

1977

# M. B. Powers, James M. Powers And Vern Petersen, D/B/A Powers And Petersen v. Gene's Building Materials, Inc : Respondents' Brief

Utah Supreme Court

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Matt Biljanic; Attorney for Appellant Richard Thornley; Attorney for Respondent

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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M. B. POWERS, JAMES M. POWERS  
and VERN PETERSEN, d/b/a  
POWERS AND PETERSEN,

Plaintiffs and  
Respondents,

vs.

GENE'S BUILDING MATERIALS,  
INC.,

Defendant and  
Appellant.

Case No. 14812

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RESPONDENTS' BRIEF

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STATEMENT OF KIND OF CASE

This is an action for damages arising from a breach of contract and from the negligent handling by Appellant of Respondents' account which Respondents had with Appellant for the purchase of certain building materials.

DISPOSITION IN LOWER COURT

The case was tried to a jury with the Honorable Bryant H. Croft presiding. A verdict was returned in favor of Respondents

in the sum of \$11,679.45 and judgment was entered thereon by the Court.

#### RELIEF SOUGHT ON APPEAL

Respondents seek an affirmation of the verdict and judgment.

#### STATEMENT OF FACTS

On or about April 30, 1973, Respondents entered into a contract with Jim Hartwell and Clearfield Realty for the construction of two six-plexes in Brigham City, Utah (Ex. 1-P). On or about May 7, 1973, Eldon Weber, president of Gene's Building Materials, Inc., Glen Campbell, secretary and treasurer of Gene's, and Jim Hartwell traveled to Brigham City and met with Respondent Jim Powers (R. 158, 185 and 196). At said meeting, a letter was delivered by Appellant's officers to Respondent Jim Powers offering to furnish Respondents building materials for Respondents' twelve-unit apartment house at a guaranteed price provided Respondents would pre-pay Appellant for said materials (R. 159-60 and Ex. 2-P).

Said agreement was between Respondents and Appellant only since Clearfield Realty was not mentioned in said letter and Hartwell and his wife were merely mentioned for the purpose of being authorized to specify which materials would be needed on the Brigham City job (Ex. 2-P). Note should be made that

said letter was addressed to "Mr. Bud Powers and Whomever else concerned" and signed by "Eldon E. Weber, Pres."

At the conclusion of the meeting in Powers' office in Brigham City, Powers issued a chit authorizing the Box Elder County Bank to pay Gene's \$54,000.00 for materials to be furnished on the Brigham City job (Ex. 3-P). Said bank received a Receipt and Lien Release signed by Gene's Building Materials - Glen D. Campbell, Sec. (Ex. 3-P). The bank then delivered to Weber and Campbell a cashier's check payable to Gene's Building Materials in the sum of \$54,000.00 (Ex. 4-P).

Appellant's officers, after receiving the cashier's check and before leaving Brigham City, drove to the proposed construction site to view the same (R. 186 and 210).

Prior to obtaining Respondents' job, Hartwell had a general account with Gene's set up as "Jim Hartwell, 402 W. 2200 N., Sunset, Utah" (R. 198 and Ex. 7-P).

After Appellant's officers returned to Salt Lake City, a new account was set up in the name of "Jim Hartwell, Brigham City Apartments" and the said \$54,000.00 was deposited therein (R. 198 and Ex. 9-P).

Appellant immediately started furnishing materials on the Brigham City job with the first invoice dated May 9, 1973 and billed to "Jim Hartwell, Brigham City Apts." (Ex. 5-P). Said job proceeded as agreed until September, 1973 when Appellant began running Hartwell's other jobs through the Brigham City account (R. 163-4 and Ex. 6-P). Said spurious

jobs were located in Kaysville, Layton, Riverdale and Clearfield and were processed through the Brigham City account by Appellant without Respondents' permission (R. 160-1 and Ex. 6-P).

