

1992

Oneida/SLIC, an Arizona partnership v. Ronald G. Roth Company, an Arizona corporation and Oneida Cold Storage and Warehouse, Inc., a Colorado corporation : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ONEIDA/SLIC, an Arizona partnership,
Plaintiff and Appellant,

vs.

RONALD G. ROTH COMPANY, an Arizona corporation and ONEIDA COLD STORAGE AND WAREHOUSE, INC., a Colorado corporation,
Defendants,

and

ONEIDA COLD STORAGE & WAREHOUSE, INC., a Colorado corporation,
Defendant, Third-Party Plaintiff, and Appellant,

vs.

METALCLAD INSULATION CORPORATION OF CALIFORNIA, a California corporation,
Third-Party Defendant, Fourth-Party Plaintiff, and Appellee,

vs.

ENPRO, INC., an Idaho corporation, ADVANCED FOAM PLASTICS, INC., a Colorado corporation; and RONALD G. ROTH COMPANY, An Arizona corporation,
Fourth-Party Defendants,

and

Case No. 920434-CA

PETITION FOR REHEARING

Appeal from the Third District Court, Salt Lake County, Judge J. Dennis Frederick

PRIORITY NO. 16

UTAH COURT OF APPEALS
BRIEF

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PETITION FOR REHEARING

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and

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ONEIDA COLD STORAGE & WAREHOUSE, INC., a Colorado corporation,
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Fourth-Party Defendants,

and

RONALD G. ROTH COMPANY, an)
 Arizona corporation,)
)
 Defendant/Fourth-Party)
 Defendant/Fifth-Party)
 Plaintiff,)
)
 vs.)
)
 ARCHITECTURAL PRODUCTIONS &)
 DESIGN CONSULTANTS, INC., an)
 Arizona corporation; and)
 WALTER E. RILEY,)
)
 Fifth-Party Defendants.)
 _____)

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STATEMENT OF CASE: PETITION FOR REHEARING

Petitioner, Stanley Averch ("Averch"), Appellant herein, submits this Petition for Rehearing pursuant to Rule 35 of the Utah Rules of Appellate Procedure.

On April 1, 1994, the Court summarily affirmed the trial court's dismissal of Averch's claims against Metalclad Insulation Corporation of California ("Metalclad"), and in doing so refused to consider the merits of the appeal because of Averch's failure to marshal the evidence in support of the findings of fact made by the trial court.

Averch respectfully submits that the Court's refusal to consider the merits of his challenge to the trial court's dismissal of his breach of warranty claims on the basis of his failure to marshal the evidence in support of the trial court's dismissal of such claims was erroneous. The trial court did not make an explicit finding as to whether the EPS insulation materials ("EPS"), specified and supplied by Metalclad failed to meet specifications. Instead, the trial court concluded that regardless of whether the EPS met specifications, Averch was not entitled to recover damages from Metalclad because he failed to show a causal connection between the EPS and his damages.

Averch respectfully submits that the Court overlooked that there is no evidence in the record which in any way supports a finding that the EPS met specifications. Because there is no evidence in the record which Averch could have marshaled in support

of the trial court's dismissal of the breach of warranty claims, Averch respectfully requests that the Court grant his Petition for Rehearing and consider the merits the Averch's appeal as to the breach of warranty claims.

ARGUMENT

I.

There is no evidence in the record that supports any finding that the EPS specified and supplied by Metalclad met specifications

Averch does not challenge the well-settled law in Utah that an appellant must marshal all evidence in support of a trial court's finding of fact when the appellant seeks to challenge such findings. However, it is simply not possible to marshal evidence in support of a finding where there is no evidence in the record that supports that finding.

The following summarizes the evidence admitted at trial on the issue of whether the EPS met specifications. Patrick Kidd, Vice-President of Metalclad, was primarily responsible for the specification and installation of the EPS at the Oneida facility. Mr. Kidd **admitted** at trial that Metalclad specified 1.5 lb. density, 25 PSI yield EPS to be used during construction of the Oneida facility, and that the EPS supplied did **not** meet that specification. (I: 71-72, 86-87, 138-140, 154-155; Ex. 115). Bruce Kidd, the contract administrator for Metalclad during the relevant time, also testified that the insulation supplied by Metalclad failed to meet specifications. (IV: 98-101). Donald E.

Bressler, a professional engineer with Chen & Associates, testified that both he and Southwest Research Institute tested EPS that was obtained from the Oneida facility construction site, and that all such EPS failed to meet specifications. (II: 146-150, 157-158). Further, Metalclad's counsel stipulated into evidence the testimony of Dick Guymon, a representative of several EPS manufacturers, that no EPS manufacturer during the period of time in question manufactured 1.5 lb. density EPS having a comprehensive strength of 21-27 PSI. (V: 45-47).

Metalclad did not dispute or in any way attempt to impeach or discredit the admissions of its own representatives. Instead, Metalclad argued about the credibility of and the weight to be assigned the written test results which were reflected in the reports of Chen & Associates ("Chen") and Southwest Research Institute ("Southwest"), Exhibits 108 and 112. Metalclad did not offer any evidence in support of its contention that the EPS, in fact, met the 1.5 density, 25 PSI compressive strength specification and there is no other evidence in the record which in any way supports even an implicit finding that the EPS met specifications.

