

1981

Highland Construction Co. v. LaMar D. Stevenson et al : Brief of Respondents in Support of Petition for Partial Rehearing

Utah Supreme Court

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HIGHLAND CONSTRUCTION COMPANY,
a Utah corporation,

Plaintiff and Appellant,

vs.

LaMAR D. STEVENSON d/b/a LaMAR
D. CONSTRUCTION COMPANY, UNITED
STATES FIDELITY AND GUARANTY
COMPANY, a Maryland Corporation,
and SHELL OIL COMPANY, a
Delaware corporation,

Defendants and Respondents.

Civil No. 17099

LaMAR D. STEVENSON d/b/a LaMAR D.
CONSTRUCTION COMPANY,

Third-Party Plaintiff,

vs.

THE STATE OF UTAH and THE UTAH
STATE DEPARTMENT OF
TRANSPORTATION,

Third-Party Defendants.

RESPONDENTS' BRIEF
IN SUPPORT OF PETITION FOR PARTIAL REHEARING

Appeal from the Judgment of the Fourth District Court
for Duchesne County, Honorable Allen B. Sorenson, Judge

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SEP 17 1981

Clerk, Supreme Court, Utah

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STATE DEPARTMENT OF)
TRANSPORTATION,)
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RESPONDENTS' BRIEF
IN SUPPORT OF PETITION FOR PARTIAL REHEARING

Respondents, LaMar D. Stevenson (hereinafter referred to as "Stevenson" or "petitioner") and United States Fidelity and Guarantee Company (hereinafter referred to as "USF&G" or "petitioner") hereby submit the following brief in support of their petition for partial rehearing:

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RESPONDENTS' BRIEF
IN SUPPORT OF PETITION FOR PARTIAL REHEARING

Respondents, LaMar D. Stevenson (hereinafter referred to as "Stevenson" or "petitioner") and United States Fidelity and Guarantee Company (hereinafter referred to as "USF&G" or "petitioner") hereby submit the following brief in support of their petition for partial rehearing:

STATEMENT OF NATURE OF CASE

Petitioners concur in the statement of nature of case previously set forth in the briefs filed in this action.

DISPOSITION IN DISTRICT COURT

Petitioners concur in the statement of the disposition in the district court previously set forth in the briefs in this case.

RELIEF ON SOUGHT ON PETITION FOR REHEARING

Petitioners petition the Court to set aside the portion of its judgment on appeal awarding attorney's fees in favor of Highland against Stevenson. Petitioners further petition the Court to allow (either by remand to the trial court or by providing for the supplementation of the record on appeal) for full consideration of the facts relating to the issue of whether, under the law as set forth in this Court's decision in this case, Highland is entitled to be awarded attorney's fees against Stevenson.

STATEMENT OF FACTS

In this Court's decision filed in this case on August 28, 1981, this Court affirmed the judgments of the trial court rendered in favor of petitioners and against Highland. However, in spite of such affirmance, this Court went on to award attorney's fees (in an amount to be determined by the trial court) against Stevenson in favor of Highland. The award was

based on both legal and factual findings by this Court. The legal determination was that a general contractor, who admits that a sum is owing but wrongfully refuses to make payment of such sum until after suit is filed against him, may be held liable for attorney's fees incurred up to the time of payment under UTAH CODE ANN. 1953 § 14-1-8. The factual determinations were that in the instant case Stevenson did owe Highland \$10,378, that he admitted owing such sum, and that he wrongfully withheld payment until 164 days after suit was filed.

ARGUMENT

Petitioners acknowledge and recognize this Court has the supreme judicial authority in this state possessing the authority and right to make the ultimate interpretation of the laws of this state. On legal issues this Court has the final and ultimate word and petitioners do not seek, by this petition, to challenge that well-established principle. Accordingly, even though petitioners may not agree with this Court's interpretation of UTAH CODE ANN. 1953 § 14-1-8 providing that a contractor who admits that a sum is owing but wrongfully refuses to make payment of such sum until after suit is filed against him may be held liable for attorney's fees up to the time of payment, it recognizes this Court's ultimate authority to make that determination of law. By this petition, petitioners do not challenge this Court's findings on the law or seek rehearing of the legal issues. Petitioners accept and consider themselves bound by the announcement of law

as set forth in the decision.

