

1956

Walter W. Sprague and United States Fidelity & Guaranty Company v. Boyles Bros. Drilling Company : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

APR 2 - 1908

WALTER W. SPRAGUE and UNITED
STATES FIDELITY & GUARANTY
COMPANY, a corporation,

Respondents,

v.

BOYLES BROS. DRILLING COM-
PANY, a corporation,

Appellant.

Clerk, Supreme Court, U.

Case No.
8351

PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

GRANT H. BAGLEY,
GRANT MACFARLANE, JR.,
For

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,

Attorneys for Appellant.

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PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

COMES NOW, Boyles Bros. Drilling Company, Appel-
lant, and respectfully petitions this honorable court for a
rehearing and re-argument in the above entitled case. This
petition is based upon the following grounds:

POINT I.

THE MAJORITY OPINION OF THIS COURT
IS FOUNDED UPON A MISTAKEN ASSUMP-
TION AS TO THE FINDINGS OF THE TRIAL
COURT.

POINT II.

THE COURT OVERLOOKED THE APPELLANT'S COUNTERCLAIM AND THE UNCONTRADICTED EVIDENCE IN SUPPORT OF IT.

POINT III.

THE MAJORITY OPINION OF THIS COURT DOES NOT CONSIDER RESPONDENT'S FAILURE TO COMPLY WITH THE TERMS OF THE CONTRACT FROM SEPTEMBER 21, TO OCTOBER 5, 1950.

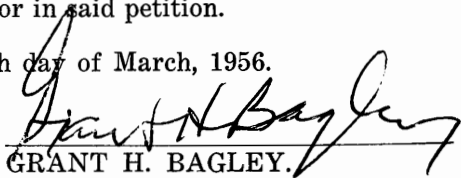
WHEREFORE, petitioner prays that the judgment and opinion of the court be re-examined and a re-argument permitted of the entitled case.

A brief in support of this petition is filed herewith.

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
*Attorneys for Appellant
and Petitioner.*

GRANT H. BAGLEY, hereby certifies that he is one of the attorneys for the petitioner, and that in his opinion there is good cause to believe that the judgment objected to is erroneous, and that the case ought to be re-examined and re-argued as prayed for in said petition.

DATED this 30th day of March, 1956.


GRANT H. BAGLEY.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

THE MAJORITY OPINION OF THIS COURT IS FOUNDED UPON A MISTAKEN ASSUMPTION AS TO THE FINDINGS OF THE TRIAL COURT.

For the purpose of this petition and brief, we accept the conclusion of the majority opinion that the memorandum decision may be considered as supplementing the findings of fact.

The majority opinion, however, entirely overlooks the finding in the memorandum decision that the cost to Sprague of breaking the additional rock required was less than Sprague agreed to pay Boyles. We quote from the memorandum decision:

“The evidence reveals the breaking of rock by Sprague after Boyles quit, *cost 45.5 cents per ton for the 5,485 tons broken by him*, or \$4,495.55 which shows a cost incurred by Sprague which, had it been done under the contract with Boyles would be \$4,632.80, *a saving to Sprague of \$137.54*” (R. 22).

Not only does the majority opinion ignore this finding, but assumes that a finding in direct conflict thereto was made.

The major item of damage which Sprague sought to recover was the cost to him of breaking rock after Boyles left the quarry on October 5, 1950. It is elementary that

Sprague was not, in any event, entitled to recover the cost of breaking rock after Boyles left the quarry, unless such cost exceeded what he agreed to pay Boyles under the contract. This is especially true in view of the provisions of the contract to the effect that if Boyles did not break the rock in time, Sprague could hire such men and equipment as was necessary to get the work done on time, and charge the same to Boyles. The majority opinion recognizes this principle of law.

The finding in the memorandum decision that the contract price was more than it cost Sprague to break the additional rock is fully supported by the evidence. It is reasonable in view of the fact that the price fixed by Boyles undoubtedly was intended to produce a profit.

The majority opinion states:

“From the trial judge’s *memorandum opinion* it appears that he specifically based his award on the amount Sprague had to expend on rock *over and above the 48 cents per ton* he would have had to pay Boyles under the contract.”

We respectfully submit that there is nothing whatever in the memorandum opinion which justifies this conclusion. On the contrary, the finding above quoted to the effect that it cost Sprague only forty-five cents a ton to break the additional rock stands unmodified and unqualified by a single word.

Nor is there anything in the findings of fact which contradicts or modifies this finding. Under these circum-

stances the finding is binding upon this court and requires that the principal award of damages against Boyles be set aside.

