

1956

Pacific States Cast Iron Pipe Company and Alvin T. Locke v. Harsh Utah Corporation et al : Answer to Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Case No. 8336

IN THE SUPREME COURT
of the
STATE OF UTAH UNIVERSITY UTAH

JAN 28 1957

PACIFIC STATES CAST IRON
PIPE COMPANY,

Plaintiff,

and

ALVIN T. LOCKE,

*Intervening Plaintiff
and Respondent,*

—vs.—

LAW LIBRARY.

HARSH UTAH CORPORATION, a
corporation, HARSH INVESTMENT
CORPORATION, a corporation; and
HAROLD J. SCHNITZER, an
individual,

Defendants and Appellants.

FILED
OCT 31 1956

Clark, Supreme Court, Utah

**ANSWER TO PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF**

**RAWLINGS, WALLACE
ROBERTS & BLACK
DWIGHT L. KING**
*Counsel for Defendants and
Appellants*

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IN THE SUPREME COURT
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PACIFIC STATES CAST IRON
PIPE COMPANY,

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and

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—vs.—

HARSH UTAH CORPORATION, a
corporation, HARSH INVESTMENT
CORPORATION, a corporation; and
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Case No. 8336

ANSWER TO PETITION FOR REHEARING

Defendants, in answer to the petition of respondent for rehearing of the above entitled matter admits, denies and alleges as follows:

1. Denies the accuracy and truth of the matter contained in the petition under the title Point I, Point II, Point III and Point IV.

WHEREFORE appellants pray that the petition for rehearing of respondent be denied and the opinion of the Court heretofore entered in the above-entitled matter be and remain the opinion of this Court; that no re-examination or re-argument be granted as requested by respondent.

Counsel for Appellants

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
corporation, HARSH INVESTMENT
CORPORATION, a corporation; and
HAROLD J. SCHNITZER, an
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Defendants and Appellants.

Case No. 8336

BRIEF IN SUPPORT OF ANSWER TO
PETITION FOR REHEARING

PRELIMINARY STATEMENT

Throughout this brief, all appellants will be referred to as appellants or by the name of the particular party. Intervening respondent will be referred to as respondent or by name.

All italics are ours.

STATEMENT OF POINTS

POINT I.

THE COURT'S OPINION REVEALS THAT IT CLEARLY AND CORRECTLY UNDERSTOOD WHAT THE PARTIES HAD IN MIND WHEN THEY AGREED TO PAY A BONUS OUT OF PROFITS.

POINT II.

NO CONSIDERATION NEED BE GRANTED TO THE QUESTION OF THE ACCOUNTING POINTS SET FORTH IN POINTS II, III AND IV OF RESPONDENT'S BRIEF SINCE IT IS UNDISPUTED THAT A CONSOLIDATED BALANCE SHEET WOULD REVEAL NO PROFIT.

ARGUMENT

POINT I.

THE COURT'S OPINION REVEALS THAT IT CLEARLY AND CORRECTLY UNDERSTOOD WHAT THE PARTIES HAD IN MIND WHEN THEY AGREED TO PAY A BONUS OUT OF PROFITS.

Respondent takes serious exception to a portion of the Court's opinion. He argues extensively throughout his brief that this Court misstated the facts concerning preparation of the October 4, 1951 agreement.

Schnitzer, on cross-examination by counsel for respondent, stated as follows concerning preparation of the October 4, 1951 Agreement:

“Q. Isn’t it a fact, Mr. Schnitzer, that the particular contract dated October 4, 1951 was prepared by Mr. Frank L. Whitaker?

A. No. I beg your pardon. It was prepared by Mr. Schnitzer (Louis Schnitzer, attorney) with Mr. Whitaker in conference, but the form was prepared by Mr. Schnitzer, and the final agreement was prepared by Mr. Schnitzer.”

Respondent denies confidence in Schnitzer’s veracity throughout his brief and continuously refers to him in the most derogatory kind of language, yet claims that Schnitzer’s testimony should be the last word on this matter. There is additional information concerning the preparation. Locke, concerning the preparation of the October 4th Agreement, under examination from his own counsel, stated as follows (p. 32-33 MT) :

“Q. Before you get into the conversation, Mr. Locke, will you tell us who were present at this discussion?