However, this Court, in its decision, not only announced the aforesaid principle of law, but also made the factual determination that the facts of the instant case brought it within the announced principle of law. It is generally not this Court's role to make factual determinations and, in the instant case, the factual findings made by this Court were made in error and will work a substantial injustice and a denial of due process of law if not corrected.

POINT I. THE COURT WAS MISLED AS TO THE RELEVANT FACTS AND ITS FACTUAL DETERMINATIONS ARE IN ERROR.

On page 6 of its decision, the Court made the following express factual determinations:

A. That Stevenson admitted that he owed and voluntarily paid Highland \$10,300.78.

B. That such payment was not made until 164 days after the action was filed.

Essential to the Court's decision on this issue were also the following implicit factual determinations:

C. That the amount paid was in fact legally owing by Stevenson to Highland.

D. That it was owing for the entire 164 days.

E. That no prior tender of an equivalent or greater amount had previously been made by Stevenson to Highland.

If supplementation of the record is allowed as set forth in petitioners' Motion to Supplement the Record on Appeal filed

herewith, or if the case is remanded and an evidentiary hearing is conducted by the court below, it will be demonstrated that the foregoing express and implicit findings of fact are in error.

Because Highland did not pursue the issue of attorney's fees in the trial court, the supporting and countering evidence on that issue has never been presented and is not in the record sent up on appeal. (Since it was Highland's claim, petitioners did not consider it their obligation to present countering evidence on the issue, when Highland did not even attempt to pursue it in the court below.) Recognizing the well-established rule that it is improper to argue facts on appeal which are not contained in the record, petitioners made no attempt to present the countering evidence by way of responding brief when Highland raised the issue for the first time on appeal. Petitioners simply relied (justifiably) on the rule that matters not presented below would not be considered by this Court. (See p. 40 of Respondents' Brief.) Petitioners considered themselves bound by the time-honored rule and believed, in good faith, that the Court would also consider Highland to be so bound.

Apparently, this Court drew an inference from petitioners' failure to argue countering facts that petitioners did not contest the assertions made by Highland in their brief and that the facts set forth above were true. The net result of this situation and the decision of appeal is to penalize petitioners for having acted properly in following the rule, while rewarding Highland for disregarding it. Such a result seems to

be clearly contrary to sound judicial policy. It will encourage parties to raise matters on appeal which were not raised below and will force responding parties to respond on the merits of the new issues raised. If the portion of the instant decision in inviting the raising of new issues on appeal (something which it has long forbidden) and will be encouraging the cluttering of appellant briefs with matters extraneous to the record.

Although petitioners recognize the impropriety of arguing facts not in the record, they are, as a result of the decision in this case, now forced to do so. Accordingly, petitioners respectfully submit that if they are allowed the opportunity to present the facts relevant to the issue in question, such facts will demonstrate:

A. That on December 30, 1976, before any legal action was taken by Highland, Stevenson tendered the sum of \$10,610.80 to Highland. That tender was made way of a letter and a check (attached as Exhibit A to petitioners' Motion to Supplement the Record on Appeal).

B. Highland rejected the tender of \$10,610.80 and demanded \$68,757.73.

C. As a condition to Highland's being entitled to payment from Stevenson, it was required to supply lien waivers and to provide a detailed itemized breakdown of its claims as required by the contract documents. Although Highland did subsequently supply lien waivers, it refused to provide the contractually required breakdown and itemization. (See Exhibits B and C

be clearly contrary to sound judicial policy. It will encourage parties to raise matters on appeal which were not raised below and will force responding parties to respond on the merits of the new issues raised. If the portion of the instant decision in question is allowed to stand unmodified, this Court will be inviting the raising of new issues on appeal (something which it has long forbidden) and will be encouraging the cluttering of appellant briefs with matters extraneous to the record.