POINT II.

THE COURT OVERLOOKED THE APPELLANT'S COUNTERCLAIM AND THE UNCONTRADICTED EVIDENCE IN SUPPORT OF IT.

The trial court found that Boyles broke 9,799 tons of rock into the sizes specified by the contract, for which it was entitled to recover the sum of \$4,703.52, the contract price of forty-eight cents per ton. Admittedly, only \$4,392.00 of this amount was paid, leaving a balance of \$311.52 due Boyles. It is further admitted that Sprague sold to Mathews 1,000 tons of rock that had been broken by Boyles. Sprague received \$1,000.00 for this rock, and was willing that Boyles should receive this amount. Boyles was therefore entitled to \$1,311.52, plus a reasonable attorney's fee. Even allowing Sprague to change his mind about awarding Boyles the \$1,000.00 for the rock which Sprague sold for that amount, he still was bound under the contract to pay at least forty-eight cents per ton for it. In any event, Boyles was entitled to recover \$792.00, with interest, and also a reasonable attorney's fee.

POINT III.

THE MAJORITY OPINION OF THIS COURT DOES NOT CONSIDER RESPONDENT'S FAILURE TO COMPLY WITH THE TERMS OF THE

CONTRACT FROM SEPTEMBER 21, TO OCTOBER 5, 1950.

The contract upon which this suit is based requires Sprague to furnish "sufficient compressed air to efficiently operate Boyles Drills."

The majority opinion underestimates the importance of this covenant, and overlooks the uncontradicted evidence which discloses a complete and total breach of it following the breakdown of the large compressor on September 21.

It was utterly impossible for Boyles to break rock into any size without compressed air. It is not an exaggeration to say that the furnishing of compressed air was the most vital element of the contract. Not only was the rental cost of an air compressor a very substantial item (\$400 to \$800 per month), but it was extremely difficult to get a suitable machine in the vicinity of the quarry. Sprague's superintendent contacted "*every equipment house and contractor or anybody who I thought might have a compressor or know of a compressor through the State and two surrounding states, trying to locate a compressor and I sat on the phone for hours and hours calling*" (R. 412). It is inconceivable that Boyles would have undertaken to break this rock out of the wall of the canyon into the chips specified by the contract for the sum of forty-eight cents per ton had it not obtained the covenant of Sprague to furnish compressed air.

Even if we forgive Sprague's breach of covenant to furnish compressed air prior to September 21, we still have the undisputed fact that there was a total breach of this

covenant between September 21, when the Bergraph compressor broke down beyond repair, and October 5, when Boyles finally left the quarry. It was following this breakdown that Sprague's superintendent made the frantic efforts above quoted to replace the Bergraph compressor.

How can it be said in the face of these uncontroverted facts, that Boyles was not legally justified in abandoning the work on October 5? Should it have kept its men and equipment idle in the quarry for two years instead of two weeks while Sprague's superintendent was contacting the equipment houses in the remaining forty-five states of the Union?

Sprague's superintendent realized the significance of Sprague's covenant to furnish compressed air, even though the majority of this court does not. Immediately after the Bergraph compressor broke down he was "aware of the fact that we must have a compressor" (R. 414). He had the Bergraph compressor returned to its owner with the request that "they repair it *immediately*" (R. 411). Since it was beyond repair he scoured the western states to find a replacement. He was not successful. Meanwhile, Boyles stood by with its men and equipment for more than two weeks ready, able and willing to complete its terms of the contract.

That the majority of the court has overlooked the total breach of the covenant to furnish compressed air after the Bergraph compressor broke down on September 21, and the

legal consequences of such breach is indicated by the following portion of the opinion:

“* * * there was testimony that a substantial portion of the longest period of deficiency complained of, that is, between December 20, 1949, and February 3, 1950, occurred before the contract was formally executed by the parties late in January. This indicates that this so-called failure was not of any grave concern to the Boyles. They having signed the contract thereafter, the trial court could reasonably believe that they had waived any such failure and were in no position to complain of it.”

Of course, Boyles, could not rely upon Sprague's failure to furnish compressed air between December 20, 1949, and February 3, 1950, as a justification for its failure to break the required amount of rock, because it resumed the breaking of rock after the surety company came to Sprague's rescue. Boyles has never contended that Sprague's breach of the contract during that period justified it in abandoning the work on October 5. What it does contend is that Sprague's failure to furnish compressed air after September 21, justified it in quitting the job on October 5.

We respectfully submit that a rehearing of this cause should be granted to the end that a serious error of law may be corrected.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,

Attorneys for Appellant.