A. Mr. Schnitzer and I.

Q. State to the best of your recollection at this time the substance of what Mr. Schnitzer said and what you said?

A. Mr. Schnitzer had prepared a draft of an agreement that he wanted me to sign, and I told him at that time that he wanted me to

give up all my ownership. He said he was going to build or bid on three projects and we would have to go out and get additional capital and he would have to do it on the basis of selling stock. He had presented me a rough draft of the agreement he wanted me to sign. I told him, 'Where was I coming out?' I said, 'I would have part of the consideration under the construction contract. That would be my share in the thing.' So Mr. Schnitzer said that would be fine. We will write this little agreement he dictated to Ella Mae. I think he had it. He asked me to sign it. I said, 'I thought I should consult my counsel on it.' I retained Mr. Frank Whitaker for counsel. His rough draft was worked over and resulted in this contract here.

Q. Referring to the contract between yourself and Mr. Schnitzer under date of October 4th, 1951, is that correct?

A. Yes sir.

Q. Prior to entering the contract dated October 4th, 1951, and pursuant to the three previous agreements here in evidence, and the one you testified about you don't have a copy of, had bids been submitted on certain projects?

A. Yes sir."

Appellants submit that the following quote from the Court's decision could not be made clearer. It is a concise statement of effect of the quoted testimony (300 P. 2d p. 612).

“The final refinement of the agreement between the parties was executed on October 4, 1951, in Portland, Oregon. The record reveals that although Schnitzer was the moving party in changing the agreement, the final draft which was executed was revised and prepared by Locke’s attorney. It is the construction of this agreement which is the bone of contention between the parties.”

The apparent purpose of respondent in attempting to show that counsel for Locke did not participate and assist in preparing the agreement is to get this Court to open the gate to a strained construction. This action is tantamount to an admission by him that unless the Court gives a strained construction to the language of the agreement its decision is correct.

Repeatedly throughout his brief respondent admonishes this Court that it must construe the October 4th Agreement most strongly against Schnitzer because his counsel prepared it. As has been demonstrated, respondent’s major premise is false. The decision of the Court reveals that it clearly understood the exact way in which the contract was prepared. But even if the contract is construed strictly against appellants it would not assist respondent. Only by complete abandonment of the Agreement and a refusal to give the language of the Agreement its normal, ordinary and clear meaning could the Court hold that Locke was entitled to a bonus out of the funds of Schnitzer.

The Court correctly understood the ends which appellants and respondent had in mind in the drawing of the October 4th Agreement. No amount of name calling or attempts to view with alarm or point with pride can change that purpose now.

Simply stated, what Locke and Schnitzer had in mind in the construction of the Wherry Housing Projects was construction for less than the amount of the mortgage. The mortgage would be guaranteed by the Federal National Mortgage Association. Whatever amount less than the amount of the mortgage the projects cost would be divided pursuant to the October 4th Agreement. This money would never have to be repaid either by Locke or Schnitzer out of their own private funds but would be repaid to the mortgage holder by the project itself and out of its earnings resulting from the rental operation.

It is true that additional profits might someday be realized by the owner of the project if the rents held up and the project was continuously occupied at a high level. The amount of this profit is entirely speculative. It is a sum about which there can be no accurate calculations. The figure must be left to conjecture. The number of persons who are employed at the base and the level of military appropriation and preparedness which is maintained will absolutely control the degree of occupancy. As a matter of fact the housing project has proved to be very unprofitable and the level of occupancy is down to a point where there are not sufficient funds available to pay even the mortgage payments as they become due.

At page 32 of respondent's brief he states that rentals could be adjusted upward to bring a constant return if the occupancy of the housing project fell below 93%. The statement is not true. Under the documents and agreements which are before the Court it is plain that there is no guaranteed return to the sponsor of a Wherry Housing Project. The maximum return is fixed at $6\frac{1}{2}\%$, but, at no place in any of the agreements is there any guarantee that a sponsor will actually earn from the investment in a Wherry Housing Project the maximum of $6\frac{1}{2}\%$. These references to rental income and to matters in which Locke, under the specific terms of the October 4th Agreement, can have no interest are additional evidences of the constant appeal by respondent to bias, prejudice and passion. Respondent apparently believes that unless the Court is swayed by extraneous matters no judgment in favor of Locke can be sustained.