This problem was further compounded when Appellant, on September 14, 1973, transferred \$1,901.28 from the Brigham City account to Hartwell's general account paying off the entire outstanding balance in the said general account (Exs. 7-P and 9-P).

The only excuse Appellant could give for such unauthorized activity was that Hartwell had called Eldon Weber and requested that the accounts be consolidated (R. 199). Weber then advised the bookkeeper to take care of the consolidation (R. 199). It should be noted at this point that the president of the company implemented the unauthorized account consolidation (R. 199).

Weber knew that the said \$54,000.00 was to be used for materials in the Brigham City job as the following testimony indicates (R. 202):

"Q. Did you know what the \$54,000.00 was to be for specifically?

A. As far as I knew, the materials for the Brigham City apartments."

Weber further admitted that the Brigham City job was not the usual situation where the lumber company dealt with the contractor and not the property owners and where the lumber company looked to the contractor for the payment of the materials (R. 208-9).

The unauthorized use of the said \$54,000.00 is further highlighted by Weber's testimony as follows (R. 210):

"Q. There is no question in your mind that you were on notice what this money was for, is there?

A. Yes, I realized it was for the apartment house."

When Hartwell requested that the accounts be combined, Appellant did not notify Respondents that Respondents' money was now being used for Hartwell's other jobs (R. 212).

Construction on the Brigham City job commenced May, 1973 and was completed on or about March, 1974 (R. 170). In the interim, Hartwell left the Brigham City job during the first part of 1974 (R. 175). Respondent M. B. Powers had advised his brother, Respondent James M. Powers, that he had notified Appellant of Hartwell's dismissal from the job (R. 176).

After Hartwell had left the job, Clearfield Realty sent a man up to the Brigham City job a few times after which Clearfield Realty discontinued working on the job and Respondents completed the job about March, 1974 (R. 170 and 219).

Respondents did not join Hartwell and Clearfield Realty as defendants in the subject litigation since Hartwell's whereabouts were unknown and no dispute existed between Respondents and Clearfield Realty (R. 130). The prime construction contract called for a purchase price of \$149,340.00 and the apartment complex ultimately cost approximately \$199,000.00 (R. 123 and Ex. 1-P). Further, Respondents had finished the construction of the project themselves. Therefore,

in order to resolve the matter, Edwin Higley, Clearfield Realty and Respondents entered into a subsequent agreement (R. 123).

In the spring of 1974, Respondents went to Appellant's place of business in Salt Lake City and requested the balance of their account assuming that they had a credit balance (R. 170). The account showed no credit balance and suit was commenced on July 15, 1974 (R. 1 and Ex. 9P).

At the beginning of the trial, the parties stipulated that \$11,679.45 was the value of the materials not used on the Brigham City job (R. 155).

#### ARGUMENT

##### POINT I.

THE TRIAL JUDGE HAD NO DUTY TO DISQUALIFY HIMSELF IN PRESIDING OVER THE SUBJECT LITIGATION.

The Record is silent as to when counsel for Appellant was notified by the court clerk of the judge assigned to try the case. All we have is counsel's assertion that he learned of the judge assignment approximately 15 minutes before trial commenced. Counsel for Respondents was not a party to any conversation between Judge Bryant H. Croft and counsel for Appellant concerning a disqualification of Judge Croft.

The Record is silent as to any written or oral motions for a continuance of the trial or a change of trial judge. Therefore, counsel for Respondents has obtained from the court clerk a letter dated March 17, 1977 setting forth the practice of assigning cases to judges in the Third Judicial District.

Said letter is attached to Respondents' Brief and marked Exhibit A. It is also the recollection of counsel for Respondents that he received notification of the judge assignment on the day prior to trial.

Rule 63(b) of the Utah Rules of Civil Procedure provides that whenever a party desires to disqualify a judge from trying a matter, the party must:

1. File an affidavit of bias or prejudice, as soon as practicable after the case has been assigned, setting forth the facts and reasons for the belief that such bias and prejudice exists;
2. File with said affidavit a certificate of counsel of record that such affidavit and application are made in good faith.

