah project. The inconsistency permeates the whole argument of the plaintiff in his brief and in his presentation before the trial court. He, on one hand, must keep Harsh Utah separate from Harsh Investment and on the other, show Schnitzer as the personification of all corporations.

(b) The Change Order Extras Amount was Improperly Calculated.

At pages 56 and 57 of his brief, plaintiff makes reference to the fact that certain changes in the work to be done at Hill Field were made and requests for extras were made to compensate Harsh Utah for the extra work anticipated.

Plaintiff quotes Article XV covering changes in work. He then attempts to show that there was an agreement between Harsh Utah and Harsh Investment concerning the amount which Harsh Utah would pay Harsh Investment for the changes in the construction that was accomplished by Harsh Investment.

There is no showing whatsoever of any agreement ever having been made. There is no evidence of any discussion between Locke and Schnitzer or anyone else in the management of Harsh Utah and Harsh Invest-

ment concerning the amount of money Harsh Utah would have to pay or be obligated to pay Harsh Investment for the changes. In fact counsel for plaintiff in his trial brief stated:

“Only contract between HARSH UTAH CORPORATION as owner and HARSH INVESTMENT CORPORATION as contractor, concerning amount to be paid to HARSH INVESTMENT CORPORATION was ‘CONSTRUCTION CONTRACT’ — ‘LUMP SUM’ (Ex. #61), wherein, pursuant to ‘ARTICLE 3—THE CONTRACT SUM’ — ‘The owner shall pay the contractor for the performance of the contract, subject to additions and deductions provided herein, on account of construction the sum of \$2,995,205.00 cash.’ There is absolutely no evidence of any other agreement between owner and contractor and absolutely no evidence, oral or written, varying this contract price.”

In an attempt to show that there was an agreement between Harsh Utah and Harsh Investment for the payment for change extras, defendant cites the testimony of the witness Hutchinson and quotes a portion of that testimony at appendix page 16. The quoted testimony in no way supports a finding that Hutchinson, Harsh Utah or Harsh Investment had entered into any kind of an agreement concerning the amount to be paid by Harsh Utah to Harsh Investment for extras.

Plaintiff then attempts to show by an F.H.A. official that the change requests that were submitted constituted a contract between Harsh Utah and Harsh Investment. Plaintiff cites appendix page 27 to 29 to

support this assertion. Even assuming that the F.H.A. official may have some helpful interpretation of the change request, that interpretation would in no way be binding upon either Harsh Utah or Harsh Investment. But the testimony quoted by plaintiff at appendix page 27 to 29 fails to support in any way the claim and in no way indicates that the change request constituted a contract between Harsh Utah and Harsh Investment.

Not satisfied with the testimony of Warwick or Hutchinson as quoted at page 16 and appendix pages 27 and 29, plaintiff attempted to show that the witness Isaacson, the inspector on the Wherry Housing Project at Hill Field interpreted the change request to mean that Harsh Utah was agreeing to pay Harsh Investment the amount of the requested change. Plaintiff quotes Isaacson's testimony at the appendix pages 30 to 32. Not one word of what Isaacson said indicated in any way that he or Harsh Utah or Harsh Investment ever thought that the change request fixed the amount Harsh Utah had agreed to pay Harsh Investment. Most of the change requests were only estimates of extra costs. Many were completely disallowed. Some were allowed in part and disallowed in part because of technical rules of the F.H.A. No one could predict the amounts which would ultimately be approved and allowed. At the time of trial no one even knew the final amount because no final approval by the F.H.A. had been granted.

This particular aspect of the plaintiff's case is extremely important to him. Without it over half of his claimed bonus is lost. Only by increasing the lump sum contract amount above the lump sum is it possible for plaintiff to claim a bonus. If plaintiff is required to look solely to Harsh Investment and its construction receipts for his bonus, none will be available.

The extent to which Locke was to participate in the changes in the increased allowance as F.H.A. adjustments is a matter specifically covered by the October 4th agreement. The following is the applicable language:

“* * * Locke shall receive a sum equal to ten per cent (10%) of all net profits received by Harsh as F.H.A. adjustments, the same being additional compensation to Harsh for changes in plans and specifications, or increased labor costs, from the United States Government for the construction of said projects, or any of them, over and above the profits involved in the original bids of Harsh accepted by the Government.”

No attempt has ever been made to ascertain whether profit was actually made on work accomplished as changes in plans or specifications or increased labor costs. It is clear, however, that only the amounts actually received as mortgage increases was to enter into the calculations, then only 10% of “net profits.” The trial court added the full amount of the requested changes as estimated in his final judgment and then gave Locke 50% of the amount after giving defendant the 10% allowance

required by the contract. In the light of the quoted sections of the contract the court's action is demonstratively erroneous.

