

1987

GMW Construction, a Partnership v. Robert Wayne Cox and Roni Cox : Brief of Respondent

Utah Court of Appeals

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Nick Sampinos; attorney for appellant.

Marlynn Bennett Lema; attorney for respondents.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870160-CA

IN THE UTAH COURT OF APPEALS

GMW CONSTRUCTION,	:	
A Partnership,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs	:	Civil No. 870160-CA
	:	
ROBERT WAYNE COX and	:	
RONI COX,	:	
	:	
Defendant-Respondents.	:	

BRIEF OF RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE ELEVENTH CIRCUIT COURT IN AND
FOR CARBON COUNTY, STATE OF UTAH
HONORABLE A. JOHN RUGGERI, JUDGE

NICK SAMPINOS, #3950
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ARGUMENT PRIORITY CLASSIFICATION:

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

GMW CONSTRUCTION,	:	
A Partnership,	:	
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Plaintiff-Appellant,	:	
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vs	:	Civil No. 870160-CA
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ROBERT WAYNE COX and	:	
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ARGUMENT PRIORITY CLASSIFICATION: 14b

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- II. FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND ORDER
- III. UTAH RULES OF EVIDENCE
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IN THE UTAH COURT OF APPEALS

GMW CONSTRUCTION,	:	
A Partnership,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs	:	Civil No. 870160-CA
	:	
ROBERT WAYNE COX,	:	
	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENTS

JURISDICTION OF COURT OF APPEALS

Jurisdiction of this Court is founded under Section 78-2a-a, Utah Code Annotated and under Rule 3 of the Rules of Utah Court of Appeals, as the appeal arises from a final judgment or order of the Eleventh Circuit Court, and for Carbon County, State of Utah.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an action for the collection of money and foreclosure of a mechanic's lien and counterclaim for damages to personal property.

B. COURSE OF PROCEEDINGS

Complaint was filed and served on or about October 1,

1985. Answer and Counterclaim was filed and served on or about October 17, 1985. Pre-Trial was had on June 25, 1986 and Order thereon was entered July 9, 1986. Trial was had on January 28, 1987 before the Honorable A. John Ruggeri, Circuit Court Judge.

The Court entered it's Memorandum Decision on February 3, 1987. Findings of Fact, Conclusions of Law and Judgment were entered on March 27, 1987.

Appellant filed Notice of Appeal on or about April 27, 1987.

C. DISPOSITION AT TRIAL COURT

The trial court found in favor of defendants on their counterclaim and against Plaintiff on its Complaint and pursuant to its final order dated March 27, 1987, awarded judgment in favor of Defendants in the sum of \$4,154.83 plus \$725.00 as and for attorney's fees and costs in the amount of \$10.00 for a total of \$4,989.83 together with interest at 12% per annum until paid.

D. FACTS

[All facts as set forth by Appellant are disputed]. Respondents hired GMW to replace the firebrick and reface their fireplace which was equipped with a heatilator and was the only source of heat for their home (TR-59,1.15,16). Prior to hiring Appellants, Respondents purchased two pallets of red brick and firebrick (TR-60,1.22,23).

Appellant contends the contract was for material and labor. Respondents contend that contract was for labor only (TR-63,1.24,25) and that it was agreed that GMW would return the red brick that Respondents purchased and exchange them for rock for a small additional charge (TR-64,1.10,25).

Appellant contends that the fireplace was "condemned" (TR-115,1.18,23) but that they were only hired to give the fireplace a cosmetic face lift (TR-7,1.25, TR-8,1.1).

Appellants' chief witness, Lynn McCourt, is not a licensed contractor (TR-23,1.3,10). Mr. McCourt did not work on the interior of the fireplace (TR-25,1.5).

The size and shape of the firebox was changed by Appellants (TR-14,1.6) and when they finished the heatilator, that fit in the old firebox, was too big for the reconstructed firebox (TR-119, 1.13,17). Mr. Counsel had not seen the fireplace in question (TR-119, 1.23,24).

Appellants' testimony that Respondents' home was dirty was rebutted by photographic evidence to the contrary. (Ex. 29,30,31).

Appellant McCourt's testimony that he moved furniture, covered the floor and cleaned up following completion of the job was rebutted by witnesses Cox (TR-66,1.1,13) and Mrs. Langley (TR-97,1.10,11).