Respondents assert that there is nothing in the record that can be reviewed by an appellate court. There is no affidavit of bias or prejudice, no certificate of good faith, and no written or oral motions for a continuance or for change of trial judge.

Counsel for Appellant practices law in the Third Judicial District and was aware of the practice of the clerk of the court in assigning judges the day before trial. Counsel was also aware that Judge Croft was a possible judge to be assigned to the case and could have either called the clerk's office the afternoon before trial or had an affidavit of prejudice ready in the event Judge Croft was assigned to the case. Counsel had a further alternative of making an oral motion for the record requesting that a new judge be assigned to the case and giving his reasons therefor.



As the record now stands, there is no showing of bias or prejudice and no basis for removing Judge Croft from the case. There was nothing before the court to transfer to another judge.

In Lepasiotes v. Dinsdale, 242 P.2d 297 (Utah 1952), where an affidavit of prejudice was filed after the trial had commenced and pertained to matters alleged to have existed long before the trial and a statement by the court during the trial, the Supreme Court of Utah observed:

"Under these circumstances, the filing of such affidavit was untimely and hence Rule 63(b)URCP, was not violated. This is particularly true in view of the fact that the evidence supported the decree regardless of any statements made by the court."

In the case at bar, the trial had not yet commenced when counsel for Appellant conversed with Judge Croft in chambers. It is difficult to see how there could be any basis for bias or prejudice by Judge Croft in the subject case.

In Christensen v. Christensen, 18 Utah 2d 315, 422 P.2d 534, this Court held that before a judge should be disqualified from a case an affidavit of prejudice should be filed setting forth the facts and reasons for the belief that such bias and prejudice exists. This Court further indicated that the reasons alleged must be "reasonable" reasons. It was then observed at page 536 of the opinion:

"We detect nothing in the Record, either before or after the affidavit, evincing any rancor of any kind on the part of the trial court, but contrariwise, only the application of what we believe to have been sound legal principles."

The matter at bar was tried before a jury and the record is replete with Judge Croft's rulings and instructions in the case. Respondents submit that there is no indication in the Record showing bias or prejudice against Appellant by the Court.

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

Appellant argues that it should be granted a new trial based on newly discovered evidence that one Edwin Higley of Clearfield Realty had entered into a settlement agreement with Respondents.

Rule 59(4)URCP, regarding grounds for a new trial, provides as follows:

"Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial."

A multitude of cases hold that whether to grant a new trial for newly discovered evidence is wholly within the trial court's discretion and is conclusive unless the discretion is abused. See Greco v. Gentile, 53 P.2d 1155.

It is also axiomatic that if a party does not exercise diligence to discover and produce the alleged newly discovered evidence at the trial, the motion for a new trial should not prevail. See Shields v. Ekman, 248 P. 122.

Respondents submit that Appellant with reasonable diligence could have discovered said settlement agreement

prior to the time of trial and could have also joined Clearfield Realty and Hartwell if Appellant so desired.

The approach of Appellant in preparing the subject case for trial is set forth in counsel's remarks during argument of the motion for new trial (R. 228):

"I don't think on a collection case such as this, Your Honor, a deposition is justified."

At the time Respondents' counsel deposed the officers of Appellant, Respondent Jim Powers was present in the office of Appellant's counsel and Appellant chose not to take his deposition (R. 232).

Respondents took two depositions and served two sets of Interrogatories on Appellant (R. 9, 14 and 15).

The subject suit was filed on July 15, 1974 and tried September 1, 1976 (R. 1 and 64). During this time, Appellant chose to take no depositions and to serve only one set of Interrogatories which were filed on February 11, 1976 and the Answers thereto filed on April 21, 1976 (R. 49 and 56).

In Respondents' Answers to Interrogatories (R. 56), Appellant was advised as follows:

- a. A copy of the prime contract was attached setting forth that Jim Hartwell and Clearfield Realty were the contractors.
- b. Jim Hartwell, Clearfield Realty and Respondents were listed as performing work on the Brigham City job.