The language quoted clearly shows a different way for considerations of F.H.A. adjustment yet the adjustments are handled exactly the same as the amount of the original lump sum from the "Lump Sum Contract."

The Goldberg audit is premised on the idea that the adjustments were to be handled in the same manner as the lump sum and therefore correction must be made if the judgment is to properly resolve the claims of the parties.

Defendants have strenuously resisted any and all claims that the amount of the change allowance be added to the lump sum. If it were added to the amount of the mortgage the resulting total was so small that under no accounting theory would Locke be entitled to a bonus.

At no place in the evidence is there any showing that Harsh Investment and Harsh Utah ever entered into any agreement concerning the overtime which Harsh Investment paid to employees at Hill Field. Nothing in the record indicates that Harsh Investment was to receive any additional consideration by reason of having to pay overtime. At no place is there any agreement that it might take rental income from Harsh Utah until the allowed construction period was over. It would be a

strange practice indeed if a builder who finished a construction project ahead of schedule could rent the project and collect income from it until the maximum period allowed for construction had elapsed.

For plaintiff to establish a right to have additional sums paid by Harsh Utah to Harsh Investment from rentals he must rely upon Schnitzer's oral agreement on the Montana job and show that he was after all the party who was in control of both Harsh Utah and the Harsh Investment and in effect is the real party in interest. If he adopts such a position and admits the fact that Schnitzer is the real person out of whose pocket losses must be paid and into whose pocket any profit will flow, then he defeats his own purpose. Admittedly a full and complete accounting reveals that no profit was made by Schnitzer. Contrast the way Goldberg attempts to handle the contract between Harsh Utah and Harsh Investment with his inconsistent treatment of the profit allowed to Pacific Coast Equipment Company on its transactions with Harsh Investment.

It is conceded by plaintiff that if profit must be made by Schnitzer, then Locke is not entitled to any bonus for no profit whatsoever was earned by him. The uncontroverted accountings show that only by taking from Schnitzer's personal funds a sum of money and arbitrarily denominating it "profit" is it possible to award a judgment in favor of Locke. It is respectfully submitted that such

action violates every intendment of the parties and is contrary to equity and justice which this court should administer with even hand.

At page 66 of plaintiff's brief, he sets forth a contention that this court should ignore the existence of Harsh Utah and Harsh Investment whenever that would be to the benefit of Locke and set them up and recognize their existence whenever to do so would benefit Locke. He justifies this claim of on again off again recognition of the existence of the separate corporate entity by a statement that to permit the existence of the corporations would perpetrate a fraud on Locke. Nothing specific is alleged at any place concerning any fraud. Apparently plaintiff contends that there is fraud in the air and in some way he should be able to receive some benefit from it.

Even in the brief, fraud is just generally alluded to. This court by its decisions recognizes that when a fraud is claimed, it must be set out in specific detail. Plaintiff knows that fraud cannot be claimed by a general non-specific statement. Desperate men will resort to any device to gain their ends.

No place in the evidence, no place in the record and no place in the accounting has there ever been any evidence presented that anyone ever attempted to cheat or to defraud plaintiff. The evidence is full of the details of how plaintiff cheated and defrauded his employer at

every turn of the road. He was forgiven and taken back into the good graces of the employer. Judgment was awarded against him for the amounts which the evidence demonstrated he had defrauded and misappropriated.

POINT III.

THE HILL FIELD WHERRY HOUSING PROJECT WAS ADEQUATELY, COMPLETELY AND FULLY FINANCED BY HAROLD J. SCHNITZER.

A basically erroneous conception is advanced and put forward by plaintiff concerning the manner in which the projects at Hill Field, Great Falls, and at Barstow, California, were financed by Schnitzer. There were numerous transfers of funds between the various corporations which defendant, Schnitzer, owned and was using to accomplish the work at Hill Field, Great Falls and Barstow. Schnitzer, throughout the construction projects, felt free to use his financial resources at whatever point the need for those resources arose. As a consequence on numerous occasions, funds were used to pay obligations at Schnitzer's own bank, obligations for Harsh Investment, Harsh Utah, Harsh Construction and Harsh California. These transfers of funds were made openly and were recorded accurately on the books of the corporation and were something which was known to Locke. For him to deny that he had knowledge of it in the face of the fact that he spent one-third of his time in the home office where the books and records of the financial transactions were handled is unbelievable. But regardless of whether Locke knew of the transfer of funds from one of the cor-

porations to another or to the defendant, Schnitzer, himself personally the only basic question is, did any of the transfers between Schnitzer, individually, or Harsh Investment or Harsh Utah in any way detrimentally affect the financing and construction of the Harsh Hill Field Project.

