

1981

# Highland Construction Co. v. LaMar D. Stevenson et al : Appellant's Opposition to Respondent's Petition for Partial Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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HIGHLAND CONSTRUCTION COMPANY, a Utah  
corporation,

Plaintiff-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,

Defendant-Respondent,

Case 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 Defendant.

---

APPELLANT'S OPPOSITION TO RESPONDENT'S PETITION  
FOR PARTIAL REHEARING

---

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

---

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APPELLANT'S OPPOSITION TO RESPONDENT'S PETITION  
FOR PARTIAL REHEARING

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Appellant, Highland Construction Company ("Highland"),  
respectfully submits this opposition to the petition of respon-  
dents, LaMar D. Stevenson ("Stevenson") and United States  
Fidelity and Guaranty Company ("USF&G"), for partial rehearing.



## STATEMENT OF THE CASE

By decision filed August 28, 1981, this Court affirmed the judgment of the trial court in part, but remanded with directions for the trial court to fix and award a reasonable attorney's fee in favor of Highland for legal services incurred in bringing and maintaining its action until Stevenson made payment to Highland of \$10,300.78.

The issue of Highland's right to attorney's fees was fully briefed to this Court based on factual references to the record. (Appellant's Brief on Appeal at 30-32.) Respondents, in their original appellate brief, vigorously opposed the Highland arguments on the issue of attorney's fees, but they did not dispute the factual premises pertaining thereto set forth in the Highland brief. (Respondents' Brief on Appeal at 38-41.)

In their petition for partial rehearing, Respondents are for the first time alleging that Highland's account of the facts underlying the attorney's fees issue was inaccurate.

### ARGUMENT

POINT I: THIS COURT'S RULING WAS BASED ON THE RECORD -- NOT ON INDEPENDENT FINDINGS OF FACT.

In their Brief in Support of Petition for Partial Rehearing, Respondents assert that this Court made "findings of fact" with regard to Highland's right to attorney's fees. That simply is not correct.



In rendering its determination on Highland's appeal, this Court applied the law to the facts as they appeared from the record and as set forth in the briefs of the parties. The recitations of fact contained in this Court's opinion of August 28, 1981 are entirely supported by the briefs of the parties and appropriate undisputed references to the record. (See Appellant's Brief on Appeal at 31.) Where conflicting statements of fact were presented by the parties to this appeal, the Court consistently limited its review to a determination that the findings of the trial court were adequately supported by the evidence. At no time did this Court make an independent resolution of a contested matter of fact, and the assertions of Respondents to the contrary are without substance.

POINT II:       RESPONDENTS ARE NOW PRECLUDED FROM RAISING THE ISSUES ADVANCED IN THEIR PETITION FOR PARTIAL REHEARING BY THEIR FAILURE TO ARGUE THOSE POINTS IN THE EARLIER PROCEEDING BEFORE THIS COURT.

At the time Respondents filed their original brief with this Court they were fully aware of the statements of fact made by Highland in support of Highland's argument on the issue of attorney's fees. Respondents raised legal arguments in opposition to Highland on that point, but Respondents never challenged the factual premises set forth by Highland. In their petition for rehearing, Respondents are for the first time contesting Highland's account of the facts.

Highland maintains that the factual statements set forth in its earlier brief filed with this Court are entirely accurate and supported by the record. In any event, however, if Respondents disagreed they were obligated to set forth the nature and basis of their dispute in their answer brief, and thus apprise this Court of the issue. Respondents chose not to raise any such issue to this Court originally, and they should not be heard to do so at this late juncture.

It is a widely recognized rule of law that parties should not be permitted to litigate appellate issues in piecemeal fashion, and that new issues will not be considered on rehearing which could have been raised earlier. Associated Engineers & Contractors, Inc. v. State of Hawaii, 568 P.2d 512 (Haw. 1977); Blackman v. MacCoy, 339 P.2d 169 (Cal.App. 1959); Smith v. Crocker First National Bank of San Francisco, 314 P.2d 237 (Cal.App. 1957); State of Alaska v. McCracken, 520 P.2d 787 (Alaska 1974).

The Respondents had the opportunity during the prior proceedings before this Court to argue the point now raised for the first time in their petition for partial rehearing. The Respondents elected not to raise those points at that time, and they should not be heard to do so now. The Respondents have had their day in court, and the matter should now be put to rest.

CONCLUSION

For the foregoing reasons, the petition of Respondents for partial rehearing should be denied.

DATED this 13<sup>th</sup> day of October, 1981.

MARTINEAU, ROOKER, LARSEN & KIMBALL

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the Appellant's Opposition to Respondent's Petition for Rehearing to be delivered to the following by depositing the same in the United States Mail, first class postage prepaid, addressed to:

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DATED this 13<sup>th</sup> day of October, 1981.

  
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