If Appellant did not desire to pursue further discovery, possibly a visit to Clearfield Realty prior to trial would have been in order. After a discussion with Clearfield Realty, Appellant then had the option of joining Hartwell and Clearfield Realty, or either of them, in the subject lawsuit.

Appellant could have moved under the provisions of Rule 19(b) or Rule 20(a) URCP to join Hartwell and/or Clearfield Realty.

Appellant also could have proceeded under Rule 21 URCP which provides as follows:

"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

Appellant had the further option of proceeding under Rule 14 URCP which authorizes third-party practice and would have allowed Appellant to bring in Hartwell and/or Clearfield Realty as third-party defendants. However, Appellant chose to do none of this and was content to wait until after an adverse verdict and judgment to assert these rights.

It should further be noted that Appellant still has the option of proceeding against Hartwell and/or Clearfield Realty in an independent action.

The trial judge observed at page 230 of the Record as follows:

"You could have brought in Clearfield, as well as anybody, and Hartwell, too, you see. You have that right under the law, but you didn't do so. Now, the reason why the plaintiffs' get a judgment against Gene's is because they can show only that instead of \$54,000.00 worth of materials being delivered to the Brigham City project for Hartwell, they delivered only about \$40,000.00 for it. And other deliveries to Hartwell made by Gene's and charged against the credit of the plaintiffs are for other jobs that Hartwell had and your own records show that. And so, all they are saying is, 'We gave you \$54,000.00 for materials and you only gave us \$40,000.00 worth of materials. We want our money back we didn't get our materials for.' And that is all this lawsuit was about, as far as this Court is concerned."

The Court further observed at page 231 of the Record:

"Any judgment is based upon the lawsuit before me, not upon the fact you may or may not have had a valid suit against Clearfield. I think the reason you have a suit against Hartwell and Clearfield is that they bought goods from you and didn't pay you for it; but instead, by a telephone call, gets you to join two accounts and credit the plaintiffs' credit with your company on their purchases for materials for other jobs."

"Now, it is between the plaintiffs and the defendant, it seems to me. The defendant is going to have to get stuck for giving Hartwell and Clearfield credit that was due the plaintiffs, but they used it up giving Hartwell materials for other jobs. Because I think, you have a claim against Clearfield and Hartwell, is simply because they purchased materials from you that they didn't pay you for. And instead of looking to them for credit, you charged the credit of the plaintiffs for those materials. So, I think your claim against Clearfield and Hartwell is for goods sold and delivered."

POINT III.

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

At page 218 of the Record the Court observed as follows:

"I would simply say in the Record, that after considering the evidence in the case and in connection with my preparation of the Instruction, it is my opinion that neither estoppel or contributory negligence are proper issues to be submitted to the Jury in the case."

The evidence believed by the jury and the Court was that the Brigham City job commenced May, 1973, Hartwell left the job during the first part of 1974, Respondents completed the job during March of 1974 and contacted Appellant concerning the balance of their account. Further, there is some indication that M. B. Powers notified Appellant when Hartwell left the job (R. 176). Respondent James Powers testified that he had not personally notified Appellant of Hartwell's departure but that his brother had notified Appellant of said departure. This negates Appellant's argument that Respondents waited an unreasonably long time. Appellant's argument is further negated by the fact that the job was completed only a month or two before Respondents' visit to Appellant in Salt Lake City concerning the balance of their account.

Appellant further argues that it is impossible for Appellant to police individual accounts and that this could raise the question of Respondents' contributory negligence. This contention is not borne out by the evidence since the

evidence was Hartwell talked with Eldon Weber, president of Appellant, concerning combining the accounts and the president of the company then arranged with the bookkeeper for the combining of the accounts.