No evidence was ever presented that the transfers of funds between the various corporations and Mr. Schnitzer in any way prevented the proper financing of the Hill Field Project. The controller, Ellis, testified that the accounts of Harsh Investment were current and that the bills of that corporation were paid promptly and without any defalcation of any kind (Tr. 1070). The accountings prove without any possible contradiction that after all of the subcontractors, materialmen and parties who had actually participated in the construction project had been paid there was still on deposit with the court, funds greatly in excess of any just demand on either Schnitzer, Harsh Utah or Harsh Investment.

During the trial, because plaintiff made so much of the fact that funds were transferred from the various corporations to each other to Schnitzer and from Schnitzer back to the various corporations, it was requested that the controller of the corporations prepare a statement showing the various transfers and the outcome of the financial manipulations which were necessary to provide adequate finances at each of the projects. The compilation became Exhibit 195.

It shows on page ii (App.) the total amounts received by Harsh Utah from the Irving Trust Company which includes the personal escrowed funds. The total amounts which were paid over to the Harsh Investment by Schnitzer or his wholly owned corporations. The document shows that there had been received from Irving Trust Company up to the time of the trial, a total of \$2,752,704.00. This total consisted of all payments from the proceeds of the mortgage amounting to \$2,245,546.00 and payments from the escrowed funds in the amount of \$512,158.00. Page ii (App.) shows a breakdown through the period of construction of the amounts paid on the Hill Field Project costs. The total is \$2,747,775.00. The difference between receipts and expenditures is \$4,929.00. This small sum in no way effected the financing of the Hill Field Project.

The court records prove beyond any possible dispute that funds are still available for the payment of all subcontractors, materialmen and others making claims against the Harsh Investment and Harsh Utah. The deposit with the Davis County Treasurer, is greatly in excess of any sum which any person can legitimately claim is due them for services rendered or materials supplied at the Hill Field Wherry Housing Project.

No attack was ever made on the accuracy, validity and truthfulness of Exhibit 195. It stands in the record uncontroverted and uncontradicted. Defendants have reproduced the exhibit at pages i and ii of the appendix in this brief.

The F.H.A. rules and regulations which are quoted and set forth in defendant's main brief require of a sponsor that a completion bond in the amount of ten percent of the construction costs be placed with the government authorities to insure the adequacy of the funds which the sponsor agreed to provide. Such a bond was supplied by the Massachusetts Bonding and Insurance Company and was in the amount of \$299,521. The bond is discussed at page 90 of defendants' brief. The bond being a completion bond was an absolute guarantee that the project would be completed and the bills and expenses incurred paid as they came due. Such bonds require large liquid collateral which Schnitzer furnished the bonding company. With the bond and the large cash deposit there is a double guarantee of adequate financing which shows beyond question that Schnitzer financed properly and adequately the Housing Project.

It is respectfully submitted that the uncontradicted, undisputed evidence shows that the Wherry Housing Project was completely, fully and adequately financed at all states of the construction; that the court's finding that it was not properly financed is without support in the evidence. Since it was properly financed the court's finding that there was no damage resulting to plaintiff is correct.

CONCLUSION

In conclusion, defendants would like to state in a few paragraphs, the primary considerations before the Supreme Court and to bring into focus, if possible, the large and material differences between the position of plaintiff and defendants.

- (a) The Accounting Information in the Trial Court was Premature.

At the time of the Goldberg audit, at the time of the Card Greaves audit, and during all of the trial no final and complete accounting could be prepared on the Housing Project at Hill Field. The project was not closed; the amount of Change Order Extras had not been determined. A great number of disputes between claimant on the project and the Harsh people had not been resolved. The exact amounts due to various subcontractors and materialmen had not been determined. As a consequence, all of the accountings had to be tentative only. At the close of the trial, after the closing papers were prepared under supervision of the F.H.A., the amounts of Change Order Extras determined, and the final judgments entered by the court for the various claimants, then defendants moved the trial court for permission to bring the accounting information up-to-date.

Part of the information offered was the F.H.A. project analysis showing the completed project and the adjustments in the mortgage figure. Defendants sought

to introduce evidence concerning the date of completion and the various other documents which finalized the project at Hill Field. This motion (R. 159-61) was filed on the 28th day of January, 1955.