Respondent would like to be able to claim that he has an interest in this long term, speculative profit that might be earned by rentals. But that interpretation cannot be given to the agreement since by its specific terms such profit is eliminated. The language of the October 4th Agreement is entirely clear on this point (300 P. 2d p. 614):

"It is understood and agreed between the parties hereto that Locke has and shall have no interest in and to the ownership or the management of the projects hereinbefore mentioned or any of them, or in connection with any profits that may

be derived therefrom, it being the intention of the parties that the interest of Locke shall be limited to the construction of said projects or any of them as in the manner hereinbefore set forth."

In the main briefs and in the oral arguments before the Court the meaning of the October 4th Agreement was carefully considered and its provisions examined. The Court's interpretation of the Agreement is confirmed by all of the evidence which was presented. It will be recalled that after the Hill Field project had been commenced numerous calculations were made by Locke in connection with bids on other projects. These figures reveal his belief and understanding that under the terms of the Agreement the only time that he could earn a bonus would be if the housing projects were constructed for less than the amount of the mortgage.

The extreme language used in the brief of respondent and the inferences which are cast upon the integrity of the Court are shocking indeed and are absolutely unjustified in view of the record in this case or from any other standpoint.

At page 26 respondent states that Hutchinson, the F.H.A. expert, computed the amount of the compensation fixed in a lump-sum construction contract, and prepared the contract itself. It will be recalled that this document is the one under which respondent now claims he is entitled to recover a bonus payment. Hutchinson prepared the Agreement without consulting Locke or any of the

various Harsh Corporations and with only the thought in mind of arriving at a figure which would require the least amount of escrowed capital. This tends to prove that Locke did not expect that the lump-sum contract would in any way be important to him, nor would in any way govern the amount which he was to receive as a bonus. And it indicates that the figures on the lump-sum contract were not to be considered in calculating the rights of the various parties to the October 4th Agreement.

Before leaving the October 4, 1951 Agreement we cannot refrain from a brief reference to the tactics resorted to in respondent's petition and brief. Apparently counsel for respondent believe that by repeatedly referring to Schnitzer as a millionaire, as a thief, as a convicted and admitted perjurer, by calling him a slick and sharp financier he can arouse some form of passion and bias among the members of this Court and thus accomplish a reversal of this Court's previous well reasoned interpretation of the Agreement. These tactics, in our judgment, constitute an insult to this Court of the highest order and certainly reflect no credit on counsel for respondent.

We respectfully submit that the Court did not err in its construction of the contract of October 4th, 1951. The construction placed upon said contract is the only one which the application of logic and reason will permit.

POINT II.

NO CONSIDERATION NEED BE GRANTED TO THE QUESTION OF THE ACCOUNTING POINTS SET FORTH IN POINTS II, III AND IV OF RESPONDENT'S BRIEF SINCE IT IS UNDISPUTED THAT A CONSOLIDATED BALANCE SHEET WOULD REVEAL NO PROFIT.

The Court placed upon the October 4th, 1951 Agreement the proper interpretation. It concluded from its examination that the only time that respondent could be paid a bonus would be if the project at Hill Field were constructed at a cost of less than the proceeds from the mortgage, which would be profit from construction of the project. The undisputed testimony of the accountant for respondent was to the effect that if a consolidated balance sheet of Harsh Utah and Harsh Investment and Harold Schnitzer were considered no profit would result. It was clearly demonstrated that the mortgage adjustments would never result in sufficient sums to even pay the costs of the project: See Exhibits No. 201 and No. 190.

Respondent could not obtain a bonus until after 10% was paid to appellants over and above the construction costs. Since the cost of the project exceeded the amount of the mortgage proceeds it would be impossible for respondent to ever obtain a bonus.

At page 34 and 35 of respondent's brief, the attention of the Court is called to a hearing before the House

of Representatives under the Construction for the Military Department Investigation. Respondent recites that hypothetical averages show the Wherry Housing Project, if fully occupied, would be extremely profitable to the owners. The owner, he states, would realize many times his investment over the period of the seventy-five year lease. The information, of course, is concerned only with gross proceeds and does not take into account any costs of operation, interest on mortgages, amortization payments or depreciation expense which would be incurred in the operation of the Wherry Housing Project. The gross income figures themselves have no real meaning. They would not indicate either that the Wherry Housing Projects could be operated profitably or that they could not be so operated. From gross proceeds from rent the net proceeds cannot be determined.

