

1975

John P. Jordan; David J. Wagstaff, Etc. v. Remco Inc., a Utah copration, et al. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Patrick H Fenton; Attorney for Third Party Plaintiff Respondent.

Carl T Smith; Attorney for Third Party Defendants-Appellants .

Recommended Citation

Brief of Appellant, *Jordan v. Remco Inc*, No. 13690.00 (Utah Supreme Court, 1975).
https://digitalcommons.law.byu.edu/byu_sc1/89

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU.
15.9
89
CKET NO.

UTAH SUPREME COURT

BRIEF

13690A

RECEIVED
LAW LIBRARY

RT

DEC 6 1975

STATE OF UTAH

BYU YOUNG UNIVERSITY
J. Reuben Clark Law School

JOHN P. JORDAN,

Plaintiff

v.

REMCO, INC., A UTAH CORPORATION,
ET AL.,

*Defendants and
Appellants.*

DAVID J. WAGSTAFF, ETC.,

*Third Party Plaintiff
and Respondent,*

Case No.

13690

v.

REMCO, INC., et al.,

*Third Party Defendants
and Appellant.*

BRIEF OF APPELLANT

FIFTH DISTRICT COURT FOR IRON COUNTY,
STATE OF UTAH,
HONORABLE J. HARLAN BURNS, JUDGE

CARL T. SMITH
520-26th Street
Ogden, Utah 84401

*Attorney for Third Party
Defendants - Appellants*

PATRICK H. FENTON
13 West Hoover Avenue
Cedar City, Utah 84720

Attorney for Third Party Plaintiff

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	3

POINT I:

THE COURT ERRED IN FAILING TO FIND THAT THE DEFENDANT HAD BREACHED THE SUBCONTRACT AGREEMENT.	3
--	---

POINT II:

THE COURT ERRED IN DISMISSING REMCO'S CLAIM OF \$20.00 PER DAY FOR TRIANGLE'S FAILURE TO CANCEL THE LIEN.	5
--	---

POINT III:

THE COURT ERRED IN DECLARING A FORFEITURE IN HOLDING THAT TRIANGLE NEITHER HAD TO FINISH THE DRYWALL WORK OR PAY THE AMOUNT TO HAVE THE WORK FINISHED OR PAY FOR MATERIALS REQUIRED TO COMPLETE THE JOB. ...	9
--	---

POINT IV:

THE COURT ERRED IN FAILING TO FIND THAT THERE WAS A WAIVER AND ESTOPPEL WHEN TRIANGLE CONTINUED WITH ITS PERFORMANCE AFTER THE BREACH OF THE SPECIAL PROVISION OF PARAGRAPH 5 OF THE SUBCONTRACT AGREEMENT WHICH PROVIDED FOR THE PAYMENT OF MATERIALS.	10
--	----

POINT V:

THE COURT ERRED IN AWARDING AN ATTORNEY'S FEE TO TRIANGLE AND FAILING TO AWARD AN ATTORNEY'S FEE TO REMCO.	14
---	----

TABLE OF CONTENTS - Continued

CONCLUSION	16
------------------	----

CASES AND AUTHORITIES CITED

CASES

<i>Brennan v. White, et al.</i> 97 Michigan 182, 56 NW 354	7, 8
<i>Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co.</i> , 102 Ark. 79, 143 S.W. 581, 583	13
<i>Perkins v. Spencer</i> , 121 Utah 468, 243 P2d 446	10
<i>Prudential Federal Savings & Loan Association v. Hartford Accident & Indemnity Co.</i> , 7 Utah 2d 366, 325 P2d 899	14
<i>Schnepf v. Thomas L. McNamara, Inc.</i> , 345 Mich. 393, 93 NW 2d 232	12
<i>Shupe v. Menlove</i> , 18 Utah 130, 417 P2d 246	14, 15, 16
<i>Snowball v. Maney Bros & Co.</i> , 39 Wyo. 84, 270 P 167	13
<i>Young v. Hansen</i> , 117 Utah 591, 218 P2d 666	9, 10

STATUTES:

Utah Code Annotated, 38-1-17	15
Utah Code Annotated, 38-1-18	16
Utah Code Annotated, 38-1-24	5, 17

TEXTS:

143 ALR, page 496	11
17 Am Jur 2d, Waiver of Breach; Election to Continue Performance,	11, 12
53 Am Jur 2d, Mechancis Liens, 235	6, 7
53 Am Jur 2d, Mechanics Liens, 241	7

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN P. JORDON,

Plaintiff,

v.

