

1971

Gibbons and Reed Company, A Utah Corporation v. Utah State Road Commission : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Gibbons & Reed v. Utah State Road Comm'n*, No. 12478 (Utah Supreme Court, 1971).
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In the Supreme Court of the State of Utah

GIBBONS AND REED COMPANY,
a Utah Corporation,

Plaintiff-Appellant,

vs.

UTAH STATE ROAD
COMMISSION,

Defendant-Respondent.

Case No.
12,478

BRIEF OF RESPONDENT

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FILED

NOV 15 1971

Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENT

NATURE OF CASE

This is an action for a declaratory judgment to determine the meaning and effect of section 208.03 of the Utah Department of Highway Standard Specifications for Road and Bridge Construction, Interim Issue, March, 1968.

DISPOSITION OF CASE IN TRIAL COURT

Following trial without a jury, the court entered a judgment of dismissal, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

Appellant entered into a contract with responder for construction of an Inter-State highway located in Salt Lake County, Utah, designated as No. I-415-9(23) 305 between 4500 South and Interstate 80. During the construction phase of the project, a question was raised by appellant as to payment for back-fill under section 208.03 of the Utah Department of Highways Standard Specifications for Road and Bridge Construction, Interim Issue, March, 1968, which states:

“Method of Measurement: ‘Compaction’ shall be measured by the cubic yard. The quantity shall be the volume of the ‘Roadway Excavation,’ ‘Structural Excavation,’ and ‘Borrow’, placed on the roadway embankment measured in its original position, less the amount paid for backfill. No payment will be made for material not compacted such as waste, material used for surcharges, or initial layer over soft ground placed for a working platform for equipment. For compaction through cuts, or the natural ground under embankment the quantity shall be the product of the compacted area, and a compacted depth of 8 inches. Backfill shall be measured by the cubic yard of material in final position in excavated area of embankment adjacent to a structure limited as follows:

On fittings, abutments, piers, box culverts, piers, abutments shall be limited to the area bounded by vertical planes one foot outside the footings

the height of the material placed adjacent to the structure. No payment shall be made for material placed above the elevation of the top of box culverts or other buried structures except pipe.

On pipes, the measurements shall be limited to vertical planes two feet wider than the outside pipe diameter and one-half of the pipe diameter over the top of the pipe, limited to two feet."

(Emphasis added.) (Ex 2-P)

The term "backfill" as it is used in the context of this case, describes the process of placing and compacting soil around a pipe which may vary in size. This procedure was explained by the contractor as follows:

Q. Will you tell us just what is involved in a typical backfill operation by way of labor and equipment; just the way a backfilling operation would proceed?

A. Well, normally, the backfill in and around the pipe itself has to be done by hand;; that is, the men using hand tools of various types. Usually with hand tools, they have to place the material down underneath the pipes and around the sides. Other men working with compaction tools, be they gas tools or gasoline driven tools, are used to compact this, to consolidate the material so that the trenches won't settle and the pipe remains in its proper position. This is a requirement, and this procedure is followed until such time as the backfill is over the top of the pipe to a sufficient height to where it will support the use of heavier tools

or pieces of equipment that might finish this procedure on up to the top of the trench. (TR-14)

The pipes installed by the contractor met the specifications as to procedure and result. The dispute between the parties arose over payment of backfill as prescribed in the above specification. The exhibits introduced at trial show that appellant and respondent agree as to the outside dimensions of the pay area prescribed by the above specification. (Ex 16-P, 15-P, 17-O)

The dispute concerns whether or not the volume displaced by the pipe should be deducted from the volume of the outside dimensions of the pay area.

The constructor was asked:

Q. And as I understand your testimony, the only dispute that we have before the Court today is whether or not the volume of the pipe is to be deducted or included in the computation for backfill?

A. That's correct. (R-94, Tr-37)

The position of defendant was expressed by Mr. Stewart Knowlton, the resident engineer on the project (R-97, Tr-40) that contractor was to be paid for "material in final position" or "embankment adjacent to a structure" limited on pipes by the outside dimensions of the specification and that inasmuch as there is no backfill material inside the pipe, payment was made by deducting the volume of the pipe and paying for ma-

terial in final position within the specified area (R-107, Tr-50 . . . R-108, Tr-51) Contractor claims that the volume of the pipe should be included in payment for backfill.

