

1981

Highland Construction Co. v. LaMar D. Stevenson et al : Petition for Partial Rehearing

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Highland Construction Co. v. Stevenson*, No. 17099 (Utah Supreme Court, 1981).

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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.

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.

FILED

SEP 17 1981

Clark, Supreme Court, Utah

PETITION FOR PARTIAL
REHEARING

Civil No. 17099

Pursuant to Rule 76(e), Utah Rules of Civil Procedure, the Respondents, LaMar D. Stevenson (hereinafter "Stevenson"), and United States Fidelity and Guaranty Company (hereinafter "USFG"), hereby petition the court for partial rehearing as follows:

1. For rehearing on the factual issue of whether Highland was entitled to be awarded attorney's fees against Stevenson. With respect to that issue, respondents petition the court:

a. To grant petitioner's Motion to Supplement the Record on Appeal and allow all facts relevant to said issue to be presented and considered; and

b. To set aside the portion of the judgment on appeal awarding attorney's fees to Highland, deferring judgment on that issue until after a full and fair hearing of all the facts relevant to that issue, with said hearing to be conducted by supplementation of the record on appeal; or

c. In the alternative, to remand this case to the trial court for a hearing not only on the issue of the amount of fees owing, but also for an evidentiary hearing on the issue of whether, under the facts of this case, (and applying the law as set forth in this Court's decision in this case), Highland is entitled to an award of fees against Petitioners.

2. The grounds for this motion are:

a. The decision of this Court, awarding attorney's fees to Highland, is based upon a factual determination, expressed by the Court on page 6 of its Opinion as follows:

Highland claims to be the "prevailing party" because 164 days after it filed this action and while this action was pending in the court below, Stevenson admitted that he owed and he voluntarily paid Highland \$10,378.00 of the amount it was suing for. In view of that payment after the action was started, Highland was "the prevailing party" with regard to that cause of action.

This Court was misled in making the factual determinations both explicit and implicit in the above statement. In order for the court to make the above determination, it found or assumed the following facts to be true:

a. That the \$10,378.00 paid by Stevenson to Highland after the action was commenced, was owed by Stevenson to Highland.

b. That Stevenson admitted that the amount was owing.

c. That Stevenson had no legal right to withhold the money until the time that it was paid.

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

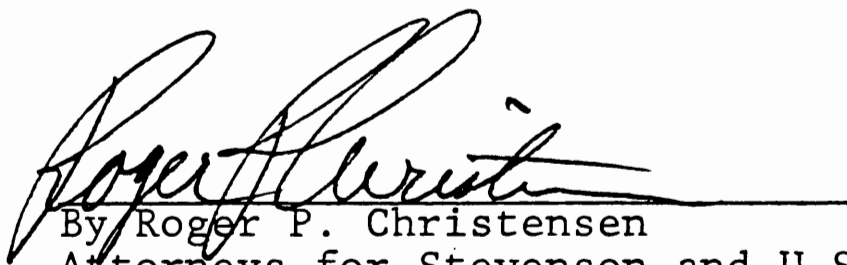
As will be made evident by the facts at an evidentiary hearing on this same issue, all of the above factual findings are erroneous and contrary to the actual facts. Since the issue was not pursued by Highland in the trial court, the facts relating to the issue have never been presented or considered, are not in the record, and this Court's reaching of factual conclusions, without having the material and relevant facts before it in the record, was in error and prejudicial to petitioners.

Considering themselves bound by the well-established rules that an issue cannot be raised for the first time on appeal, and that facts which are not in the record should not be referred to in a brief in appeal, Petitioners did not attempt to present the facts countering the position taken by Highland on this issue, in their responding brief. In fact, it would have been improper for them to have done so.

The effect of this Court's making of factual determinations, without support in the record of this case and without Petitioners being afforded the opportunity to present evidence on such factual questions constitutes a taking of the property without due process of law in violation of both State and Federal Constitutional rights.

DATED this 17th day of September, 1981

CHRISTENSEN, JENSEN & POWELL

A handwritten signature in dark ink, appearing to read "Roger P. Christensen", is written over a horizontal line.

By Roger P. Christensen
Attorneys for Stevenson and U.S.F.&G.

CERTIFICATE OF SERVICE

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

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A handwritten signature in black ink, appearing to read "Ray G. Martineau", is written over a horizontal line.