**REMCO, INC., a Utah Corporation,
et al.,**

*Defendants and
Appellants.*

DAVID J. WAGSTAFF, etc.,

*Third Party Plaintiff
and Respondent,*

v.

REMCO, INC., et al.,

*Third Party Defendants
and Appellant.*

Case No.
13690

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This case involves a Subcontract Agreement for all drywall work on a 60 unit apartment complex constructed in Cedar City, Utah, entered into between the third party plaintiff, David J. Wagstaff, dba Triangle Drywall referred to in this brief as Triangle and the third party defendant Remco Inc., referred to in this brief as Remco.

DISPOSITION IN THE LOWER COURT

The District Court Judge, J. Harlan Burns, after hearing

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

the testimony and observing the documents which were introduced, awarded judgment for Triangle in the principal sum of \$4,064.94, interest in the sum of \$325.20 plus an attorney's fee of \$1600.00 for a total judgment of \$5,990.14.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the judgment entered and that the case be remanded for findings of fact, conclusions of law and a judgment which legally corresponds to the factual evidence presented and pursuant to the argument set forth herein.

STATEMENT OF FACTS

Remco Inc., entered into a subcontract agreement with David J. Wagstaff, dba Triangle Drywall on the 19th day of May, 1972. Triangle was to do all the drywall work on the 60 unit apartment complex being constructed by Remco in Cedar City, Utah for the sum of \$47, 383.00, to be completed by August 1, 1972. (Pl's. Ex. 2).

In preforming the contract, Triangle was falling behind in their work as acknowledged by David J. Wagstaff. (Tr. 32). In an effort to rectify the situation, they assigned a portion of the work to Christiansen Drywall, (Tr. 32, 56 and 57), and to David Cranmer. (Tr. 79). Mr. Richins, who represented Remco, made numerous contacts with Mr. Wagstaff in an effort to keep the job moving. (Tr. 124 to 135 and 166). Mr. Sid Miller, the job superintendent, felt he had to get the drywall job in progress and therefore hired Robert Barwick. (Tr. 65). Finally, on the 1st day of September, Remco was required to step in and finish Triangle's job. (Tr. 167).

Disregarding the monetary value of Remco's work in behalf of Triangle in stocking the drywall, (Tr. 82 and R.

23), and in cleaning up and hauling trash, (Tr. 83, 85 and R. 23), the total payments made by Remco to Triangle or in their behalf was \$49,966.62; the said payments were as follows: \$4709.00 to James Cody and David Cranmer (Def's Exs. 2 and 5); \$3458.62 to Christiansen Drywall, to which Triangle agreed with \$3,144.20 (Tr. 151); \$1550.00 to Bobby Barwick (Tr. 151) to which Triangle agreed with \$900.00 (Tr. 13); \$758.00 to Southern Utah Lumber (Tr. 152), to which Triangle agreed with \$55.51 (Tr. 47), and \$272.65 to Iron County Lumber (Tr. 148). The direct payments to Triangle or in their behalf to Capitol Supply and the Internal Revenue Service, to which Triangle concurs, were \$39,218.35 (Def's Ex. 10 and Tr. 7, 46, and 140).

Triangle placed a lien on the property which was subscribed to on October 5, 1972 for the sum of \$13,673.00. (Def's Ex. 8). Triangle was informed of Remco's position that the lien was wrongfully placed on January 19, 1973. (Def's Ex. 17). Triangle refused to release its lien even with the payment into court of the full amount of its claim (R. 7) and the knowledge that payments to all its suppliers and sub-contractors had been made (R. 10). A motion for the release of the lien (R. 9) was granted, (R. 11), but required placing with the clerk of the court the sum of \$13,216.61 of Remco's funds. An attempt was made by Remco's attorney to place the funds in an interest bearing certificate of deposit on the 24th day of September, 1973, (R. 19), although this had not been done at the time of the dispersal of the funds on January 23, 1974. (R. 30).

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO FIND THAT THE DEFENDANT HAD BREACHED THE SUB-CONTRACT AGREEMENT.

The sub-contract agreement, (Pls, Ex. 2), provides, among other things, as follows:

“8. Subcontractor agrees to start work May 24, 1972 with four men, and will keep four to six men on project as long as they can be used effectively and other crafts do not cause them delays.

3. Subcontractor shall prosecute his work with due diligence so as not to delay the work of Contractor or other subcontractors etc.

1. The agreement between Contractor and Owner requires that the work to be performed must be completed by August 1, 1972.”