Apparently respondent expects this Court to be so impressed by the total amount of gross proceeds from rentals of the Wherry Housing Project over a seventy-five year period that it would cease to consider the terms of the October 4th Agreement and ignore the provision that Locke would not have any interest in the ownership of the project. Having been thus persuaded respondent hopes that this Court would abandon the controlling matters in this action and award Locke a bonus because there is some speculation that the Wherry Housing Project might be profitable to appellants. Appellants suggest that such repeated attempts by respondent to divert the Court's attention from material matters and the repeated

recitations of matters calculated to engender heat but no light can only be the result of a lack of faith in the merit of his cause.

Under Point III respondent attempts to re-argue the point which he argued in his main brief to get the Court to adopt a false, fictitious and unrealistic sum as being the amount which was available to the appellants for the payment of change order extras. The only amount properly to be considered is the actual increase in the mortgage.

The Court has properly refused to adopt any fictitious or unrealistic figures in arriving at its decision. It has viewed the matter practically and has placed upon the agreement the practical interpretation which is the one dictated by reason and logic and the one the parties had before the dispute arose. A construction of the contract according to the terms contended for by respondent is manifestly contradictory to its plain terms when the contract is considered in the light of the surrounding circumstances and the situation of the parties at the time it was entered into.

At page 40 and 41 of the respondent's brief a statement is made that the Harsh Utah Corporation did not fully take over owner-manager responsibility for the project until January of 1955. This statement is entirely false. Also false is the statement that Harsh Utah Corporation did not commence to collect the rents or manage

the projects until the construction period of twenty-four months had expired. Exhibits No. 203 and No. 442 shows an operation by Harsh Utah Corporation from the date of the first rentals of any housing unit. Harsh Investment Corporation did not collect any of the rentals and at no time managed the project or rented it to individual tenants. The exhibits referred to show a continuous collection by Harsh Utah Corporation of rentals from the time when first rental units were ready for occupancy. As a consequence there were no income rentals ever realized by Harsh Investment Corporation. Rentals were collected solely by Harsh Utah Corporation.

At page 41 respondent again makes an effort to influence the Court to accept an oral modification of the October 4th Agreement. He attempts to convince it that in a casual conversation between Locke and Schnitzer, the written agreement was modified and Locke was given some right to participate in the profits of the rental units after they were constructed and turned over to the owner-management corporation. This argument has been made fully in the main briefs of appellant and answered in the brief of respondent. No income was realized from the construction of the project and the October 4th Agreement is specific in its terms that Locke is not entitled to participate in the income of or the ownership of the constructed units. Furthermore the conversation which is referred to was one concerning the profits on the Harsh Montana Wherry Housing Project. Nothing was ever said about the Harsh Utah Project.

This Court adopted the practical point of view common to business people in the construction of the Agreement. It has held that the contracting parties did not have in mind any theoretical profits or paper proceeds to be obtained from the construction project. What they had in mind was the obtaining of cash in hand. No one could possibly believe that the parties agreeing to a bonus out of profits would provide for it to be paid out of the private funds of one of the parties and become an added cost of the project to that party.

At page 33 of the respondent's brief he makes the statement that there would be a tax free rental profit for the first ten years of the seventy-five year lease amounting to \$375,985.00 as a minimum. There is no tax free provision in any of the Wherry Housing acts, rules or regulations. Every cent of income earned by Harsh Utah Corporation or earned by Harsh Investment Company, and every cent of income Schnitzer individually earns would be subject to the regular income tax provision. If the Hill Field Project had turned out to be profitable, which is not the case, this would not be a matter of concern to respondent. The specific terms of the October 4th Agreement, as has been repeatedly pointed out, do not permit Locke to share in the ownership or the rental earnings of the corporations. The only purpose for a repeated recitation of matters of this kind is to attempt to divert the Court from the matters which are material to its consideration.

It is respectfully submitted that the Court's opinion is clear, concise, carefully written and is one which completely covers the problems presented to it on appeal. It results in a fair, equitable and dispassionate solution.

CONCLUSION

It is respectfully submitted that the petition for rehearing and re-argument filed by the respondents be denied and the decision of the Court permitted to remain as now written.

Respectfully submitted,

RAWLINGS, WALLACE
ROBERTS & BLACK
DWIGHT L. KING
*Counsel for Defendants and
Appellants*