Mrs. Cox testified that an oak mantle was removed from the fireplace and taken by GMW (TR-78,1.14,15). Appellants

claim that the mantle piece was made of plywood and that it was thrown away (TR-29,1.15,16).

Mrs. Cox testified that one year prior to the incident she purchased a Television Set for \$596.00 and a coffee table for \$248.00 (TR-67,1.20,22). There was no objection to her testimony nor was it rebutted. She testified that the television set and table were damaged by flying chips of cinderblock (TR-67, 1.13) and by the pipe of one of the workman (TR-66,1.22,25, TR-67,1.1,2).

Appellant McCourt testified that they did in fact break rock inside the home. (TR-30,1.4,7).

Mrs. Cox testified to damage to her carpet (TR-68,1.8,18; Ex. 19,20) and her testimony was supported by Appellant McCourt (TR-16,1.24,25; TR-17,1.1,14) She testified that replacement cost was \$573.28 (TR-77,1.11,19) There was no objection to this testimony.

Mrs. Cox testified that, after waiting for two or three days for the mortar to dry, her husband lit a fire, that the fireplace would not work and the house was smoke damaged (TR-70,1.15,23). This testimony was corroborated by Mr. Cox (TR-91,1.22,25; TR-92,1.1,6); witness, Langley (TR-97,1.21,25) and witness Jennings (TR-106,1.12,23, Ex.10,21.25). Mr. Cox testified further that cleaning and painting expenses were over \$500.00 (TR-73,1.8,12).

There were no objections from Appellants' counsel who also stipulated that evidence of expenses for drapes and curtains be submitted to the court subject to counsel's right to request further hearing (TR-123,1.24,25; TR-124,1.1,25; TR-125,1.1,4). Evidence was submitted and there was no request for further hearing.

Appellant McCourt testified that \$3,500.00 was a minimum amount to reconstruct the fireplace (TR-32,1.6,7). Witness, Counsel testified that \$4,000.00 "on up" was the cost to reconstruct (TR-45,1.17,18).

Mrs. Cox testified that at 10:30 P.M. on the night the fireplace was lighted she called Appellant Gomez, at his home to advise him of the problem (TR-73,1.13,17) and that within one week following the completion of the work the mortar was falling out and cracks were appearing in the fireplace (TR-78,1.23,25; TR-79,1.1,25; Ex.17,27,18).

Appellant McCourt knew of Respondents' complaints within one week of completion of the work (TR-58,1.11,12).

SUMMARY OF ARGUMENT

There was, as the Trial Court found, sufficient evidence to support the Court's decision.

The Court of Appeal is precluded from hearing issues raised for the first time on appeal.

ARGUMENT

POINT I

WHETHER TRIAL COURT ABUSED IT'S DISCRETION BY AWARDING DAMAGES BASED ON EVIDENCE PRESENTED.

At trial of the case at bar the Court found from the evidence that Appellants' work on Respondents' fireplace caused damage to Respondents' home and personal property. (Addendum 1,2).

Appellants challenge the Courts findings based on the fact that there was conflicting testimony and that, in Appellants' view, their witnesses had more expertise. Appellants conclude that the evidence was not "substantial" and did not support the judgment.

The same argument was the issue on appeal in Kinkella v. Baugh, 660 P2d 233, (Utah 1983), cited by Appellant in support of their argument. The Utah Supreme Court said in Kinkella:

Plaintiff argues that he presented irrefutable evidence that defendants inflated the labor and material costs. Plaintiff also claims that the trial court attached insufficient weight to the testimony of plaintiff's expert. The trial court heard the witnesses of both parties first-hand, evaluated detailed written audits by both sides, and concluded that plaintiff's evidence was not as convincing as defendants' evidence. On appeal we do not retry

the facts and will not overturn the trial court's findings of fact if they are supported by substantial evidence.... [Citations Omitted] at 235.

This standard of review has been refined and expanded in the recent criminal case decided by the Utah Supreme Court which said:

On January 1, 1987, however, new Utah Rule of Civil Procedure 52(a) took effect, providing:

In all actions tried upon the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 52(a). Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.....