Triangle failed to comply with the foregoing provisions by falling behind in the work as testified to by David J. Wagstaff. (Tr. 32). David Cranmer also testified that the drywall work was considerably behind when he started working in the first part of July. (Tr. 79). Mr. Richins contacted Triangle, through Mr. Wagstaff and Mr. Jensen, on numerous occasions in an effort to get sufficient men on the job to comply with the contract terms, but had little success (Tr. 124 to 135). Further efforts to keep the drywall work progressing were made by the job superintendent, Sid Miller, in hiring Robert Barwick. (Tr. 65). Finally, some thirty days after Triangle was to have had the job completed, Remco took over the drywall work and paid for its completion. (Tr. 167).

Paragraph 18 of the contract provides:

“Subcontractor agrees not to sublet, transfer or assign this agreement or any part thereof without the written consent of contractor.”

Triangle proceeded by subletting work to Christiansen Drywall, (Tr. 32, 56 and 57), and to David Cranmer. (Tr. 32 and 73). The obvious reason for having the provision against subletting is that without it you lose control of the progress and often times the quality of the job, (Tr. 124), which is precisely what occurred.

Triangle was to be paid on the 10th day of each month for the previous months work. However, only one bill was ever submitted by Triangle and payments were made through verbal requests. (Tr. 177). Because of this situation, and the levy by the Internal Revenue Service, Mr. Richins had certain reservations about paying them. (Tr. 176 and 177).

Even though the Court construed the contract strongly against Remco, (Tr. 183), it is submitted that the strength of the construction should not have been so formidable as to withstand the penetration of Triangle's breach, and the failure of the Court to so find was error.

POINT II

THE COURT ERRED IN DISMISSING REMCO'S CLAIM OF \$20.00 PER DAY FOR TRIANGLE'S FAILURE TO CANCEL THE LIEN

Utah Code Annotated 38-1-24 provides:

"The claimant of any lien filed as provided herein, on the payment of the amount thereof together with the costs incurred and the fees for cancellation, shall at the request to be cancelled of record within ten days from the request, and upon failure to so cancel his lien within the time aforesaid shall forfeit and pay to the person making the request the sum of \$20.00 per day until the same shall be cancelled, to be recovered in the same manner as other debts."

The initial written notification by Remco to Triangle that the lien had been wrongfully placed was on January 19, 1973 by letter from Remco's attorney to Triangle's attorney with a copy to David J. Wagstaff. (Def's. Ex. 17). Remco's attorney, as authorized by Triangle's attorney, contacted Mr. Wagstaff directly in the latter part of July 1973 in an effort to get the lien released upon payment of his alleged claim plus 25 Percent, but Triangle refused to release lien. (R. 7). Remco was then required, by motion (R. 9), to get the Court to order the release of the lien which was so ordered on the 9th day of August, 1973 upon Remco depositing with the Clerk of the Court the sum of \$13,216.61. (R. 11).

It is Remco's position that a lien placed for an unreasonable amount is just as wrongful as placing a lien where it is not justified. Triangle's position, which was taken by the Court, is that even if only \$1.00 was owing the lien was proper, and whether the lien was placed for \$5.00 or \$50,000.00 the statutory provision became meaningless. If Section 38-1-21 is to have any meaning at all, then it should be applied in the instant case. 53 Am Jur 2d Mechanics Liens, Section 235 deals with this problem in stating:

"Where an overstatement of the amount due and sought to be recovered by virtue of a mechanic's lien is made intentionally and with a design to defraud, it is generally held that the entire lien must fail. Such a rule, or a very similar one, is expressly stated in some statutes, and in some jurisdictions the statutes go beyond this rule and additionally provide that the owner may recover a civil penalty for wilful exaggeration.

Even in the absence of a fraudulent purpose, liens have been declared void where the claim was

grossly and intentionally exaggerated, or where it was much greater than the claimant honestly believed due. Where the claimant asserted a lien for more than \$5,000 while the court held that only some \$1,500 was due and unpaid, the amount claimed was so excessive as to preclude the likelihood of a mistake made in good faith and to support a finding that the plaintiff intentionally claimed an amount greater than that which was justly due him. ”

In Section 241 there is an expression of how the amount of the lien is to be determined:

“While there is some authority that a mechanic’s lien is valid only to the extent of the actual cost of the work and materials used up to the time work under the contract was stopped which excludes from the lien, profits or prospective profits to the contractor, and although, where there has been substantial performance of the contract before it is terminated, the courts have frequently permitted recovery and a mechanic’s lien based on the contract price less the cost of completion, a great number of cases hold that the reasonable value of the work done and materials supplied, rather than the actual cost thereof, constitutes the amount for which a mechanic’s lien may be obtained by a contractor who fails to complete the contract work through no fault of his own. In some states, statutes limit this rule by providing for a reasonable recovery for the work performed in proportion to the price for the entire contract. ”

A statement of the Court in *Brennan v. White et al.* 97 Michigan 182, 56 NW 354, reflects why the amounts set forth on liens must be correct as follows:

"Liens laws are recognized as harsh remedies, and when, as by our statute, parties are required to file 'just and true statements of the demand over and above all legal set-offs,' equity treats as insufficient a statement which is largely excessive. Parties are not permitted to include speculative items in their claims, thereby encumbering the lands of others with untrue and unjust claims; and, as the means of information is within their reach, they are held to a degree of accuracy greater than may be necessary in mere actions upon demands."

The instant case represents a situation going beyond the actual placement of the lien. In July of 1973, Remco, through their attorney, requested that Triangle release its lien upon placing \$11,522.41 with the Court, (R. 7) which was refused. Remco was then required to obtain an order of the Court and place \$13,216.61 with the Court. (R. 11), even though their total claim at that time and at the time of trial was \$4,064.94. Triangle never did release or cancel the lien. Even under these circumstances, Triangle moved to reinstate the lien, (R. 15), to which Remco responded. (R. 16).

With the lien being placed for an exaggerated amount, Triangle refusing to cancel the lien of record upon the payment of the amount, with costs incurred and the fees for cancellation, and the requirement of placing with the Court an amount which was in excess of three times the actual claim, the situation represents an abuse for which the statute was intended. Not only was there a refusal on Triangle's part to cancel the lien, but also the additional abuse of requiring the payment of the \$13,216.61.

The minimum amount of time for which Remco should be entitled to the \$20.00 per day, is from the time of refusing to cancel the lien, requiring the order of the Court, (R. 11), on August 9, 1973, until the parties stipulated to the

dispersing of the funds, after the trial, on January 23, 1974. This is a period of 152 days for which Remco should be entitled to \$3040.00

POINT III

THE COURT ERRED IN DECLARING A FORFEITURE IN HOLDING THAT TRIANGLE NEITHER HAD TO FINISH THE DRYWALL WORK OR PAY THE AMOUNT TO HAVE THE WORK FINISHED OR PAY FOR MATERIALS REQUIRED TO COMPLETE THE JOB.

The Court held that upon the breach by Remco, Triangle was entitled to the full contract price but the obligation for performance was forfeited. Fortunately for Remco, Triangle continued to perform some work and they concurred with portions of the payments to Christiansen Drywall, Barwick Drywall, and Southern Utah Lumber. Remco submits that the Court erred in not accounting for the remainder of the Iron County Lumber obligation, (Def's Ex. 6) or the Southern Utah Lumber obligation (Def's Ex. 6), when the materials could only have been used for the drywall job and were delivered to the project. (Tr. 76 and 116). The Court in not accounting for the payments made to James Cody and David Cranmer (Def's Ex. 2 and 5), resulted in a forfeiture in the amount of \$4,709.00, although the amount was reasonable to complete the job, (Tr. 84, 104, 158, 159, and 160), and Remco certainly was not paying gratuities at that point.

In holding as the Court did, the conclusion is that in any contract, if payment is not made on the precise due date, the party who has not been paid need no longer perform, but is entitled to the full contract price. It is suggested that such a conclusion if concurred with by this Court, will lead to contractual chaos.

The entire analysis of this Court in *Young v. Hansen*, 117

Utah 591, 218 P2d 666, is appropriate in application to the present factual circumstances, wherein it was stated:

“The contract did not provide for retention of the money and even if it did, it is questionable that such a provision could be enforced, as defendants would acquire an unconscionable advantage and be unjustly enriched at the expense of plaintiffs as there is no showing that defendants have suffered any damage. . . . Even though the plaintiff's breach is wilful and without semblance of excuse, the defendant must restore the excess of benefit over harm if, with knowledge that the breach has occurred or is impending, he assents to the part performance, or retains it or accepts the benefit of it unreasonably.”

Even where forfeiture clauses have been involved, this Court has not upheld them if the amount involved is disproportionate to the damages actually sustained. *Perkins v. Spencer*, 121 Utah 468, 243 P2d 446.

