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W. P. Harlin Construction Company, A Utah Corporation v. Utah State Road Commission : Appellant's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

W. P. HARLIN CONSTRUCTION COMPANY, a Utah corporation,
Plaintiff and Appellant,

vs.

UTAH STATE ROAD COMMISSION,
Defendant and Respondent.

Case No. 10773

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County Honorable Joseph G. Jeppson, Judge

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AUTHORITIES CITED

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ARGUMENT

POINT I.

THE PRE-TRIAL HEARING WAS NOT A SUMMARY JUDGMENT PROCEEDING.

In Respondent's Point I, it contends that the Pre-Trial Court's holding on the First Cause of Action was proper because Motions for Summary Judgment

and attached Affidavits had been filed by both sides. Respondent is incorrect. The hearing was not a summary judgment proceeding, but as indicated on the Pre-Trial Order, was a Pre-Trial hearing. (R. 70).

The Pre-trial Court's order would be equally erroneous if this had been a Summary Judgment proceeding since there were several factual disputes vital to a determination of the issues which were not even considered by the Court, or which could not have been decided as a matter of law, in the absence of considerable evidence, to-wit: the areas of Waiver, Estoppel, Arbitrariness, The State's prior agreement, and Breach of Contract.

POINT II

EQUITABLE ESTOPPEL IS AVAILABLE AGAINST THE STATE.

At page 8 of its brief, Respondent contends that the Doctrine of Estoppel will not be applied against the State in the performance of its governmental functions. This contention is without merit in our case. "Governmental functions" and "proprietary functions" are distinguished in cases involving the question of Governmental immunity against suit; and a State in performing these "governmental functions" is generally immune from suit in the absence of a statute to the contrary.

Under the specific holding of *Niblock v. Salt Lake City,* 100 Utah 573, 111 P 2d 800, and under the com-

plete definition of "governmental function" established in *Cobia v. Roy City,* 12 Utah 2d 375, 366 P 2d 986, the State would probably be immune from suits involving the construction of highways — a governmental function—in the absence of our statute. Of course, Utah *does* have a statute waiving this immunity. See Section 27-12-9 U.C.A., as amended and Section 63-30-5 U.C.A., as amended in 1965, which later section provides: "Immunity from suit of all governmental entities is waived as to any contractual obligation." Therefore since governmental immunity is waived, it cannot be used as a bar to estoppel, as Respondent here attempts to do.

Respondent's cases cited at pages 8 and 9 are clearly not in point, but rather involve either the question of the delegation of functions to various State highway departments, or situations where the person against whom estoppel is being asserted had no authority to represent the State. Obviously, our case is materially different and can be summarized as follows:

1. The State waived immunity by statute.

2. The State entered into the construction contract. (R. 1, 9).

3. The contract authorized the Chief Structural Engineer for the State to agree on the rating of the hammer (R. 9), without the necessity of any writing.

4. Estoppel would lie against the State or the Engineer to deny such an agreement.

Respondent cites 1 *A.L.R.* 2*d* 347 as authority that estoppel will not lie against the State. However, that citation does not support respondent's contention, and as a matter of fact, the rule is well established in this annotation that a State may be estopped when the acts of its officials, alleged to constitute the grounds of estoppel, are done in the exercise of powers expressly conferred by law and when acting within the scope of their authority. 28 *Am. Jur.* 2d 786. Such is our case.

Respondent now raises on appeal and for the first time in the case a question as to the authority of the State to agree to the use of the D-12 Hammer on the prior 21st South project. Such an argument at this time is surprising indeed in view of the record in which the State clearly admits that the use of the D-12 Hammer was permitted on the 21st South project. It must follow that if the State permitted the use, that the rating was acceptable and agreed to.

In its Answer, (R. 17) respondent admitted the first three paragraphs of the plaintiff's Amended Complaint. The Amended Complaint is set forth at Pages 9 through 12 of the record, and the original Complaint at Pages 1 through 6. At Paragraph 4 of the Answer appears the following admission by respondent:

> "Defendant admits that the specifications for a pile driver on the 21st overpass contract were the same as those on the present contract . . ."

At Page 28 of the record is plaintiff's Interrogatory No. 6, which asks:

"State whether or not the defendant permitted the use of the plaintiff's Del Mag D-12 Hammer on the 21st South project, and give the name of the Project Engineer for the State who permitted the use of said hammer."

At Page 143 of the record is the defendant's answer:

"The State did not specifically agree to an energy rating for the Contractor's Del Mag D-12 Hammer used on the 21st South project, but did not question its use. The State's Project Engineer on this work was Maurice Anderson. Tolboe & Harlin Construction Company was the Contractor."

