

1993

Interwest Construction, a Utah corporation v. R. Roy Pamer and Val W. Palmer, dba A. H. Palmer and Sons : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

930220 CA

INTERWEST CONSTRUCTION, a Utah
corporation,

Plaintiff and
Appellant,

vs.

R. ROY PALMER and VAL W. PALMER,
dba A. H. PALMER & SONS,

Defendants and
Appellees.

Case No.: 930220-CA

Priority: 15

R. ROY PALMER and VAL W. PALMER,
dba, A. H. PALMER & SONS,

Third Party Plaintiffs,

vs.

JOHN RYSGAARD, dba, FIBERGLASS
STRUCTURES COMPANY and
FIBERGLASS STRUCTURES COMPANY,
INC.,

Third Party Defendants.

FIBERGLASS STRUCTURES AND TANK
COMPANY, fka FIBERGLASS
STRUCTURES COMPANY OF ST.
PAUL, INC.,

Third Party Plaintiffs,

vs.

THIOKOL CORPORATION,

Third Party Defendant.

APPELLANT'S REPLY BRIEF

FILED
Utah Court of Appeals

AUG 9 1993

Mary T. Noonan
Mary T. Noonan

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APPELLANT'S REPLY BRIEF

**APPEAL FROM A JUDGMENT IN THE
FIRST DISTRICT COURT OF CACHE COUNTY
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE**

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APPELLANT'S REPLY BRIEF

Appellant Interwest Construction respectfully submits the following reply brief.

I. DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

There are no determinative constitutional provisions or statutes in this case.

II. ARGUMENT

POINT I:

**INTERWEST IS NOT REQUIRED TO MARSHALL EVIDENCE
BECAUSE THE EVIDENCE SUPPORTING THE TRIAL COURT'S
DECISION WAS NEVER IN DISPUTE.**

Palmer's claim that Interwest is required to marshal all evidence in support of the trial court's findings and that Interwest has failed to do so. However, in this case there is no need to marshal the facts and present them in the light most favorable to the trial court's findings because the facts regarding the contract between Interwest and Palmer, the amount unpaid thereunder and the circumstances under which the unpaid amount would become due and payable have never been in dispute. These facts were not only admitted but alleged by Interwest in the Complaint and Amended Complaint filed herein. The simple issue before this Court is not one of fact nor whether the evidence supports the judgment but is one of law, i.e., whether

the trial court correctly interpreted the contract between the parties. Interwest does not challenge the sufficiency of the evidence supporting the trial court's findings and conclusions but instead challenges the court's determination of the legal principles employed in arriving at those findings and conclusions. The trial court's conclusions of law are "accorded no particular deference, we review them for correctness." Doelle v. Bradley, 784 P.2d 1176, 1179 (Utah 1989).

POINT II:

PALMERS WERE NOT ENTITLED TO FINAL PAYMENT.

Regardless of when the Treatment Plant was completed, the fact remains that Interwest has not been paid in full by Thiokol for the work performed under its general contract with Thiokol and pursuant to the clear terms of the Subcontract between Palmers and Interwest, Palmers is not entitled to full payment until and unless Interwest is been paid in full.

Palmers argue that bits and pieces of the contract have been put forward in support of Interwest's arguments however, Palmers' ignores the fact that it is appropriate to look to the contract as a whole when the interpretation of that contract is in question. Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492, 494 (Utah App. 1991) citing Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989). When read as a whole, the Subcontract Agreement is clear that Palmers was bound by and subject to the general contract between Thiokol and

Interwest and until that contract was fully satisfied, Palmers' performance under the Subcontract Agreement was not complete and they were not entitled to final payment.

POINT III:

**INTERWEST IS ENTITLED TO INDEMNIFICATION
AGAINST THE COSTS IT INCURRED IN DEFENDING THIS ACTION.**

Palmers argue that contracts of indemnity are to be strictly construed and that the Subcontract should be construed against Interwest and interrupted as not requiring Palmers to indemnify Interwest against claims that Palmers' work was defective. Palmers go so far as to cite Pickhover vs. Smith Management Corporation, 771 P.2d 664 (Utah App 1989) as support for the strict construction rule. However, Palmers ignore both the rationale for the strict construction rule and the ruling of this Court in the Pickhover case. This Court, after a careful analysis of the current trend of the law, ruled in Pickhover:

We hold that the rule [strict construction of indemnity agreements] applies only to indemnity provisions where the indemnitee seeks indemnification for the consequences of its own negligence. Id at 670.

Palmers cite two additional cases in support of their argument that Interwest is not entitled to indemnification from them: Goldman v. Ecco-Phoenix Electric Corporation, 396 P.2d 377 (Ca. 1964) and Tyee Construction Co. v. Pacific Northwest Bell Telephone Company, 472 P.2d 411 (Wash. App. 1970). Both cases are easily distinguishable. In Goldman, the general contractor sought indemnification against its own negligence involving a

job site injury. In Tyee Construction, the indemnitee directed the indemnitor to do certain work in a particular way which ultimately resulted in damage to the indemnitee's property. In both cases the indemnitee sought to impose upon the indemnitor the obligation of answering for the negligence or intentional acts of the indemnitee.

In this case, Interwest has only sought to have Palmers abide by their Subcontract Agreement and hold Interwest harmless from Palmers' own negligence or breaches of contract and against the negligence or breaches of the subcontractors and suppliers for which Palmers are responsible. Interwest has not sought nor has Palmers provided any defense of claims that Interwest itself was negligent.

This case arose because Interwest found itself in the middle of a dispute between Thiokol, who claimed the tanks supplied by Palmers were defective and Palmers, who claimed that the tanks failed because of Thiokol's modifications. No one has claimed nor is there any evidence to support a claim that Interwest contributed to the failure in any way, yet Thiokol withheld funds earned by and rightfully belonging to Interwest solely on account of the tank failure. Under such circumstances, Interwest did not and does not seek to shift the burden of its own negligence or breaches of contract to Palmers, but has merely sought to have Palmers defend Interwest against Thiokol's claims and hold it harmless from the damage Interwest

suffered on account of Thiokol's withholding of payment.

Palmers also argue that because the trial court ultimately found that the cause of the failure was the overfilling the tanks and not poor workmanship or faulty materials, as was claimed by Thiokol, Interwest is not entitled to be indemnified by Palmers. Palmers' argument leads to the conclusion that any party that seeks to be indemnified against the claimed negligence or breach of contract of another can only recover if, in fact, the indemnitor is ultimately found to be negligent or to have breached its contract. If such an argument were accepted by this Court, the result would be that in all cases in which indemnification is an element, no indemnitee would ever accept a tender of the defense of a claim and both the indemnitor and the indemnitee would be required to defend against the same claims resulting, as it has in this case, in the expenditure of additional attorneys' fees by both parties.

III. CONCLUSION

There is no evidence that requires marshalling in this case and this Court may review the trial court's decision for correctness. The trial court was incorrect in its interpretation of the Subcontract Agreement and should have given effect to the full intention of the agreement which is clearly to place upon Palmers the sole responsibility of defending the quality of its workmanship and materials.

Interwest respectfully requests that this Court remand this case to the trial court with instructions reinstate Interwest's

Complaint against Palmers and to award reasonable attorney's fees to Interwest.

DATED this 9th day of August, 1993.

WALSTAD & BABCOCK



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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 1993, I mailed a copy of the foregoing, APPELLANT'S REPLY BRIEF, postage prepaid, to the following:

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