The Court refused to permit the filing as exhibits of the documents which finalized the housing project. The documents were placed in the record and are now before the court even though not admitted as exhibits. There was no question concerning their accuracy or authenticity nor the fact that they would very materially effect the figures which had been used by the court. The documents would require adjustments in the accountings which were made while the project was still under construction. The actual effect that the closing figures had on the project are shown in the appendix to defendants' main brief, as a part of the Peat, Marwick, Mitchell accounting. This accounting it is hoped will assist the court in understanding the effect of various differences between the Greaves accounting, the Goldberg accounting and the true and accurate figures which are demonstrated by the record before the court.

The accountings demonstrate that there can be no possible payment of a bonus to Locke. They demonstrate that the construction project when considered as a whole and when all of the costs are taken into account did not result in a profit to any person.

The trial court understood that it would be necessary to make adjustment in the accounting figures which were received. Locke's case was originally scheduled to follow all of the other cases which were at issue. To accommodate counsel for plaintiff the Locke case was commenced at an earlier date and was tried prior to the time that there was any determination as to exactly how much was due and owing the various subcontractors whose matters were in litigation. It was then anticipated that adjustments would be made and would necessarily have to be made if the accounts were to show accurately the profits and losses on the housing project. These are the anticipated adjustments which the court refused to permit at the close of the case. The rationale of such a refusal is difficult for defendants to ascertain. It is defendants' position that there could be no reason why the accounting information should not be brought up to date and the accurate figures presented and used by the trial court as a basis for his judgment.

(b) False claims of profits.

In Locke's brief, he continually refers to the enormous profit which will be realized by defendants. Those profits are entirely fictitious, speculative and uncertain.

For instance, in his brief, Locke claims that Schnitzer will have projects worth seven million dollars in Montana and Utah. This statement is entirely false and knowingly so. The equity of Schnitzer will be only such

sums as he has actually paid as costs for the construction of the projects. The advancements from the various mortgages must be repaid in full and with interest. For plaintiff to ignore the tremendous obligations which must be liquidated prior to the time Schnitzer can realize anything out of his capital investments is to attempt to perpetrate on this court a false and fictitious concept.

At another point in the brief of plaintiff, he claims that defendants will have \$30,000.00 of tax free income. What he is not stating to this court is that that income will be depreciation calculated on the projects. Whether or not it is realized will depend on whether or not the projects maintain their value and are profitable investments and whether or not the projects are managed in such a way so that returns may be obtained.

It is a false and fictitious notion that there is any assurance that defendants will ever receive any return whatsoever on the money invested in the housing project or that there will ever be a return of the capital invested in said projects. There is no guarantee by any agency in the United States Government that the sponsor and builder of Wherry Housing Projects shall realize any profit at all. The limitations are on the amounts which may be realized. The act requires and provides that there shall not be a return in excess of six and one-half percent on all the money which has been used for the construction. Out of this six and one-half percent must be paid the mortgage interest payment and any other interest charges.

It is recognized by all parties that what Locke and Schnitzer had in mind in the construction of the Wherry Housing Project was a so-called windfall profit. It was to be realized by constructing the housing projects at a cost less than the amount that could be obtained as advancements on mortgage.

This so-called windfall profit becomes possible only if the efficiency and economy with which the projects are constructed exceeds F.H.A. expectations. Estimated costs of replacements fixing maximum bids were placed on each project by the F.H.A. experts and officials. The mortgage was calculated at ninety percent of the bid accepted by the government. In order for there to be a windfall profit, the sponsor had to construct the project for less than ninety percent of the bid which was accepted by the government for the construction of the project.

There is nothing illegal, unconscionable or inequitable about sponsors attempting to make windfall profits by the exercise of ingenuity, efficiency and economy in the construction of a Wherry Housing Project. The Wherry Housing Act was aimed at interesting in government housing construction, private enterprise and private builders. The private builder would be interested in constructing the project only if he could see that to do so would net him a profit. The profit, in order to entice the builder into government housing when the number of tenants is uncertain and dependent upon the amount of

defense expenditures, would have to be one which can be calculated and ascertained at the beginning of the construction project.

Defendants' experience at the Hill Field Wherry Housing Project has been very unprofitable. Contrary to the speculations that plaintiff makes in his brief, the occupancy rate is way down. The mortgage on the project has been returned to the Federal Housing Administration for handling. It has been necessary for the sponsor to obtain from the Federal Government a moratorium for the payment of the amounts which are currently due on the mortgage balance.

It has been held that Harsh Investment should be permitted to increase its lump sum contract amount by fictitious figures as follows:

(a) Change order extras in the sum of \$178,672.00. The actual amount received was \$154,400.00. The difference between these two figures being \$24,272.00.