The language of Rule 52(a) is similar to the Federal Rules of Civil Procedure. Federal case law has defined the standard of review in the federal rule and Wright & Miller summarizes that standard as follows:

[I]t is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. All of this is true in reviewing a jury verdict. It is not true when it is findings of the court that are being reviewed. Instead the appellate court may examine all of the evidence in the record. It will presume that the trial court relied only on evidence properly admissible in making its findings in the

absence of a clear showing to the contrary.
It must give great weight to the findings
made and the inferences drawn by the trial
judge, but it must reject this findings if it
considers them to be clearly erroneous.
Wright & Miller, Federal Practice and
Procedures, Section 2585(1971)(Citations
Omitted]. [Emphasis Added].¹

Appellant in his narration of "fact" and review of the testimony favorable to his position merely highlights conflicting testimony and asks this Court to accept his version as true and disregard the evidence relied upon by the Trial Court in reaching it's decision. This approach was declined by the Utah Supreme Court in Hal Taylor Associates v. Union America, Inc., 657 P2d 743, (Utah 1982):

...Where the evidence is in conflict, we defer to the trial court's first-hand assessment of the witnesses' credibility and assume that the trial court believed those aspects of the evidence which support its findings.
[Citations Omitted] at 749.

Counterclaimants were competent to testify as to cause and amount of damage.

The Trial Court in it Memorandum Decision outlined the findings which supported the Court's decision. (Addendum 7).

Rule 701 of the Utah Rules of Evidence provides that lay testimony is admissible if the layman's inferences or opinions are rationally based on the perception of the

1. State v. Walker, 64 Utah Adv. Rep.10 (Utah 1987);
c.f., Kohler v. Garden City, 639 P2d 162 (Utah 1981);
Charleston v. Hackett, 360 P2d 176 (Utah 1961);
Dugan v. Jones, 39 Utah Adv. Rep.37 (Utah 1986)

witnesses and are helpful to a clear understanding of his testimony or to a determination of the fact in issue. (Addendum 3). Rule 702, Utah Rules of Evidence provides experts may testify but does not provide for any situation in which such testimony is mandatory. (Addendum 3).

In Roods v. Roods, 645 P2d 640, (Utah 1982), the Utah Supreme Court held that lay opinion was proper even though expert testimony would be admissible with respect to the issue.

In the case at bar, Respondents were in a position to observe and perceive their damages; when and how they occurred.

Appellant's witness, Mr. Counsel, had not seen the fireplace in question. (TR-119,1.23,24). Appellant who testified regarding said fireplace was not a licensed contractor (TR-23,1.3,10) nor did he work on the construction of the fireplace (TR-23,1.21,23).

Respondents were certainly in a better position to observe the malfunction of the fireplace and the result of said malfunction; as well as the damage to their carpet and furnishings.

All competent evidence tending to establish a legitimate item of damage is, under proper pleadings, relevant and admissible. Evidence tending to show the extent of the damages as a matter of just and

reasonable inference has been held admissible where the fact of damage has been proved, and where, because of the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of the damages can be so estimated, evidence of all the facts and circumstances of the case have any legitimate tendency to show the damages or their probable amount may be admitted for the purpose of enabling the trier of the facts to make the most accurate and probable estimate which the nature of the case permits. [Citations Omitted]²

While there are some inherent qualifications in the rule and variations of phraseology in its statement, the general rule supported in nearly all jurisdictions, in criminal as well as civil cases, is that an owner of a chattel, although not an expert on the subject, is qualified by the relationship of owner to give his opinion as to its value. The primary reason for admitting such an estimate of value is that of necessity, the owner necessarily knowing something about the quality, cost, and condition of the article, and it often being impossible to produce other witnesses having the requisite knowledge upon which to base an opinion. But the rule of admissibility is more frequently predicated on the presumption that the owner, being familiar with his property, knows what it is worth. It thus appears that familiarity on the part of the owner with the chattel involved is a condition precedent or inherent predicate to the admission in evidence of a

2. 25 A C.J.S. Damages Section 145, p.27.

nonexpert owner's opinion as to
value...[Citations Omitted]³

Respondents testified to the amount of damage to their property. There was no objection to nor rebuttal of said testimony.

Rule 301, Utah Rules of Evidence provides follows:

- (a) Effect of erroneous ruling.
Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

Appellants' witnesses testified that \$3,500.00 or \$4,000.00 would be the cost of reconstruction of the fireplace (TR-32,1.6,7) and (TR-45,1.17,18). Therefore, the Trial Court's conclusion that \$1,500.00 would compensate for damage to the fireplace was not unreasonable. The Court obviously did not believe Appellant McCourt's testimony that the fireplace mantle in an old home was made of plywood.

