

1962

General Insurance Company of America v. Paul J. Henich et al : Appellants' Reply Brief

Utah Supreme Court

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F. Robert Bayle; Wallace R. Lauchnor; Hurd, Bayle & Hurd; Attorneys for Respondent;
Elliott Lee Pratt; Clyde & Mecham; Attorneys for Appellants;

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IN THE SUPREME COURT
of the
STATE OF UTAH

GENERAL INSURANCE COMPANY OF
AMERICA, a Corporation,
Plaintiff-Respondent,

vs.

PAUL J. HENICH, dba P. G. & H. GEN-
ERAL CONTRACTORS, ELLEN JANE
HENICH, his wife,

Defendants,

MAX S. ANDREWS and NED E. SHURT-
LEFF, individually and as a co-partner-
ship dba SHURTLEFF & ANDREWS
CONSTRUCTION COMPANY, and
SHURTLEFF & ANDREWS, INC., a
Utah Corporation,

Defendants-Appellants.

Clerk, Supreme Court, Utah

No.
9596

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the
3rd Judicial District for Salt Lake County
Hon. Ray Van Cott, Jr., Judge

ELLIOTT LEE PRATT
CLYDE & MECHAM
351 South State Street
Salt Lake City 11, Utah
Attorneys for Appellants

F. ROBERT BAYLE and
WALLACE R. LAUCHNOR
Of
HURD, BAYLE & HURD
1105 Continental Bank Building
Salt Lake City 1, Utah
Attorneys for Respondent

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APPELLANTS' REPLY BRIEF

ARGUMENT

By way of reply to Respondent's Brief, appellants respectfully submit the following:

RESPONDENT'S POINT I

At Page 10 of Respondent's Brief, it is argued that the date of the Indemnity Agreement is not important, and is not

one of the terms of the agreement. Again, at Page 20, Respondent urges the unimportance of the date of execution. At Page 35, respondent again argues that the date which the Indemnity Agreement and the Corporate Resolution bear is not material. At Page 44 of the brief, respondent quotes the Court in part to the same effect. The full quotation of the Court is as follows:

“ . . . and I don't just see any escape from it myself and, as I say, this matter of date is not important. They are not in or they are not out by virtue of the change of the date, except the opposite way for them to contradict or modify the written contact that is here.”

For respondents to maintain that the date is unimportant and is not one of the terms of the agreement is to totally ignore the basis of liability sought to be imposed on appellants by the Indemnity Agreement. If the agreement was dated and executed December 23, 1959, then appellants could only be liable for the Convent Job, not for the P.I.E. Job. On December 23, 1959, only the Convent Job could have possibly been included under the Indemnity Agreement. What term of the contract could be more significant to the liabilities imposed thereunder than is the date of execution? With one date, to-wit, December 23, 1959, the P.I.E. Job could not have been included; but with the other date, to-wit, January 25, 1960, the P.I.E. Job could be included.

If the date was insignificant, then why did the plaintiff have the date notarized on the Indemnity Agreement; why did the plaintiff have the Corporate Resolution dated and certified to December 23, 1959; and, why did the plaintiff in its Com-

plaint, allege that the Indemnity Agreement was executed December 23, 1959, and the Convent bond issued in reliance thereon? The answer is simply that the date establishes liability, a liability which could not possibly have included the P.I.E. Job on December 23, 1959.

Is the Court warranted in striking from the agreement one of two inconsistent provisions? The Indemnity Agreement sued on has two completely opposite provisions, i.e., the dates and the notarization of December 23, 1959, as opposed to the statement on the face of Exhibit 2, to-wit:

“ . . . and the construction of the P.I.E. Truck Terminal, only.”

Exhibit 3, the Corporate Resolution, likewise has two contradicting provisions, i.e., on the face thereof appears:

“Construction of P.I.E. Truck Terminal \$271,030.00”; but the Certificate of the Corporate Resolution, as well as the date of the meeting, show the date, December 23, 1959.

The Trial Court, in the case of each exhibit, in effect struck the notarized and certified statements, the highest and most reliable form of authentication of signatures, and left on the agreement the unnotarized and uncertified to statements relating to the P.I.E. Job. The Court then by parol evidence inserted the ambiguous dates of January 25 to January 30, and also by parol related these dates back to December 23, 1959.

This principle violates reasonable principles of interpretation of the contract document and is indicative of the Court's erroneous disregard of the materiality of the date of both exhibits.

RESPONDENT'S POINT II.