The position of the defendant has uniformly been the same that payments to contractors under the specification for backfill have been made with a deduction for the volume of the pipe. (R-123, Tr-66)

The respondent basically agrees with appellants statement of fact but submits that the issue despite appellant's excursions into state of mind and specification history is the same; namely, can defendant pay contractor pursuant to section 208.03 for a volume circumscribed by the pipe which contains no backfill material?

ARGUMENT

I

The court did not err in finding that the specifications of the contract relating to measurement of backfill were not ambiguous.

The court found that section 208.03 of the Interim Standard Specifications of March 1968, "are not ambiguous and were correctly interpreted by defendant by measuring the outside dimensions of the planes described in 208.03 and deducting therefrom the volume displaced by the pipe thereby paying only for the actual material in final position as required by the specification".

Respondent submits that a review of section 208.03

in accordance with proper statutory interpretation supports the above finding of the court. The provision must be considered as a whole with a critical inspection of what parts of the provision limit other parts.

The applicable part of section 208.03 dealing with backfill states:

“Backfill shall be measured by the cubic yard of material in final position in excavated area or embankment adjacent to a structure limited as follows:”

The statement includes all possible situations in which backfill can be measured and requires that in those circumstances involving backfill that measurement be made for backfill material in final position or embankment adjacent to a structure. It is clear that the structure being backfilled is not included in the payment for backfill because the measurement is only for backfill material in final position or embankment adjacent to the structure. It should be noted that the structure or in this case the pipe itself, is paid for under a unit bid item for pipe. (See Sec. 514.11 Method of Measurement and Sec. 514.12 Basis of Payment Ex 2-P p. 164) (See also Sec. 515.06 and 515.07 Ex 2-P p. 165).

Thus, in the general situation the specification makes the condition that backfill be paid for material in final position or embankment adjacent to the structure both of which are phrases which describe the backfill material. Respondent submits that this excludes pay-

ment for backfill for other than material in final position.

The provision states that the payment for backfill is limited to certain dimensions which are described. The provision first describes the limitations for footings, abutments, piers, box culverts wherein payment is limited to an area bounded by vertical planes one foot outside the footings extending to the height of the structure except for pipes. The general provision that payment be made for backfill material in final position adjacent to a structure is thus limited to the area described except for pipes.

Obviously the reason pipes must be limited separately is because they have a different configuration than the above mentioned structures which are generally rectangular with vertical walls.

On pipes the specification requires that the backfill material in final position adjacent to the structure be limited to vertical planes one foot on either side of the outside diameter of the pipe but unlike the rectangular type structures previously discussed, allows for payment above the top of the pipe limited to one half the diameter of the pipe not to exceed two feet. Thus, the material in final position forms a collar around the pipe whereas the backfill adjacent to a vertical wall forms a parallel plane. The condition that measurement be for backfill material in final place adjacent to a structure varies only in the shape of the payment area which forms a collar around the pipe because it is round rather

than a box shape area adjacent to a vertical wall as in the case of abutments and piers.

Each paragraph subsequent to the definition of measurement for backfill material further limits the definition to fit the definition to the differently shaped structures. The limitations do not change the requirement that backfill be paid for material in final position or embankment adjacent to a structure. Certainly a collar of material around the pipe is adjacent to the structure in the same manner as material next to a wall bounded by planes one foot vertical is adjacent to an abutment or pier, which are also structures.

A structure as defined in section 101.57 of Interim Standard Specifications, March 1968, includes pipes in the following items: "Bridges, culverts, catch basins, drop inlets, retaining walls, curbing, manholes, endwalls, buildings, sewers, service pipes, underdrains, foundation drains, and other features which may be required in the work and not otherwise classed herein." Pipes are included in the major classification of structures in the Interim Specifications (see Ex 2-P p. 113).

A pipe being classed as a structure and separate payment being made for the pipe itself it is submitted that the requirement that backfill, which is the only item being discussed in this law suit, is for material in final position and embankment adjacent to the pipe which means around the pipe. There is obviously no material inside the pipe and for that reason the respondent made

no payment for the volume of the pipe which respondent submits is a correct interpretation and that to interpret otherwise would violate the clear and unambiguous intent of the provision.