POINT IV

THE COURT ERRED IN FAILING TO FIND THAT THERE WAS A WAIVER AND ESTOPPEL WHEN TRIANGLE CONTINUED WITH ITS PERFORMANCE AFTER THE BREACH OF THE SPECIAL PROVISION OF PARAGRAPH 5 OF THE SUBCONTRACT AGREEMENT WHICH PROVIDED FOR THE PAYMENT OF MATERIALS.

The Court held that Remco breached the agreement by failing to make the payment as provided in the special provision of paragraph 5 (Tr. 183). This was presumably breached on the 19th day of June, 1973 which was thirty days after the execution of the agreement on the 19th day of May 1973. It should be noted, however, that the demand by Triangle was \$20,000.00 for the sheetrock which ac-

cording to Mr. Wagstaff cost \$14,580.00, (Tr. 61), and according to Mr. Richins would cost approximately \$12,000.00 (Tr. 154). This was of concern to Mr. Richins, (Tr. 173), but based on the Court's holding his concern was ill-founded.

The specific legal situation where performance is continued is covered in 143 ALR at page 496 which states:

"Under ordinary circumstances, where there is an existing actual breach of contract, of a character going to the essence, the innocent party (having in such case the right to go on with performance, or to rescind, or to stop performance and seek damages as for total breach) will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to performance."

The waiver aspect of the breach is discussed in 17 Am Jur 2d section 447, entitled waiver of breach; election to continue performance. The appropriate language as applied to the instant case is as follows:

"Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has an election of continuing performance, or of ceasing to perform, or of repudiating the contract. Any act by the injured party indicating an intent to continue will operate as a conclusive election, not depriving him of his right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his own part. Under ordinary cir-

cumstances where there is an existing actual breach of contract of a character going to the essence, the innocent party will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to performance. In other words, a party may waive a breach by the other party and then be liable for his own subsequent breach. ”

In *Schnepf v. Thomas L. McNamara, Inc.*, 354 Mich. 393, 93 NW 2d 232, a very similiar factual situation was presented to the Court. In holding that the injured party had waived its right to terminate the contract the Court stated:

“Did defendant’s change of the location for sand loading operations constitute a breach of contract relieving plaintiff from the obligation to supply a sufficient number of trucks at all times? Plaintiff continued operations under the written contract for a number of days after such change of location and up to the April 21 meeting without protest and without claiming breach of contract or asserting its termination. The record does not indicate that he made such claim at any time prior to suit. By continuing thus to perform and to accept payments under it, as above noted, he lost his right, if any, to terminate the contract and declare it forfeited. *Robinson v. Lake Shore & M.S. Railway Co.*, 103 Mich. 607, 61 N.W. 1014.

‘It was appellant’s duty, when it discovered the apparent breach of the contract, if it intended to insist upon a forfeiture, to do so at once. By per-

mitting appellees to proceed with the performance of the contract it waived a breach.' *Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co.*, 102 Ark. 79, 143 S.W. 581, 583.

"Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, *not indeed of depriving him of a right of action for the breach which has already taken place*, but depriving him of any excuse for ceasing performance on his own part. Anything which draws on the other party to execute the agreement after the default in respect of time or which shows that it is deemed a subsisting agreement after such default will amount to a waiver.' (Italics ours.) 12 Am. Jur. p. 968, s 390." *Sinclair Refining Co. v. Costin*, Tex. Civ. App., 116 S.W. 2d 894, 898."

A similar result was reached by the Court in *Snowball v. Maney Bros. & Co.* 39 Wyo. 84, 270 P 167, wherein the Court held:

"We do not think that there were two contracts in the case at bar, but that all the work by the plaintiff was done under the written contract. A man cannot blow both hot and cold. He cannot treat a contract in force and effect, and then sue for its breach, upon the theory that it was repudiated by the opposite party. If he acts on the theory that it is still in force, the breach, if any, is waived."

The statement of this Court in *Prudential Federal Savings & Loan Association v. Hartford Accident & Indemnity Company*, 7 Utah 2d 366, 325 P2d 899, also seems

applicable, the statement being:

“Furthermore, it is a recognized principle of contract law that a breach of an insubstantial nature, which is severable and does not vitally change the transaction, does not release the other party completely from performing his obligations under the contract, but gives rise to a right for damages for any loss occasioned thereby. ”

The case at hand involved a situation where there was a waiver of the breach, although Triangle should have been entitled to any damages caused by the breach, if any there were. Triangle continued to perform in some sort of fashion from the 19th day of June 1973, until approximately the 1st of September 1973, when Remco was required to step in and complete their job. During this period of time they continued to accept payment and made no mention of the breach. By waiving the right Triangle may have had, they were required to perform pursuant to the contract terms, but failed to do so.

