

1965

Utah State Building Board et al v. George R. Romney et al : Petition for Rehearing and Supporting Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE BUILDING

BOARD, et al,

Plaintiffs,

vs.

GEORGE R. ROMNEY and M.
WALLACE ROMNEY, dba G.
MAURICE ROMNEY COMPA-
NY, a partnership, and AMERI-
CAN CASUALTY COMPANY,
of Reading Pennsylvania, a corpora-
tion,

*Defendants, Third-Party Plaintiffs,
and Appellants,*

vs.

INDUSTRIAL INDEMNITY
COMPANY, a corporation,

*Third Party Defendant and
Respondent.*

Case No.
10143

MAR 9 - 1965

Utah Supreme Court

PETITION FOR REHEARING AND SUPPORTING BRIEF

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UNIVERSITY OF UTAH

APR 20 1965

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PETITION FOR REHEARING AND SUPPORTING BRIEF

Third Party Defendant and Respondent, Indus-
trial Indemnity Company, a corporation, respectfully
moves the court for a rehearing in the above entitled

case. The rehearing should be granted for the following reason:

1. The court inadvertently overlooked and did not consider or discuss a major point on this appeal and a major ground for the decision of the court below.

SUPPORTING BRIEF

POINT I

THE PRINCIPAL ON THE BOND IN THIS CASE, ONE J. G. WEDDING, SOLD THE PLUMBING BUSINESS TO SYLVIA RHODE, WHO THEN INCORPORATED THE BUSINESS AS WALSH PLUMBING COMPANY, AND THEREAFTER ISSUED CHECKS FOR LABOR AND MATERIAL CLAIMS WHICH WERE NOT HONORED BY TRACY COLLINS BANK.

The court in this case, by virtue of the decision herein, is compelling Respondent, Industrial Indemnity Company, to pay the obligation of a different principal from the one it bonded in accordance with the bond and the contract now before the court.

Regardless of certain recitals on the face of the bond (pretrial Exhibit No. 1) and in Paragraph 1 of the subcontract (Exhibit D. 16) referred to by the court in the seventh paragraph of its decision herein, the facts of this case are that at the time of the sub-

contract and bond in issue in this case, the subcontractor—and the principal on the bond—was an individual, J. G. Wedding, and Appellant, prime contractor, Romney, was aware of this fact. The subcontract itself (Exhibit D. 16) is signed “Walsh Plumbing Company by J. G. Wedding, Owner”.

The bond, as the pretrial findings and the judgment in this case clearly show, was written for J. G. Wedding as principal, Paragraph 5 of the pretrial order (R. 226) and Paragraph 3 of the judgment (R. 234).

In Point II on Page 13 of its prior brief in this case, Respondent raised this point that it was discharged from the obligation of its bond because of a material change in its contract. The point was not even contested by Appellant, American Casualty Company and Romney. No mention on this connection is made by Appellants either in their original brief or in their reply brief.

There is and can be no dispute about the facts upon which this contention of Respondent is based.

In the original answer of Third-Party Defendant and Respondent, Industrial Indemnity Company, as its third defense (R. 40) Industrial alleged that it was relieved of any liability under the bond in question herein by reason of the change in identity in the principal during the course of construction of the Rehabilitation Center without Industrial’s knowledge or consent, to its injury. The facts with respect to this contention are not in dispute.

At the pre-trial hearing, which was quite extensive in this case, the court called upon the various parties for various stipulations concerning the facts. The pre-trial order (R. 225-R. 228) clearly recites the facts. Paragraph 3 of the pre-trial order (R. 226) is as follows:

“J. G. Wedding did business prior to October 1, 1961, as Walsh Plumbing Company.”

Paragraph 4 provides:

“On or about October 1, 1961, J. G. Wedding sold the Wash Plumbing Company to Sylvia Rhode, who immediately thereafter incorporated the same as Walsh Plumbing Company, a Nevada corporation.”