The measure of damage to personal property was set forth; allowing replacement cost as admissible evidence, in the Utah Court of Appeals decision rendered July 10, 1987, Ault v. Dubois, 61 Utah Adv.Rep. 35:

3. 31 Am.Jur. 2d, Expert and Opinion Evidence, Section 137, p.682-683.

...[C]ost of replacement may have been the only evidence available for the jury in determining the fair market value of the destroyed items. And the desired objective of damages is "to evaluate any loss suffered by the most direct, practical and accurate method that can be employed." [Citing Even Odds, Inc. v. Nielson, 22 Utah 2d 49, 448 P.2d 709, 711 (1968).] Moreover, Dubois did not introduce any other evidence to prove the fair market value of the damaged property...

As in Ault, Appellant herein offered no evidence of fair market value.

In this case, as in Robinson v. Hreinson, 17 Utah 2d 261, 409 P2d 121, (Utah 1965):

The parties have had what they were entitled to: a full and fair opportunity to present their contentions and the evidence supporting them to the court [and jury]. When this has been done all presumptions are in favor of the validity of the [verdict and] judgment. at 125.

Viewing the evidence in a light most favorable to Respondents, the established standard for appellate review,⁴ this Court should sustain the decision of the Trial Court⁵ and deny Appellants' request, on appeal, for a new trial.

Although the evidence was disputed and reasonable people

4. Gustaveson v. Gregg, 655 P2d 693 (Utah 1982).

5. McCloud v. Baum, 569 P2d 1125 (Utah 1977); Egbert & Jaynes v. R.C. Tolman, supra; n.3, citing Charlton v. Hackett, 11 Utah 2d 389; 360 P2d 176, (1961) and URCP 59 (a)(6), Addendum 15,p.1).

might arrive at different conclusions, the issues were decided by the Court. That decision should not be disturbed on appeal.

POINT II

WHETHER THE COURT OF APPEAL IS PRECLUDED FROM ADDRESSING ISSUES NOT RAISED AT THE TRIAL LEVEL.

Appellant did not raise the issue of sufficiency of the evidence at any time during the trial. It is obvious that the issue of sufficiency of evidence, if any, would have been apparent to Appellant at the close of Respondents' case. It was not raised.

Appellant now raises the issue of sufficiency of the evidence for the first time.

The Court has held in Barson v. E. R. Squibb & Sons, Inc., 682 P2d 832, (Utah 1984):

In order to preserve a contention of error on appeal, the party claiming error in admission of evidence must raise the objection the trial court in clear and concise terms and in a timely fashion calculated to obtain a ruling thereon. Where there was no clear and definite objection... that theory cannot now be raised on appeal..... Therefore, we are precluded from addressing this assertion of error on the merits. at 837,[citing 6].

6. U.R.E. 4; Cook Assocs. Inc. v. Warnick, Utah, 664 P2d 1161, (1983). State v. Malmrose, Utah 649 P2d 556, (1982). Franklin Financial v. New Empire Dev. Co., 659 P2d 1040, (Utah 1983).

Barson deals with timely objection to admissibility of evidence. The Supreme Court of Pennsylvania recently held:

"...The rule has been stated over over again that a party may not remain silent and take his chance on a verdict and then, if it is adverse, complain of some inadequacy which could have been quite easily corrected. See Susser v. Wiley, 1944, 350 Pa. 427, 39 A.2d 616; Rastmus v. Pennsylvania R. Co., 1949, 164 Pa. Super. 635, 639, 640, 67A. 2d 660; Stadham Co. v. Century Indemnity Co., 1950, 167 Pa. Super 268, 275, 74 A. 2d 511..." Bodine v. Boyd, 383 Pa. 525, 119 A. 2d 54, 276.

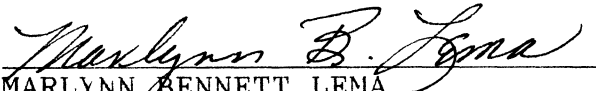
The issues raised on this appeal were or should have been apparent to Appellant at the close of the trial. They were not raised. Appellants chose to await the decision, which did not weigh in their favor before raising the issues on appeal.

Appellants argument in favor of reversal of the decision below should not be heard.

CONCLUSION

Judgment and Order of the Trial Court should be affirmed.