POINT V

THE COURT ERRED IN AWARDING AN ATTORNEY'S FEE TO TRIANGLE AND FAILING TO AWARD AN ATTORNEY'S FEE TO REMCO.

On the question of awarding attorney's fees, this Court has previously spoken in *Shupe v. Menlove*, 18 Utah 130, 417 P2d 246. In that case the parties entered into a contract for building a house for cost, plus ten percent. As in the present case, as performance continued certain controversies arose regarding the amount of payment for the work performed, although the house involved was completed. The defendant claimed that the total amount owing including his ten percent was \$49,630.00 The jury awarded the sum of \$43,000.00 and found that the plaintiff was en-

titled to an offset of \$1,230.22. The claim of Triangle in the present case was \$13,216.61 and, excluding the interest and attorney's fee, they were awarded \$4,064.94. Reduced to percentages there was a 16 percent differential in the Shupe case as compared to a 69 percent differential in the present case. The statement of the Court in the Shupe case which is applicable here is:

"The final claim of error we give attention to is the trial court's refusal of defendant's request for attorney fees and costs. The pertinent statutes are:

'Section 38-1-17.— As between the owner and the contractor *the court shall apportion the costs according to the right of the case*, but in all cases each subcontractor exhibiting a lien shall have his costs awarded to him, including the costs of preparing and recording the notice of claim of lien and such reasonable attorney's fee as may be incurred in preparing and recording said notice of claim of lien. 'Section 38-1-18. - In any action brought to enforce any lien under this chapter *the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in this action.*' (Emphasis added).

It is plain that these two sections relating to this subject should be construed together and that when attorney fees are awardable thereunder they are to be treated as costs which, as expressed in 38-1-17 the court 'shall apportion the costs according to the right of the case'. Viewing the overall picture of this case in the light most favorable to the facts as found by the jury and to the verdict and judgment we cannot say that the trial court abused its discretion in rejecting defendant's contentions."

Remco would concede that Triangle was the successful party in the matter in the sense that they were awarded the full amount they then claimed as due and owing in the sum of \$4,064.94, but certainly it was substantially different than the claim in August of \$13,216.61. However, even assuming that the Court made no errors in its findings, conclusions and judgment, it is submitted that the Court did not apportion the costs according to the right of the case even in viewing the overall picture of the case in the light most favorable to the facts as found by the Court. This would certainly be the case if the percentage precedent of *Shupe v. Menlove* is followed.

CONCLUSION

The performance of both parties to the sub-contract agreement was certainly less than perfect. Remco was over a month late in paying the material supplier, Triangle failed to keep a sufficient number of men on the job to keep up with the other trades, they sublet much of their work, and they left the job without completing it. Financial problems beset both, so rather than Remco making monthly payments as provided in the agreement, they were made for the purpose of maintaining Triangle's performance. Certainly the evidence establishes a breach on the part of Triangle in many aspects of the agreement.

If Triangle was to have claimed a breach, such action should have been taken at the time of such breach, which was not done. By continuing to perform, they waived the breach and should be held to the damages resulting from their non-performance, which damages amounted to award granted by the Court plus the payment of \$2,583.62 which was in excess of the contract price, or a total of \$6,973.56, excluding the attorney's fee award. The total amount set forth is also the monetary amount lost by Remco when it forfeited its right to performance. Remco submits that such a forfeiture is greatly disproportionate to the damages actually sustained by Triangle.

The abuse of the lien law by Triangle should be carefully scrutinized by this Court. Under the circumstances which existed at the time of filing the lien, for the excessive amount indicated, it may have been justified. The real abuse came when Triangle refused to cancel the lien some ten months later, knowing that all its sublet contractors and materialmen had been paid, and knowing that its claim was \$4,064.94. In requiring them to place \$13,216.61 with the Court, it became an aggravated abuse which should not be condoned. This is precisely the type of situation where the \$20.00 daily penalty, provided for in UCA 38-1-24, should apply.

The aggravated abuse of the lien law as exerted by Triangle, should not be considered as the "right of the case" as required by statute in determining an award of attorney's fees and the award granted by the Court should be reversed.

Respectfully submitted,

CARL T. SMITH
Attorney for Appellant