Although petitioners recognize the impropriety of arguing facts not in the record, they are, as a result of the decision in this case, now forced to do so. Accordingly, petitioners respectfully submit that if they are allowed the opportunity to present the facts relevant to the issue in question, such facts will demonstrate:

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B. Highland rejected the tender of \$10,610.80 and demanded \$68,757.73.

C. As a condition to Highland's being entitled to payment from Stevenson, it was required to supply lien waivers and to provide a detailed itemized breakdown of its claims as required by the contract documents. Although Highland did subsequently supply lien waivers, it refused to provide the contractually required breakdown and itemization. (See Exhibits B and C

to Petitioners' Motion to Supplement the Record on Appeal.)

D. That based on the agreement between the parties, Stevenson was not required to make payments to Highland until the Department of Transportation made payments to him for work performed by Highland. As the Department of Transportation made progress payments to Stevenson, Stevenson promptly made payment to Highland of the amounts owing to Highland reflected in such progress payments.

E. The voluntary payment made by Stevenson to Highland on December 19, 1977, of \$10,300.78 did not reflect amounts due to Highland prior to that time, but was made because the Department of Transportation had made a payment to Stevenson of \$11,328.67 on December 1, 1977. The cover letter sent with that payment and a subsequent letter between counsel, make it explicitly clear that the payment was not made as an admission of liability. (See Exhibits D, E and F attached to Petitioners' Motion to Supplement the Record on Appeal.) Both petitioners' counsel, Roger P. Christensen, and Bruce Maak, who was counsel for Highland for the period in question, will testify that it was expressly understood that such payment was in no way to be construed as an admission of liability by Stevenson.

F. The facts will also demonstrate that the amounts reflected in the \$10,300.78 payment were not, in fact, owing by Stevenson to Highland. The trial court ultimately found that Highland's claims were without merit. Based on this ultimate determination of the dispute, such sums should never have been

paid by Stevenson to Highland.

Based on the foregoing, it is respectfully submitted that this Court was misled as to the actual facts (which unfortunate occurrence was made possible by the lack of evidence in the record), that its factual findings are in error, that such findings should be set aside and decision on that issue should be made only after petitioners are afforded a full and fair opportunity to present and be heard on the relevant facts.

POINT II. PETITIONERS ARE ENTITLED, UNDER THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS, TO A FULL AND FAIR EVIDENCIARY HEARING.

The fourteenth amendment of the United States Constitution and section 7 of article I of the Constitution of the State of Utah both provide that no person shall be deprived of property without due process of law. This Court has long recognized that it is fundamental to due process to allow a party an opportunity to be heard on the relevant facts before a factual judgment is made. In the case of Christiansen v. Harris, 163 P.2d 314 (Utah 1945), this principle was stated as follows:

Many attempts have been made to further define "due process" but they all resolve into the thought that a party shall have his day in court--that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or his defense, after which comes judgment upon the record thus made.

Id. at 316.

In Gribble v. Gribble, 583 P.2d 64 (Utah 1978), this

Court stated, "Implicit in the due process clause of our state Constitution is that persons be afforded a hearing to determine their rights under the law." Id. at 867.


Due to the fact that the issue of Stevenson's liability for attorney's fees was not pursued below, an evidentiary hearing on that issue has not been conducted. As stated above, petitioners have a constitutional right to have such a hearing and it is respectfully submitted that the opportunity for such a hearing should be afforded either in this Court or in the court below before a judgment on Stevenson's liability is made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the portion of this Court's decision granting judgment in favor of Highland and against Stevenson for attorney's fees be set aside and the parties allowed an evidentiary hearing to determine whether, under the facts of this case and the applicable law as set forth in the Court's decision, Stevenson is liable to Highland for such fees.

DATED this 17th day of September, 1981.

CHRISTENSEN, JENSEN & POWELL

By 
Roger P. Christensen
Attorneys for Respondents
Stevenson and USF&G

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of September, 1981, a true and correct copy of the foregoing Respondent's Brief was mailed, postage prepaid to the following:

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A handwritten signature in black ink, appearing to read "Roger Hirschi", with a long horizontal line extending to the right.