Respectfully Submitted,


MARLYNN BENNETT LEMA
ATTORNEY FOR RESPONDENTS
ROBERT WAYNE COX AND RONI COX

IN THE UTAH C

C	ASSIGNMENT,	:	CERTIFICATE OF SERVICE
	nership,	:	
		:	
	Plaintiff-Appellant,	:	
		:	
VS		:	
		:	
	ROBERT WAYNE COX and	:	
	RONI COX,	:	
		:	
	Defendants-Respondents.	:	Civil 160-CA

MARLYNN BENNETT LEMA, an Attorney for Defendants-
Respondents, of 248 East Main Street, Price, Utah 84501,
states that she served the Brief of Respondents upon the
following party by placing four true and correct
in an envelope add

NICK
ATTORNEY FOR
FIRST NATIONAL BANK BUILDING
TE 201
IN STREET
PRICE, UTAH 84501

a following the same, postage prepaid, on the 9th day of
1987.

Marlynn B. Lema
BENNETT LEMA
ATTORNEY FOR DEFEND
ENDENTS, ROBERT
AND RONI COX

A D D E N D U M

IN THE ELEVENTH JUDICIAL CIRCUIT COURT
CARBON COUNTY, STATE OF UTAH

- - -oOo- - -

GMW CONSTRUCTION,
a partnership,

plaintiff

-vs-

ROBERT WAYNE COX
and RONI COX,

defendants

MEMORANDUM OF DECISION

The Court makes the following findings of fact:

1. That the fireplace in question was operational and in use as the only source of heat at the time plaintiffs undertook repairs.
2. That the work done by plaintiffs resulted in structural modification of the fireplace as well as cosmetic ~~changes~~ ^{damage}.
3. That plaintiffs installation and repair of the firebrick and the "heatalator" was the direct cause of the malfunction of the fireplace.
4. That plaintiffs in cutting and fitting the rock and masonry work allowed chips and rock particles to damage the defendants television set and other furniture pieces.
5. That plaintiffs removed and destroyed an existing oak mantel belonging to the defendants.
6. That plaintiffs faulty construction/alteration is the direct cause of the damages incurred by defendants, as follows:

Damage to TV Tuner and Furniture	\$596.00
Damage to Drapes and Walls	620.55
Cleaning and Painting	500.00
Repair and Cleaning of Carpet	583.28
Oak mantel destroyed	325.00
Replacement costs for Fireplace	1,500.00

Memorandum of Decision Continued:

7. That the pre-trial order provided for attorneys fees, and the Court fixes defendants attorneys fees at \$725.00.

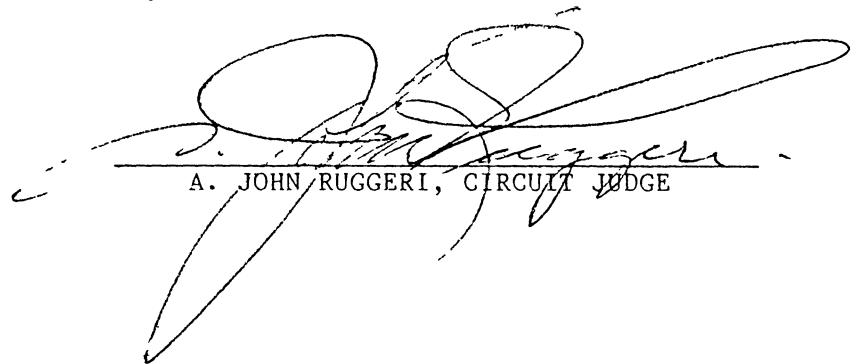
8. That plaintiffs returned, for credit, 100 red brick at 3¢ each for a total of \$30.00, which amount belongs to defendants.

The Court makes the following Conclusions of Law:

1. That defendants are entitled to judgment in the amounts indicated in the findings, together with costs and attorneys fees.

2. That plaintiffs lien is not valid and must be released forthwith.

Dated this 3rd day of February, 1987.



A. JOHN RUGGERI, CIRCUIT JUDGE

Marlynn B. Lema

ATTORNEY AT LAW 1933
248 EAST MAIN STREET
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(801) 637-2690

ATTORNEY FOR:

DEFENDANTS
ROBERT WAYNE COX
RONI COX
222 North 2nd East
Price, Utah 84501

IN THE ELEVENTH CIRCUIT COURT IN AND FOR
PRICE, CARBON COUNTY, STATE OF UTAH

GMW CONSTRUCTION,
A Partnership,

Plaintiff,

vs

ROBERT WAYNE COX
and RONI COX,

Defendants.