Under this point, respondent places considerable emphasis upon the execution of the financial statements of appellants, arguing that these financial statements were admittedly prepared prior to the execution of Exhibit 2, and thus prove that Exhibit 2 was executed between January 25, 1960, and January 30, 1960. In support of this theory, at Page 23 of Respondent's Brief, the testimony of Mr. Henich is quoted in part. Respondent, however, did not complete the quotation, which I quote below:

"Q. Did you make any contact with Wood, Mann & Smith concerning these documents?

"A. No, I never did.

"Q. Did you ever go over there and pick them up and bring them to Mr. Barton's office?

"A. I don't even know where their office is, sir.

"Q. Well, you don't answer the question. Did you?

"A. No, I didn't.

"Q. Did you discuss what period of time that the reports would cover?

"A. Pardon?

"Q. Was it discussed with either Mr. Shurtleff or Mr. Andrews what period of time would be required on these financial statements?

"A. Not that I know of, sir."

Respondent further emphasizes the testimony of Mrs. Pugsley, respondent's own witness. However, the substance of her testimony was merely that Exhibit 14 was prepared October

12, 1959, and Exhibit 15 was prepared January 28, 1960 (R. 312). Mrs. Pugsley could not tell who picked up Exhibit 15, but she doubted that Henich would have received it, since he was a stranger to the office. She further testified that the October 12, 1959, statement was delivered apparently to the client, but with no definite information as to the actual recipient of the statement (R. 313).

Further, respondent, at Page 22 of its brief, claims Mr. Andrews admitted the execution of the financial statements before the signing of the Indemnity Agreement. This testimony of Mr. Andrews, as well as that of Mr. Henich, has been taken out of context by respondent to prove its point. There is no question but what Mr. Andrews, as well as Mr. Henich, believed and so testified that the Indemnity Agreement was executed December 23, 1959. Therefore, both of these witnesses, in testifying that the financial statement or statements were furnished prior to the signing of the Indemnity Agreement, actually referred to a period prior to December 23, 1959. As is apparent from Pages 21, 22 and 23 of Respondent's Brief, the questions propounded to the witnesses were carefully put so that the date of the signing was not referred to, but merely a period of time prior to the signing. Thus, the answers of the witnesses must be considered in context with their prior testimony that the signing occurred December 23, 1959.

The furnishing of the October 12, 1959, financial statement is completely consistent with the signing of the Indemnity Agreement some two months later on December 23, 1959. Both Andrews and Henich recognized that prior to the Convent bond and the signature on December 23, 1959, the financial

statement was furnished, or made available. However, there is no testimony or evidence from any of the witnesses to show that Exhibit 15, the financial statement prepared on January 28, 1960, was ever delivered to Mr. Barton's office, excepting Mr. Barton's own testimony and that of his employees. This testimony of Barton is inconsistent in its application to the sequence of events, as has been pointed out in appellants' brief. How Mr. Barton obtained Exhibit 15 is not proven by respondent. There appears little doubt, however, but that he obtained it sometime in late January or early February, and this occurred probably about the time that he issued the bond on the P.I.E. Job. His obtaining the financial statement is consistent with his issuance of the bond, but it does not show that the Indemnity Agreement was executed between January 25 and January 30.

RESPONDENT'S POINT III.

Respondent, in its brief at page 34, indulges in speculative reasoning by surmising that even though the Indemnity Agreement had not been filled out at all, appellants would have been bound thereunder. The plaintiff's theory of the case and its evidence introduced in support thereof, leave no room whatsoever for any cause of action based upon a blank Indemnity Agreement. Such speculation is merely that, and should have no place in respondent's brief.

Respondent further speculates at Page 38 of its brief, that Mr. Shurtleff had fabricated Exhibit 19, which was the group of receipts kept in the company files relating to his trip to Nevada. This contention is completely unfounded. Re-

spondent made no objection to their admission (R. 258). An examination of these various receipts show, of course, that the person actually acknowledging receipt of the various items was not Mr. Shurtleff, nor was it shown by his signature. Instead, individuals signed each separate receipt.

Respondent at page 19 of its brief, center paragraph, again attempts to disparage appellants by stating that certain statements in appellants' brief were untrue. Again respondents have but to read the rest of the testimony to see that the statements refer to knowledge of the Indemnity Agreement.

SUMMARY

Upon neither the testimony cited by respondents nor upon the authorities quoted in its brief can the respondent justify the complete disregard of the statements under oath by its Notary Public, its judicial admission by way of the allegations in the Complaint, and the principle that it is not permitted to sue upon a notarized agreement and then impeach the agreement to show additional liability of these individual appellants. Neither should Respondents be permitted to vary an agreement, which admittedly must be in writing, by orally changing the dates and orally making the dates retroactive.

Respectfully submitted,

ELLIOTT LEE PRATT
CLYDE & MECHAM
Attorneys for Appellants