See also paragraph 2 of the affadivit of William P. Harlin (R. 53):

"That the defendant agreed to and had established a rating on the plaintiff's diesel hammer prior to use on the subject project, and has since agreed to its use and rating on similar jobs in Salt Lake Valley on the same Interstate Project with the same plans and specifications."

Respondent, at page 11 of its brief, quotes only a portion of the Appellant's Answer to the Respondent's Interrogatory No. 1, and thus argues that Appellant has conclusively admitted a lack of authority on the part of the State's employees to accept the prior use of the Del Mag Hammer on the 21st South job. However, the complete Answer should be noted, since in its completeness, Appellant states

"The acceptance was oral and occurred by reason of the fact that the defendant was informed of the use of the Del Mag D-12 Hammer and the defendant permitted said use for the entire pile driving portion of said project . . ."

This Interrogatory, however, only refers to the term *acceptance* used in Paragraph 4 of the Amended Complaint (R. 10). The balance of the allegations of that Paragraph 4 clearly establish the basis for the prior agreement as to the rating of the Del Mag D-12 Hammer.

Assuming, for purposes of argument that there is a question as to whether or not the Project Engineer had authority to act for the Chief Structural Engineer in making the agreement as to the use of the Hammer, such a question must be developed as a factual question, not as a conclusive legal admission, as is claimed by Respondent.

The foregoing clearly indicates that Appellant's claim of estoppel and its claim that the State had agreed to the rating are legally sound. The facts from respondent's most optimistic viewpoint are in controversy. The matter should have been tried and not summarily dismissed as a matter of law.

POINT III

BAD FAITH IS NOT A NECESSARY ELEMENT FOR BREACH OF CONTRACT BY THE STATE.

Respondent, beginning at page 15 of its brief, argues exclusively that since Appellant admitted there was no bad faith on the part of the Chief Structural Engineer, there can be no recovery for breach of contract. This argument is untenable for the following reasons:

1. The Interrogatory in question only states: (R. 147)

> Attached to these Interrogatories marked Exhibit "A" is a copy of a report made by David L. Sargent concerning these tests. Does plaintiff contend that this report of David L. Sargent was made in bad faith?
>
> The Answer—No.

Obviously there is no report attached to the Interrogatories, but we assume that it is the same report as is attached to the Motion for Summary Judgment, as pages 50-a, b of the Record. Just as clearly, the report is undated but is subsequent to the action complained of. The arbitrary testing and rejection of the Hammer, as well as the report, are here involved. All of the circumstances must be considered in determining the answer to the problem—not just the making of the report.

2. Admitting, for purposes of argument, that the Engineer did not act in bad faith, Appellant claims a breach of contract as a matter of law when the State refuses to allow the specifications which prescribe the test for approval of the D-12 Hammer.

3. Lack of bad faith does not imply that the actions of the State were not arbitrary. Arbitrariness and bad faith are not used synonymously in cases of breach of contract. Even Respondent's cases distinguish between the two concepts, so that the absence of bad faith does not mean the lack of arbitrariness.

Bad faith as such is a subjective thing imparting a dishonest purpose or some moral obliquity. It evidences an "actual intent to mislead or deceive." *Spiegel vs. Beacon Participations,* 8 N.E. 2d 895. In this case, the court defines "bad faith" as a mere actual state of mind—not a technical term. Dishonesty and fraud are synonymous with bad faith. *Pabst Brewing Company vs. Nelson,* 236 P. 873.

Arbitrariness on the other hand is the exercise of discretion in such a manner after a consideration of evidence, as clearly to indicate an action is based on conclusions, such that reasonable men fairly and honestly considering the evidence would reach contrary conclusions. *Greer vs. Susman,* (Colo.) 298 P. 2d 948. See also *Miller vs. City of Tacoma,* 378 P. 2d 464, 474. This concept is better stated in *Robertson vs. Cameron,* 224 Fed. Supp. 60, 62. The Court holds that to be arbitrary or capricious, one must be without a reasonsonable or rational basis, but one need not act in bad faith.

> " . . . By arbitrary or capricious is not meant that the refusal must be in bad faith. These words are not used in their popular opprobious significance. They are words of art and they

> mean merely that there must be a reasonable or rational basis for the action of the superintendent. The superintendent may not act according to his personal notion or whim no matter how well intended or bona fide his action may be."

It is no excuse that the Structural Engineer may have exercised his honest judgment. His actions on behalf of the State are still arbitrary even though he misconstrues his duties so that he can honestly say that he was not acting in bad faith. His bad faith is a subjective criteria, but it does not extend to an objective consideration of his actions and the actions of the State in arbitrarily refusing to follow the specifications, and in clearly breaching the contract by wrongfully rejecting the hammer for reasons not set forth in the specifications.