The general rules of contract interpretation concerning the words and phrases used is well stated in 17 AmJur 2nd, Contracts, Section 247, Page 637 where-in it states:

“Words used in a contract will be given their ordinary meaning where nothing appears to show that they were used in a different sense or have a technical meaning, and where no unreasonable or absurd consequences will result from doing so. Words chosen by the contracting parties should not be unnaturally forced beyond their ordinary meaning or given a curious, hidden sense which nothing but the exigency of a hard case or the ingenuity of a trained and accute mind can bring forth. In slightly different language, the rule may be said to be that the non-technical terms of every written instrument are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect of the subject matter, as by the knowledge or useage of trade or the light, acquired a particular sense distinct from the popular sense of the same words, or unless the context evidentially points out that in the particular instance or in order to effectuate the immediate intention of the parties, it should be understood in some other peculiar sense.”

The law requires that the above specification sec-

tion 208.03 be given a reasonable interpretation. Restatement of contracts section 235 states:

“Words are to be taken and understood in their natural, usual, and ordinary sense if they are clear and free from ambiguity.”

It is submitted that taken as a whole, the specification as found by the trial court was not ambiguous on the ground that payment could be made only for material in final position or embankment adjacent to the structure. It is a simple calculation to measure the outside dimensions of the backfill pay area and deduct the volume of pipe. Respondent submits that to pay for other than material in final position, which would be the effect of paying for the volume of the pipe, does violence to the above rules of law which require that words are to be taken and understood in their natural, usual, and ordinary sense. The words “backfill,” “material in final position” and “embankment adjacent to a structure,” and “structure” are all words and phrases which are capable of reasonable interpretation free from ambiguity. By what stretch of the imagination can the space occupied by the volume of the pipe be construed or interpreted as material in final position or embankment adjacent to a structure? That the above contractual rules of law are applicable to construction contracts, it is well stated in 13 AmJur 2d, Building and Construction Contracts, Section 8 Page 11, wherein it states:

“The principles of law governing the construction of contracts generally are applicable to building and construction contracts. Affect must be given to the intention of the parties as gathered from a consideration of the entire contract. The contract should receive a practical construction by the courts . . . Building contracts and accompanying specifications are, the same as other documents, to be construed according to their terms, and that the terms of the contract are clear and unambiguous, the court is bound to enforce the contract as it finds it. The terms of a plain, unambiguous contract cannot be varied or contradicted by parole or extrinsic evidence or by evidence of custom and usage.”

Appellant argues that the court must take into account a number of extrinsic facts and circumstances, including the situation of the parties, the apparent purpose of the contract, and their prior contracting experience. All of the extrinsic matters which were presented to the court were allowed into evidence over the objection of respondent's counsel that such excursions were irrelevant, immaterial, and incompetent. However, the trial judge allowed all testimony into evidence presented by the contractor and considered those matters brought out in the testimony. The rule on parole or extrinsic evidence is stated in 13 AmJur 2d, Section 124, Page 114 wherein it states:

“In accordance with the established principles governing written instruments generally, parole

one half the pipe diameter over the top of the pipe, limited to two feet.”

Respondent submits that even paraphrased, the provision found in appellant’s brief as paraphrased, requires payment for material in final position in the excavated area. It is the requirement that payment be made for material that makes the contract unambiguous and clear in its meaning. Payment can only be made for material and not for something which is not backfill material. The inside of a pipe is not backfill material. The very purpose of the pipe is to provide a duct or opening through which water can drain across the roadway.

Counsel cites the case of *Orren v. Phoenix Insurance Co.*, 179 Northwest 2d, 166 (Minn. 1970), which involved a case to recover for jewelry theft under a comprehensive home owner’s policy issued by the defendant. The court held that the homeowner’s policy which provided that in any one loss from theft, the insured should not be liable, “for more than \$250.00 on articles of jewelry, including watches, necklaces, bracelets, gems, precious or semi-precious stones, and articles of gold or platinum . . .”, was ambiguous since it neither clearly provided that insured should receive up to \$250.00 for each article of jewelry stolen, nor clearly provided that insured should not receive more than \$250.00 in the aggregate for all articles of jewelry stolen; accordingly, it would be construed in favor of the insured to

evidence is not admissible to vary or contradict the plain and unambiguous terms of a building or construction contract, nor can such terms be varied or contradicted by evidence of custom or usage. If, however, the terms of the contract are uncertain or ambiguous, parole, or extrinsic evidence is admissible to explain or interpret the contract language, such as, for example, parole evidence of customer usage to show the meaning in which particular terms were used, or to identify and apply the terms of the writing to the subject matter.

