



## **E.L. Scott Roofing Co. v. North Carolina**

346 S.E.2d 515 (1986) | Cited 6 times | Court of Appeals of North Carolina | August 5, 1986

Scott and Pennsylvania National, having filed a joint brief in this Court, take the same position on appeal. They contend the trial court erred in concluding as a matter of law that Scott was contractually liable to the State for damages to the interior of Dudley Hall. We agree.

The State neither alleges nor contends that Scott was negligent in any respect in its performance of the work; rather the State claims that it had the right to withhold the \$41,859.84 from

its payment to Scott because Scott breached certain provisions of the contract. The State contends the following contractual provisions support the trial court's findings and conclusions that Scott and its insurer Pennsylvania National are liable for the damages:

### Article 12.

The Contractors shall be jointly responsible for the entire site and the building or construction of the same and provide all the necessary protections, as required by the Owner or Engineer or Architect, and by laws or ordinances governing such conditions. They shall be responsible for any damage to the Owner's property, or of that of others on the job, by them, their men, or their sub-contractors, and shall make good such damages. They shall be responsible for and pay for any claims against the Owner. All prime contractors shall have access to the project at all times.

The Contractor shall provide cover and protect all portions of the structure when the work is not in progress; provide and set all temporary roofs, covers for doorways, sash and windows, and all other materials necessary to protect all the work on the building, whether set by him, or any of the sub-contractors. Any work damaged through the lack of proper protection or from any other cause, shall be repaired or replaced without extra cost to the Owner.

The Contractor shall provide for all necessary safety measures for the protection of all persons on the work, including the requirements of the A.G.C. Accident Manual in Construction as amended, and shall fully comply with all State laws or regulations and Building Code requirements to prevent accident or injury to persons on or about the location of the work. He shall clearly mark or post signs warning of hazards existing, and shall barricade excavations, elevator shafts, stair wells and similar hazards; he shall protect against damage or injury resulting from falling materials; he shall maintain all protective devices and signs throughout the progress of the work.

### Article 36



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**Care of Buildings and Grounds :** All Contractors are responsible for protection of the buildings and grounds on which they are working and shall pay for any repair, replacement or repainting any parts or elements of the buildings or grounds damaged or destroyed during the course of the work.

A contract is to be construed according to the intention of the parties as ascertained from the words used in the contract as well as the subject matter, desired results, and purposes thereof, and the situation of the parties at the time the contract is made. *State Highway Commission v. L.A. Reynolds Co.*, 272 N.C. 618, 159 S.E.2d 198 (1968). Applying this rule of construction to the contract entered into by Scott and the State, we hold that Scott is not liable.

The first paragraph of Article 12 provided that Scott "shall be responsible for any damage to the Owner's property, or that of others on the job, by them, their men, or their sub-contractors, and shall make good such damages." The record reveals no evidence, nor did the trial court find that Scott, its men, or its sub-contractors, cause the damages to the temporary roof that allowed the rainfall to leak into and damage the building. The damage to the roof was caused by some unknown third person. Thus, Scott cannot be held liable for the damage under this portion of the contract.

Paragraph two of Article 12 provided that Scott "shall provide cover and protect all portions of the structure when the work is not in progress . . . ." Scott met this obligation when it installed the temporary roof and ventilation hatch cover before leaving the job site. The fact that the hatch cover was not secured in place is of no consequence in view of the trial court's finding that other contractors required access to the roof in order to complete their work.

The same paragraph also provided that "[a]ny work damaged through the lack of proper protection or from any other cause shall be repaired or replaced without extra cost to the Owner." In determining whether the court properly concluded that the appellants

were liable under this provision we must determine the meaning of the term "work" as it is used in this contract. When a contract defines a term, that definition is to be used. *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978). Work is defined in this contract as follows: "'work,' as used herein as a noun, is intended to include materials, labor and workmanship of the appropriate contractor." The damages for which the State withheld the \$41,859.84 were for neither materials, labor nor workmanship of Scott; the damages were for repairs to the underlying structure of Dudley Hall occasioned by water leakage and caused by the actions of some unknown third party who damaged the temporary roof which Scott had placed on the building. Under the terms of the contract only the temporary roof, which Scott promptly repaired, constituted "work" within the meaning of the contract. Thus, the State's claim cannot be sustained by reliance upon this clause of the contract.

Scott's liability was also predicated upon its failure to place banners, barricades or signs to warn of the fragile nature of the roof and to prevent people from walking upon it. The court found, and Scott does not contest the fact, that there were no banners, barricades or signs placed around the roof. The



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court concluded that Scott's failure to place barricades was a breach of the contract which supported the State's action in withholding the funds. The contract required Scott "to provide all necessary safety means for the protection of all persons on the work." (Emphasis added.) Included as a part of the requirement for the protection of persons on the work was the marking or posting of signs warning of the hazards which existed. However, the trial court did not find that the temporary roof constituted a hazard, requiring warnings to prevent injury to persons. The trial court's reliance upon this provision to support Scott's liability for the damages to Dudley Hall is misplaced. The unambiguous language of the contract shows that the provisions relating to signs and barriers were intended for the protection of persons on the job site and not for the protection of the property upon which the work was being performed. Scott's failure to conform with the contractual requirements to place the barriers to protect people on the work site cannot be used to hold it liable for damage to the structure.

Nor does the court's finding with respect to the "usual custom and practice in the industry" result in liability in this case.

A custom or usage may be proved in explanation and qualification of the terms of a contract which otherwise would be ambiguous, . . . but evidence of a usage or custom is never admitted to make a new contract or to add a new element to one previously made.

Lester Brothers, Inc. v. J.M. Thompson Co., 261 N.C. 210, 218, 134 S.E.2d 372, 378 (1964) (quoting 55 Am. Jur., Usages and Customs § 31).

Finally, we must determine whether the provision set forth in Article 36 of the Contract regarding care of buildings and grounds supports the court's judgment. The issue which must be determined with respect to Article 36 is whether Dudley Hall was damaged "during the course of the work" by Scott.

The term "during the course of the work" is not defined in the contract, thus, the presumption is that these words are to be given their ordinary significance. *Lester Brothers, Inc. v. J.M. Thompson Co.*, supra. Webster's New World Dictionary (2d College Edition 1974) defines "in the course of" as being "in the progress or process of; during." Applying this definition to the term "during the course of work" we hold that this term was meant to encompass only that time while Scott was actually engaged in working on the Dudley Hall project. Once Scott, at the State's direction, placed a temporary roof on the building, discontinued its work, and left the premises to await further authorization from the State, the work was no longer in progress until that authorization was given. Thus, Scott could not be held liable under that portion of Article 36 relied upon by the court to impose liability. To interpret the clause otherwise would make Scott a virtual insurer of the building against the acts of third persons even when it had no control over these persons or over the premises. We do not believe that the parties intended or contemplated such a duty when they entered into the contract.



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None of the provisions of the contract make the appellants liable for the water damage to Dudley Hall. The judgment of the trial court is reversed and the case remanded for entry of judgment consistent with this opinion.

Reversed and remanded.

Disposition

Reversed and remanded.

