

1958

# Huber & Rowland Construction Co. v. City of South Salt Lake : Brief of Respondent

Utah Supreme Court

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Lowry, Kirton & Bettilyon; Wilford W. Kirton, Jr.;

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# In the Supreme Court of the State of Utah

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HUBER & ROWLAND CONSTRUCTION  
CO.

*Plaintiff and Appellant,*

vs.

CITY OF SOUTH SALT LAKE

*Defendant and Respondent.*

No.  
8766

## RESPONDENT'S BRIEF

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

The Respondent disagrees with the Appellant's Statement of Facts for the reason that many of the facts set forth in Appellant's Brief are not supported by the record. This case was tried to the Court below and from the evidence the Court rendered Findings of Fact and Conclusions of Law and, thereupon, entered its Judgment and Decree. The appeal which is before the Court has for its record only the pleadings in the Court below, the Findings of Fact, Conclusions of Law and

Judgment and Decree in addition to one of the Exhibits introduced into evidence at the trial designated as Plaintiff's Exhibit No. 1, which is a written agreement by and between the Parties hereto. The only facts, therefore, before this Court are those as set forth in the Findings of Fact and as set forth in Plaintiff's Exhibit No. 1.

These facts are as follows: The Appellant entered into a written contract with the Respondent incorporating plans and specifications admitted into evidence as Plaintiff's Exhibit 1 and 2. Therein, Appellant agreed to construct curb and gutter and sidewalk for the Respondent, known as South Salt Lake Special Improvement District No. 5. In connection therewith, 64,904 square feet of existing sidewalk was removed by the Appellant as required by the contract, and it was paid 75 cents per cubic yard for all sidewalk thus removed. The Court found there was no trade, practice or custom in the construction industry requiring a construction of the written contract embodied in Plaintiff's Exhibit 1 which was different from or in modification of the written contract. The Court further found that the Plaintiff's Exhibit 1 set forth the bid price per unit of work to be done as shown in the proposal.

From these Findings of Fact, the Court concluded that sidewalk removal was part of the excavation work covered by the Contract and that the Appellant had been properly paid therefor. As a result, judgment was entered in favor of the Respondent "no cause of action."

There are also various sections of the specifications which are vital to the issues here involved. The first of these is Section 2.2.1.

*"Definition.* General excavation shall include the performance of all operations necessary in the excavation of earth and rock of whatever kind from areal excavations, street sections; to excavate ditches, channels and borrow pits; to excavate for reservoirs and water basins, building foundations or basements, fill depressions and build embankments and dikes to the dimensions and at the locations shown on the plans or as directed by the Engineer; to construct the subgrade for all types of street pavements, including sidewalks, curb and gutter, driveways, etc., to excavate for and backfill around waterways and culverts, and all incidental work of whatever nature necessary to complete the work in accordance with the plans and these specifications."

Other sections are as follows:

2.4.1. *"Description.* Structural excavation shall include the performance of all operations incidental to the excavation of earth and rock, of whatever kind, for structures on this project. It shall include backfill and embankment of excavated material, the disposal of all material not required, or not suitable for backfill or embankment, and the cleanup and restoration of surfaces except as hereinafter specifically provided."

2.4.2. *"Classification.* All structural excavation shall be unclassified."

1.4.4. *"Extra Work.* New or unforeseen items of work found to be necessary, and which cannot be covered by any item or combination of items for which there is a contract price, shall be classed as 'Extra Work.' The Contractor shall do such extra work and furnish such materials as may be required to complete fully the whole work contemplated upon written order of the Engineer. In the absence of such written order no claim for 'Extra Work' shall be considered."

There are also two paragraphs of the Contract itself to which the Respondent invites the attention of the Court. They are as follows:

"1. SCOPE OF WORK: The Contractor shall perform everything required to be performed, shall provide and furnish all labor, tools and equipment, and shall furnish and deliver all materials so specifically stated as being furnished by the Owner, to complete all the work necessary to construct Special Improvement District No. 5 in the South Salt Lake City, Utah in the best and most workmanlike manner, and in strict conformity with the provisions of this Contract, the Instructions to Bidders, the Proposal and the Plans and Specifications. The Plans and Specifications, the Instructions to Bidders, and the Proposal are hereby made a part of this Agreement as fully and to the same effect as if the same had been set forth in the body of this Agreement."

"8. CONTRACT PRICE: The Owner shall pay the Contractor, as full consideration for the performance of this Contract, the contract unit bid price per item, as shown in the Proposal, for the quantities of work actually performed."

There are other provisions of the Contract which are only incidentally helpful as to the issue here involved, but Respondent has called to the Court's attention those items which it feels bears directly upon these issues.

## ARGUMENT

The only error claimed by the Appellant to have been made by the Court below was as to its interpretation of the Contract. It is claimed that the Court below was required to construe

the Contract in favor of the Appellant as a matter of law. On page three of the Brief of the Appellant at the beginning of the last paragraph, the Appellant specifically states that it accepts the Findings of Fact of the trial court as being correct. Even though Appellant has no quarrel with the Findings of Fact, it contends that the Court below upon making such findings was required, as a matter of law, to construe the Contract in its favor.