In Jury Instruction No. 10 (R. 104) the Court presented Appellant's position in the case as follows:

"The defendant denies that it breached its contract with plaintiffs and alleges that it delivered to Hartwell the total amount of building materials for which plaintiffs had paid defendant the advance payment of \$54,000.00 and denies any responsibility for the fact that Hartwell may have used some of the materials so delivered on other jobs. Defendant further denies that it was negligent in the keeping of its books or records or that any negligence on its part was a proximate cause of any damages sustained by plaintiffs."

Appellant's position was further set forth in Instruction No. 12 (R. 106) which provided as follows:

"It is the duty of a person who has been injured by the negligence of another or damaged by a breach of contract to use reasonable diligence in caring for his injuries or damages and reasonable means to prevent their aggravation and to effect a recovery. Reasonable diligence and reasonable means in such situations depend upon the facts and circumstances of the particular case. If one fails to use reasonable diligence to care for his injuries and they are aggravated as a result of such failure, the liability of another, if any, must be limited to the amount of damage that would have been suffered if the injured person himself had exercised the diligence required of him.

"Thus, at the time Hartwell terminated working on the construction of the Brigham City apartments, plaintiffs had a duty to advise defendant that Hartwell had left the job and that no further materials should be furnished to him for use on the Brigham City apartments and charged against that account. Having failed to notify defendant of

such termination, any charges made after such termination of goods to Hartwell for use on the said apartments would not be chargeable to defendant."

Respondents submit that Appellant's position as justified by the evidence was amply set forth by the Court.

#### CONCLUSION

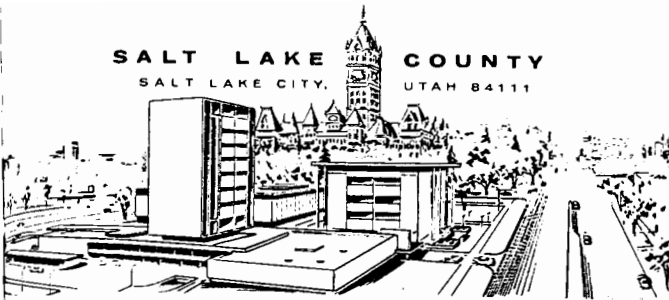
Respondents submit that Appellant had its day in court and that the verdict and judgment entered thereon should be affirmed.

Respectfully submitted,

RICHARD H. THORNLEY  
Attorney for Plaintiffs  
and Respondents  
2610 Washington Boulevard  
Ogden, Utah 84401



**SALT LAKE COUNTY**  
SALT LAKE CITY, UTAH 84111



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March 17th, 1977

Mr. Richard H. Thornley  
Attorney at Law  
2610 Washington Blvd.  
Ogden, Utah

Dear Sir:

Pursuant to your request for information relative to procedures in notifying counsel as to pending cases set for a specific date in the Third Judicial District Court, please be advised the procedure is set forth as follows:

On the day prior to the date on which cases are scheduled for trial, the Docket Clerk and his Assistant make a determination as to which cases are going to be tried and these cases are then assigned to a particular Judge. Sometime between the hours of 3:00 P.M. and 5:00 P.M., respective counsel are notified by telephone by the said Docket Clerk or his Assistant as to the name of the Judge assigned to try the case and the time the case will commence.

With particular respect to the case of M. B. Powers, et al -vs- Gene's Building Materials, Inc., Case No. 220946, which case was scheduled for trial on September 1st, 1976, it is the opinion of the undersigned based on established practice as outlined above, all counsel, to-wit, Richard H. Thornley and Matt Biljanic, were notified on the day prior to the trial which was set for September 1st, 1976, at least one hour prior to 5:00 P.M. as to the name of the Judge Assigned to try the case, to-wit the Honorable Bryant H. Croft, and as to the time of trial, which was ten o'clock A.M. Said notice would have been given to counsel personally or by leaving word with a Secretary in the said Law Office.

Very truly yours,

  
Robert A. Olsen, Docket Clerk  
Third Judicial District Court