The fact that the judge allowed all of the extrinsic evidence into evidence makes appellant's argument as to extrinsic evidence a hollow one in that all of the factors mentioned were considered by the judge and the ruling made in favor of the defendant that the contract was not ambiguous, and that the backfill should be paid for material in final position, with the volume of the pipe deducted.

To illustrate the problem of the construction placed upon the specification found beginning on page 15 of appellant's brief, the appellant submitted that the provision for measurement of backfill could reasonably be paraphrased to read:

“Backfill shall be measured by the cubic yard in final position in excavated area . . . limited as follows . . . on pipes, measurement may not exceed a rectangle formed by vertical planes two feet wider than the outside pipe diameter and

and clear on its face. The court after an examination of all the facts specifically found that the interpretation of the defendant-respondent was a correct interpretation, and that the volume of the pipe should be deducted.

It is a black letter rule of law that the findings of judgment of the trial court are presumed to be correct and valid and the reviewing court is to view the evidence and inferences therefrom in a light most favorable to the findings. See *Harmon v. Rasmussen*, 13 U2d 422, 37 P2d 762, (1962), *Nagle v. Club Fontainebleu* 17 U2d 125, 405 Pd 346, (1965) *Citizens Casualty Co., of New York v. Hackett* 17 U2d 304, 410 P2d 767. (1966)

Beehive Security Company v. Bush 16 U2d 328, 400 P2d, 506. (1965)

As stated in the *Hackett Case*, *supra*,

“In conformity with the cardinal rules of review which we have had occasion to affirm in prior cases, it is our duty to indulge the presumption that the findings and judgment of the trial court are correct; and to affirm unless the appellant sustains the burden, which is his, of demonstrating to the contrary.”

The cardinal rules of review are outlined in *Charlton v. Hackett* 11 U2d 389, 359 P2 1060 (1961), as follows:

“In considering the attack on the findings and judgment of the trial court, it is our duty to follow these cardinal rules of review; to indulge

provide that the insureds should receive for each stolen article, either its value or \$250.00 whichever was less. The court in that case was involved with a specific provision which the trial court found was ambiguous. The court allowed evidence of a subsequent policy change in the language.

The court in the present case based on the *Orren v. Phoenix Insurance Co.* case, allowed evidence that the wording in the specification had been changed by the commission. Counsel states on page 18 that this means that the fact that the contract provision was amended by the commission shows that the commission thought it was ambiguous. The court after considering this argument, rejected it and found that the contract provision was not ambiguous knowing full well that the provision had been changed. The trial judge had all information before it over counsel's objection as to what changes were made and why they were made and found after taking into consideration all of the evidence which was placed before him that the contract was not ambiguous.

II

The court did not err in finding that defendant's interpretation of the contract provision was correct and in not adopting plaintiff's interpretation.

In response to part 2 of appellant's argument, respondent submits that the contractor's interpretation of the contractual provision was not reasonable in that the contract provision was not ambiguous and was plain

them a presumption of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence.”

It is submitted that the trial court used proper rules of contract interpretation and considered all of the evidence placed before it by the defendant and plaintiff. As stated in *Maw v. Noble* 10 U2d 440, 354 P2 121 (1960):

“We are in agreement with the well recognized rule urged by defendants that where there is uncertainty or ambiguity, the contract should be strictly construed against him who draws it. But it is to be kept in mind that this rule applies only where there is some genuine lack of certainty and not to the strained or merely fanciful or wishful interpretations that may be indulged in. The primary and more fundamental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty it must be given effect.”

As stated in *Ephraim Theatre Company v. Hawk* 7 U2d 163, 321 P2d 221. (1958):

“Generally speaking, neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hard-

ship, but they must be enforced in accordance with the intention manifested by the language used by the parties to the contract. (citing cases)''

The finding and judgment of the court after all evidence had been presented was that the provision relative to backfill was not ambiguous and required the State Road Commission to pay for backfill material by the cubic yard of material in final position, or embankment adjacent to a structure which material the court found does not include the volume of the pipe which contains no backfill material and that the State Road Commission was correct in deducting the volume of the pipe.

CONCLUSION

Respondent submits that the trial court was correct in its finding and judgment and prays this court affirm the judgment of the trial court.

Respectfully submitted,



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