On page two of Appellant's Brief, it contends that an item of sidewalk removal was omitted from the proposal either through inadvertence or mistake. There is nothing before the Court to support this contention. There is no Finding of Fact nor any other evidence from which the Court on appeal could consider the question of whether an item necessary to the Contract had been omitted by inadvertence or mistake. The whole argument of the Appellant assumes that the Contract is not complete because specific reference is not made therein to sidewalk removal. There is no evidence before this Court, however, that the Contract is incomplete or in any way defective because it did not make specific provision for sidewalk removal as a separate item.

The Court had before it evidence from which it made one of its Findings of Fact which was specifically that there was no trade practice or custom in the construction industry requiring a construction of the contract different from or in modification of the written contract. This was a vital issue in the trial of this cause in the court below. It was argued by the Appellant that the Contract was incomplete and did not cover the agreement of the parties. The Court carefully

analyzed all provisions of the Contract, discovered that there was a considerable amount of excavating to be done which was performed under the terms of the Contract and for which payment was made and received by the Appellant, all of which included the sidewalk removal as well as all other matters excavated. From all the evidence, the trial court found that the written agreement covered the agreement of the parties with respect to sidewalk removal as well as all other matters and that the Appellant had been properly paid therefor.

Throughout Appellant's brief, extensive argument is made to prove that sidewalk removal was a part of the excavation work included within the terms of the Contract. Further, the Appellant himself contends that removal of old sidewalk was necessary to establish proper grades for the new sidewalk. It was, therefore, clear to the Appellant when it was preparing its bids and before the Contract was let that the sidewalk removal actually accomplished would be necessary in connection with the performance of the contract. From a reading of Section 2.4.2., it is clear that also Appellant knew that the structural excavation was *unclassified*. It, in fact, removed the sidewalk and was, in fact, paid for the sidewalk which was removed. The Appellant does not claim otherwise, except to say that it was not paid a proper amount for the sidewalk which was removed. It claims that there must be extra compensation for this particular kind of work.

There is no evidence before this Court that there was to be any extra compensation made for the removal of sidewalk. But even assuming that sidewalk removal constituted extra work to be performed under the Contract, then and in that

event, Section 1.4.4. is brought to bear upon this case. From a careful reading of this section as set forth in Respondent's brief, it will be seen that new or unforeseen items of work found to be necessary and which cannot be covered by any item or any combination of items for which there is a contract price shall be classed as extra work. The section then goes on to say that the contractors shall do the extra work and furnish such extra materials as may be required upon *written order of the engineer*. In the absence of such written order, no claim for extra work shall be considered. There is no evidence before the Court in this case that sidewalk removal was extra work. But even assuming this to be so, there is no evidence before the Court that the engineer made any written order for such extra work. Under the specific provisions of the Contract, in the absence of such a written order, no claim for extra work is to be considered. These provisions of the Contract were specifically before the Appellant. If during the course of the construction of this Contract, Appellant found itself disgruntled and desired to claim extra compensation for the work required to be performed under the terms of the Contract, it could certainly have made demand for additional compensation claiming this to be extra work. With the record entirely silent in this connection, under the terms of the written agreement, any claim for extra compensation has not been properly laid by the Appellant.

A great deal of stress is laid by the Appellant upon Webster's definition of "rock." The Respondent has no quarrel with such definitions, however, when we follow the rule urged upon the Court by the Appellant that a Contract is to be con-

strued as a whole, it becomes abundantly clear that all structural excavation was unclassified and it included the performance of all operations incidental to the excavation of earth and rock of whatever kind for the structures on this project. As another part of the section 2.2.1. it was to perform all incidental work of whatever nature necessary to complete the work in accordance with the plans and specifications. Paragraph one of the Contract provides that the plans and specifications, the instructions to bidders and the proposal are hereby made a part of this agreement as fully and to the same effect as if the same had been set forth in at length in the body of this agreement. When the Court reads all of these provisions as a whole, it became abundantly clear that the contractor was fully apprised of all excavation work necessary to complete the project and that it was entirely clear to him that there would be a certain amount of sidewalk removal incident to the accomplishment of this excavation. Under these circumstances it cannot be said that the Appellant was misled by the Respondent. In bidding the excavation work to be done, the Appellant was to submit a bid which would cover the excavation work shown to be done upon the plans and specifications. If he felt that sidewalk removal would be more difficult than ordinary excavation, he could certainly take that into consideration in connection with submitting his bid. He was never invited to bid for earth removal only, or for rock removal only, or for any other item. He was simply invited to bid for the excavation work which would necessarily have to be accomplished to put in the proposed improvements, and was advised that structural excavation was unclassified.

We think the rules of construction involved in the instant case are too well settled for argument. They include the rule that the Contract must be construed as a whole. Also that all provisions of the Contract must be given effect.

## CONCLUSION

It is hereby submitted that the Contract between the Plaintiff and Defendant covered all work required to be done by the Appellant, that the work was performed and payment was made to the appellant by the Respondent for all work completed, including sidewalk removal. The trial Court had before it all the evidence of the parties with respect to these matters and made Findings of Fact and Conclusions of Law consistent with the evidence, and in as much as the Appellant has no quarrel with the Findings of Fact, the same are stipulated by the parties hereto as being correct. Certainly under the Findings of Fact as made by the Court below it was entitled to render its Judgment in favor of the Defendant, no cause of action. Since the Judgment of the Court is fully supported by the record, the Court on Appeal ought not to disturb it. It is, therefore, respectfully submitted that the Judgment and Decree of the Court below should be affirmed by this Court with costs to the Respondent.

Respectfully submitted,

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