: FINDINGS OF FACT AND
CONCLUSIONS OF LAW

:

:

:

: Civil No. 85-CV-104

This matter came on for trial on the 8th day of January, 1987 and Plaintiff was personally present in Court and represented by Counsel, Nick Sampinos, and Defendants were personally present in Court and represented by Counsel, Marlynn Bennett Lema, and the Court having heard testimony and having received evidence and being fully advised in the premises and having entered its Memorandum Decision hereby finds as follows:

FINDINGS OF FACT

1. That this Court has jurisdiction.

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4501
,

2. That the Court finds in favor of Defendant on their Counterclaim and against Plaintiff on their Complaint.

3. That the fireplace in question was operational and in use as the only source of heat at the time Plaintiffs undertook repairs.

4. That the work done by Plaintiffs resulted in structural modification of the fireplace as well as cosmetic changes.

5. That Plaintiffs installation and repair of the firebrick and the "heatalator" was the direct cause of the malfunction of the fireplace.

6. That Plaintiffs cutting and fitting the rock and masonry work allowed chips and rock particules to damage the Defendants television set and other furniture pieces.

7. That Plaintiffs removed and destroyed an existing oak mantle belonging to the Defendants.

8. That Plaintiffs faulty construction/alteration is the direct cause of the damages incurred by Defendants, as follows:

Damage to TV Tuner and Furniture	\$	596.00
Damage to Drapes and Walls		620.55
Cleaning and Painting		500.00
Repair and Cleaning of Carpet		583.28
Oak Mantle destroyed		325.00
Replacement costs for Fireplace		1,500.00

9. That the pre-trial order provided for attorneys fees, and the Court fixes Defendants attorneys fees at \$725.00.


10. That Plaintiffs returned, for credit, 100 red brick at 3 cents each for a total of \$30.00, which amount belongs to Defendants.

Based upon the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

1. That Judgment should be awarded as against Plaintiff and in favor of Defendants in the amount of \$4,154.83 plus \$725.00 as and for attorney fees and costs of Court in the amount of \$10.00 for a total of \$4,989.83 same to bear interest at the rate of 8% per annum until paid.

DATED this 21 day of February, 1987.



A. JOHN RUGGERI
CIRCUIT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:



NICK SAMPINOS
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ATTORNEY FOR:

DEFENDANTS

ROBERT WAYNE COX

RONI COX

222 North 2nd East

Price, Utah 84501

IN THE ELEVENTH CIRCUIT COURT IN AND FOR

PRICE, CARBON COUNTY, STATE OF UTAH

GMW CONSTRUCTION,
A Partnership,

:

O R D E R

Plaintiff,

:

vs

:

ROBERT WAYNE COX
and RONI COX,

:

Defendant.

:

Civil No. 85-CV-104

This matter came on for trial on the 28th day of January, 1987 before the Honorable A. John Ruggeri, Circuit Court Judge, and the Plaintiff was personally present in Court and represented by Counsel, Nick Sampinos, and Defendants were personally present in Court and represented by Counsel, Marlynn Bennett Lema, and the Court having heard testimony and having received evidence and being fully advised in the premises and having entered its Memorandum Decision and having entered its Findings of Fact and Conclusions of Law, Now Therefore,

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(b) Scope of cross-examination.

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions.

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

RULE 612. WRITING USED TO REFRESH MEMORY.

If a witness uses a writing to refresh his memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

RULE 613. PRIOR STATEMENTS OF WITNESSES.

(a) Examining witness concerning prior statement.

(b) Extrinsic evidence of prior inconsistent statement of witness.

(a) Examining witness concerning prior statement.

In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT.

(a) Calling by court.
(b) Interrogation by court.
(c) Objections.

(a) Calling by court.

The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court.

The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections.

Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

RULE 615. EXCLUSION OF WITNESSES.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

Rule 702. Testimony by Experts.

Rule 703. Bases of Opinion Testimony by Experts.

Rule 704. Opinion on Ultimate Issue.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

Rule 706. Court Appointed Experts.

RULE 701. OPINION TESTIMONY BY LAY WITNESSES.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

RULE 702. TESTIMONY BY EXPERTS.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

RULE 704. OPINION ON ULTIMATE ISSUE.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the