Furthermore, the alleged reasons were not proven to be in any way indicative of the ability of the hammer to perform the contract. Such other reasons, if they were valid under the contract specifications, should have been subjected to proof, in view of the contention of Appellant that the hammer did have the proper rating and could, if it had been permitted to function, comply with all aspects of the specifications. Again, we have a substantial factual issue, even taking the State's most extreme position, that it had authority to reject the hammer on some basis other than the failure to agree upon a rating. Certainly the Pre-Trial Court completely disregarded the other breach of contract issues by holding as a matter of law that Appellant couldn't recover. (R. 71).

POINT IV.

APPELLANT'S ANSWER TO INTERROGATORY NO. 3 IS NOT CONCLUSIVE.

Respondent, at Page 19, falls back upon the untrue statement that "the admitted fact that nothing was done by Appellant at that time," destroys Appellant's allegation of arbitrary action. Such a narrow concept of the interrogatory is unwarranted. Respondent argues on the one hand that Appellant is held to an admission "at that particular time" (R. 45) (Answer 3), and then on the other hand at Page 18 of its brief:

> "The issues to whether Respondent's Chief Structural Engineer acted arbitrarily must be examined not only in light of the Chief Structural Engineer's knowledge and expertise, but also in light of the total circumstances that surround the rejection of Appellant's combustion-type hammer."

What difference does it make that Appellant at the test was not sufficiently clairvoyant to fully advise the State as to all possible reasons why the test was arbitrary. Suppose Appellant had not discovered how arbitrary the rejection really was for months — does this lessen the arbitrariness? Must a man discover fraud at its inception, or all of the facts of arbitrariness as they occur?

Prior to the test the State was informed of the only facts then available. Only as the test began and as the methods and conclusions were made apparent by the State, did the full scope of the irrelevance and capri-

cious nature of the test become known to the Contractor. Then, of course, he registered further objections, but all to no avail.

The arbitrary nature of the State's action was implicit in its deliberate disregard of the energy rating, and its avowed purpose, not to be concerned with that rating. Therefore what else could the Contractor do, either as a matter of fact, or of law, than what it did do:

a. After the State and the Contractor had entered into the contract, the State on June 3, for the first time, questioned the manufacturer's rating of 22,500-foot pounds. (R. 74).

b. The Contractor asked for a short delay to obtain further information in support of the manufacturer's rating, (R. 74) and on June 7 in a meeting with the State, the Contractor and its Consulting Engineer further gave the State information to support the 22,500 rating, and that this size and type of hammer was being used throughout the Western states on Interstate Highway projects. (R. 76).

c. On June 10, the Contractor and the special engineer met with the State and raised various questions concerning the forthcoming test. (R. 77, and letter dated June 13, 1963, following page 81 of the Record).

d. The test was conducted in an arbitrary and irrelevant manner, in that it did not prove any

rating at all, the capability and rating of the competitor's hammer was unknown, the tests were merely to see which hammer could drive through a dense layer and established nothing by way of rating or compliance with the specifications, everyone present saw that the tests were inaccurate, speculative and immaterial, (R. 44, 45, 50-a, 50-b, 53, 54, 55) and that the tests were conducted by the State deliberately avoiding a determination of the energy rating of Appellant's hammer.

The State was intent upon rejecting the hammer for a fallacious and unsupported reason, to-wit, that the competitor's hammer was larger and was undoubtedly going to be able to drive through a dense layer of material much more easily than could the combustion-type hammer. That layer was below the contract-required depth and far below the depth to which the piles were ultimately driven on this project. The test had absolutely no bearing on the rating nor on the ability of the D-12 to comply with the specifications.

POINT V

ADDITIONAL ARGUMENTS WERE SUBMITTED FOR CONSIDERATION AT THE TIME OF TRIAL.

It is clear from an examination of the record that additional arguments were presented at the time of trial, which even more clearly indicated the inequity and the legal error, together with the manifest injustice resulting from the failure to include the First Caus

of Action in the trial of the law suit. Respondent's Point III is not supported by the record. (R. 73-85, 90, 91).

SUMMARY

Respondent seems to have presented nothing to support the lower court's ruling, other than Respondent's version of the controverted facts. Why the trial court relied upon an incomplete excerpt from the Answers to interrogatories to rule as a matter of law that Appellant could not recover on its First Cause of action, and why Appellant should be precluded from trying this cause of action because at the testing it didn't inform the State of all of the facts going to make up the arbitrary action by the State, when it didn't know all of the facts, are still unanswered by Respondent. It should not be necessary for the Respondent to rely upon an array of facts at this point in our procedure. If such reliance is necessary, then we should have had a trial of the issues. Both Appellant and Respondent argue that many facts must be considered and yet the trial court decided as a matter of law that no facts need be considered. Such a ruling is an abuse of the trial court's discretion and is unsupported by any theory of law.

Respectfully submitted,

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