Paragraph 5:

“Pre-trial Exhibit 1 is the bond furnished by Industrial Indemnity Company, as surety, and J. G. Wedding as principal to the G. Maurice Romney Company, a partnership.”

Paragraph 10:

“On or about October 1, 1961, the principal was changed from J. G. Wedding, doing business as Walsh Plumbing Company, to the Walsh Plumbing Company, a corporation, but no novation or agreement between the parties or any of them was ever made to the effect that J. G. Wedding was relieved from his contract to perform as made with Romney Company.”

The judgment in this case entered April 2, 1964, from which judgment the court has ruled the Appellant

is entitled to appeal, is the judgment before the court in this case, provides at R. 233 and R. 234 as follows:

“The following facts were stipulated and agreed to by the parties:

1. J. G. Wedding did business prior to October 1, 1961, as Walsh Plumbing Company.

2. On or about October 1, 1961, J. G. Wedding sold the Walsh Plumbing Company to Sylvia Rhode, who immediately thereafter incorporated the same as Walsh Plumbing Company, a Nevada corporation.

3. Pretrial Exhibit 1 is a bond furnished by Industrial Indemnity Company as surety and J. G. Wedding as principal to the G. Maurice Romney Company, a partnership.

5. On or about October 1, 1961, the principal was changed from J. G. Wedding, doing business as Walsh Plumbing Company, to the Walsh Plumbing Company, a corporation, but no novation or agreement between the parties or any of them was ever made to the effect that J. G. Wedding was relieved from his contract to perform as made with Romney Company.”

The findings and recitals of this judgment as such have never been questioned or challenged by the Appellant and they cannot be because they recite the true facts in this case.

The pretrial order at Paragraph 11, R. 227, and especially the affidavit of George R. Romney at R. 181, show that several months after the sale of the business by J. G. Wedding to Sylvia Rhode that there

was more than enough money in the Walsh Plumbing Company account at Tracy-Collins Bank and Trust Company to pay all of the labor and material claims involved in this case. Thus it is very clear that the surety, Industrial, was prejudiced by the change of ownership of the business and the principal on its bond in this case because the bank took the money that was supposed to pay these labor and material claims on some kind of a claim against Sylvia Rhode or Walsh Plumbing Company which had nothing to do with J. G. Wedding, the original subcontractor and principal on the bond. Also, the liabilities for each and all of the claims of the claimants in this case were incurred after October 1, 1961, to-wit: the date upon which the principal on the bond in this case written by Industrial Indemnity was changed. Various citations to the record showing this with respect to the claimants are, R. 3, R. 5, R. 41, R. 61, R. 130, R. 139, R. 151, and R. 160.

It should also be noted that not only has Appellant not challenged the facts and findings in this case with respect to the change of principal in this court, but never challenged them in the lower court even when he could have. For example, Appellant's motion to change pretrial order (R. 229) and its motion to set aside the judgment of April 2, 1964, (R. 252), make no objection or challenge to the findings of the pre-trial order or the judgment of April 2, 1964. Even in the findings of the judgment of the part of the case which finally went to trial, the court finds at R. 256, Paragraph 4, the same facts disclosed at pretrial and

in the final judgment of April 2, 1964, upon which this appeal is based.

The authorities seem to hold without dissent that a change of principal is a material change in the obligation which will discharge the surety from liability. See *Spokane Union Stockyards Company vs. Maryland Casualty Company*, 105 Wash. 306, 178 P. 3, and 50 Am Jur., Sec. 130, p. 990, 50 Am. Jur., Sec. 50, p. 939, and 144 A.L.R. 1267, Note 1.

Respondent submits that the facts and the law with respect to this point are clear in this case. It seems certain that one or other of the parties herein will be right back before this court in the future to determine this same point upon the basis of this same record.

CONCLUSION

Respondent respectfully submits that its position on this point is well taken and that the court should consider this contention and sustain the judgment of the court below.

Respectfully submitted,

Shirley P. Jones, Jr.

Attorney for Respondent