(b) Total receipts to the Harsh Interests was \$3,173,877.00. The actual total amount received by Harsh Utah, Harsh Investment and Harold Schnitzer from the mortgage as it was finally adjusted, is \$2,791,200, a difference of \$382,677.

(c) That rentals collected on the Housing Project by Harsh Utah should be added to the amount of the lump sum contract. The amount erroneously calculated was

\$165,986.49. The inclusion of this rental income was specifically prohibited by the October 4th agreement. See page 76 of defendants' brief.

Profits have been increased by the elimination of demonstrated and undisputed expenditures by Harsh interests, such as:

(a) The payment by Harsh Utah and Schnitzer for financing, planning and commencing the Project. The amounts thus eliminated were \$157,442.76. See appendix, main brief, page 15.

(b) Eliminations of indirect overhead costs as audited by all of the auditors. The amount eliminated, \$120,-384.90; amount substituted, \$45,631.34; difference, \$74,-753.56.

(c) Eliminations of interest expenses actually incurred and paid by Harsh Utah during the construction period. Amount, \$105,845.39. Total amount of these actual demonstrated and undisputed expenditures which were eliminated erroneously, \$338,041.71, and if said expenditures are allowed, it would eliminate the possibility of any bonus whatsoever to the plaintiff.

Other costs which have been eliminated by the decision of the trial court, defendants submit, are proper and should have been allowed by the trial court but since they are disputed, either in amount or as to whether or not

they are proper, they are not included in this summary, and only costs which were actual, demonstrated and disputed are included.

(c) Conclusion

It is respectfully submitted that if the court does any one of the following: (1) properly interprets the October 4th agreement, (2) properly permits the inclusion of all actual, demonstrated and undisputed expenses, or (3) includes only the proper items of income to Harsh Investment then plaintiff would not and could not be awarded a bonus.

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APPENDIX

APPENDIX

	H I C a/c Pay. Paid	Deduct	Balance to Hill Field Costs
1952			
July	\$ 10,784	-----	\$ 10,784
August	13,501	-----	13,501
September	364,890	\$ 50,000	314,890
October	210,465	15,100	195,365
November	186,031	17,000	169,031
December	274,112	113,525	160,587
1953			
January	342,254	151,500	190,754
February	165,259	21,556	143,703
March	142,287	20,784	121,503
April	227,128	36,500	190,628
May	674,576	333,971	340,605
June	287,685	5,400	282,285
July	255,557	29,886	225,671
August	230,991	50,322	180,669
September	86,544	33,415	53,129
October	115,734	53,681	62,053
November	12,635	2,042	10,593
December	49,200	10,621	38,579
1954			
January	19,242	2,694	16,548
February	15,333	6,479	8,854
March	50,093	32,072	18,021
April	53,978	53,956	22
	<u>\$3,788,279</u>	<u>\$1,040,504</u>	<u>\$2,747,775</u>

	H-U-C		H-I-C	
	Rec'd. from Irving	Paid to HIC	Rec'd. from HUC	a/c Pay. Paid
1952				
July	\$ 47,295	-----	-----	\$ 10,784
August	991	-----	-----	13,501
Sept.	337,106	336,419	336,419	364,890
Oct.	221,241	221,991	221,991	210,465
Nov.	296,550	235,000	235,000	186,031
Dec.	85,927	16,000	16,000	274,112
1953				
Jan.	261,768	262,700	262,700	342,254
Feb.	220,558	700	700	165,259
March	104,182	-----	-----	142,287
April	129,234	129,200	129,200	227,128
May	400,980	393,000	393,000	674,576
June	187,958	190,000	190,000	287,685
July	209,384	207,000	207,000	255,557
August	184,521	185,400	185,400	230,991
Sept.	65,009	66,000	66,000	86,544
Oct.	-----	3,100	3,100	115,734
Nov.	-----	8,700	8,700	12,635
Dec.	-----	9,000	9,000	49,200
1954				
Jan.	-----	5,000	5,000	19,242
Feb.	-----	6,000	6,000	15,333
March	-----	11,500	11,500	50,093
April	-----	11,400	11,400	53,978
Total	<u>\$2,752,704</u>	<u>\$2,298,110</u>	<u>\$2,298,110</u>	<u>-----</u>
Mort. Pr.	2,240,546	73,279	73,279	
Escrow	512,158	44,274	44,274	
		<u>\$2,415,663</u>	<u>\$2,415,663</u>	<u>\$3,788,279</u>