The evidence that relates to Metalclad's argument about the credibility and weight of Exhibits 108 and 112 is discussed in Metalclad's Brief of Appellee at Pages 12-13 and 21-23. That evidence can be summarized as follows. Steve Renslow, an employee of various business entities owned by Averch, was present at the

construction site when Mr. Breslow obtained a piece of broken and jagged insulation from under one of the damaged areas of the concrete floor. (III: 137). Mr. Bressler testified that repeated stresses and loads on the insulation would compromise the validity of the test results. (II, 121-123, 141, 172, 176-177, 186-187). Mr. Bressler further testified, however, that in his expert opinion he did not believe the weight of concrete trucks driven across the concrete floor during construction was excessive enough to deform the EPS so as to invalidate the test results, all of which found the EPS to be less than the 25 PSI impressive strength specification. (II, 144, 146-151, 157-160, 176-179). Metalclad also claims that there is confusion about the origin of the EPS samples that were tested by Chen and Southwest.

It is respectfully submitted that the evidence summarized above does not support an explicit or implicit finding that the EPS met specifications. Rather, such evidence relates only to Metalclad's argument as to the credibility or weight to be accorded the written test results.

Even if this Court totally disregards the written test results, there still exists ample evidence that the EPS did not meet specifications and there still exists absolutely no evidence that the EPS did meet specifications. Certainly Averch should not be penalized for failing to marshal that which does not exist.

Because there exists no evidence in support of a contention that the EPS met specifications, Averch respectfully submits that

this Court should consider the merits of his appeal from the trial court's dismissal of the breach of warranty claims as argued in the Brief of Appellant and Reply Brief of Appellant previously filed herein.

II.

Metalclad breached its express and implied warranties

The trial court held that Averch failed to prove that there was a causal connection between Metalclad's breach of warranty and the damage to the floor installed in the warehouse. The trial court's holding is contrary to the explicit language of the Utah Uniform Commercial Code regarding the measure of damages for breach of warranty. For this reason, Averch requests that the Court review the correctness of the trial court's conclusion of law regarding the causation element and that this review be without particular deference to the trial court's conclusion. Online Corp. v. Granite Mill, 849 P.2d 602, 605 (Utah App. 1993) (A trial court's interpretation and application of a statute presents a question of law subject to review by the appellate court for correctness); Western Kane Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377-78 (Utah 1987).

Pursuant to the Utah Uniform Commercial Code, the measure of damages for breach of warranty is the difference "between the value of goods accepted and the value that they would have had if they had been as warranted." See § 70A-2-714(2). The language of Utah Code Annotated § 70A-2-714(2) does not require proof of causation

in order to recover the differential between the value of the EPS as warranted and the value of the EPS as accepted by Averch.

Metalclad argues that Averch must prove causation. However, Metalclad cited no authority in support of such proposition because that is not the law in Utah.

Accordingly, Averch submits that the trial court erred at law by declining to award Averch damages equal to the price of the EPS. The unrebutted and uncontroverted evidence adduced at trial established both the contract price for the EPS, \$104,199, and the value of the EPS as accepted, \$0. (See Reply Brief of the Appellant, Page 19). Thus, Averch is entitled to a judgment against Metalclad on its breach of warranty claims in the amount of \$104,199 plus interest. See, Land v. Bankgart, 525 P.2d 602, 608-609 (Utah 1974).

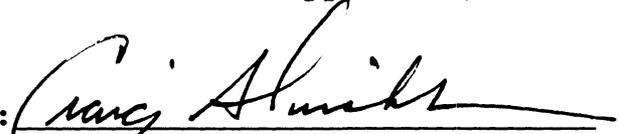
CONCLUSION

Averch respectfully requests that the Court grant this Petition for Rehearing and consider the merits of his appeal as to the breach of warranty claims. Averch further requests that upon such consideration, the Court enter an Order reversing the trial court's dismissal of said claims and remand the cause to the trial court with directions to enter judgment in favor of Averch and against Metalclad in the sum of One Hundred Four Thousand One Hundred Ninety-Nine Dollars (\$104,199) together with interest thereon as permitted by law.

DATED this 14th day of April, 1994.

STANLEY AVERCH, as Assignee of
ONEIDA/SLIC, a partnership and
as Assignee of ONEIDA COLD
STORAGE AND WAREHOUSE, INC., a
Colorado corporation,
Plaintiff and Appellant,

BY:



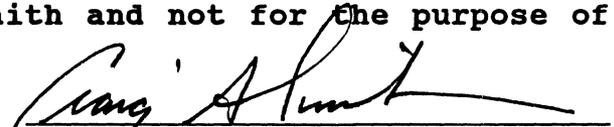
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CERTIFICATE

The undersigned hereby certifies that this Petition for Rehearing is presented in good faith and not for the purpose of delay.


Craig A. Knickrehm

CERTIFICATE OF SERVICE

The undersigned hereby certifies that four true and correct copies of the above foregoing Petition for Rehearing were served by regular United States mail, postage prepaid, this 14th day of April, 1994, to the following:

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