

1979

L. Keith Lignell et al v. Clifford M. Berg et al : Appellants' Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH LIGNELL, MARIAN H. *
LIGNELL, his wife, BURTON M. *
TODD and PHYLLIS W. TODD, *
his wife, *

Plaintiffs and *
Appellants, *

v. *

CLIFFORD M. BERG and *
WILLIAM R. BERG, a partner- *
ship, d/b/a BERG BROTHERS *
CONSTRUCTION COMPANY, and *
FIDELITY AND DEPOSIT COMPANY *
OF MARYLAND, a corporation, *

Defendants and *
Respondents. *

Case No. 15001

APPELLANTS' REPLY BRIEF

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PREFACE

Unless otherwise indicated all statutory references are to Utah Code Annotated, 1953.

The reporter's transcript is designated as "T. ____." With the exception of one day's testimony the entire record was taken by the same reporter, Mr. Walton; the exception being the 27th day of August, 1976. Mr. Walton numbered the pages of his transcript consecutively from 1 to 3443. The testimony taken on the 27th day of August fits chronologically between pages 935 and 936 of Mr. Walton's transcript. The reporter for August 27th numbered her transcript from 1 to 121. In order to avoid confusion relating to two pages numbered 1, 2, 3, etc., the clerk has numbered that transcript with the preface "935." Thus, citations to that portion of the transcript are cited as "T. 935-1, T. 935-2," etc.

In addition, a transcript dealing with the pretrial conference has been filed to supplement the trial record. This is numbered consecutively from 1 to 82. Citations to that transcript are designated as "Supp. T. ____."

TABLE OF CONTENTS

INTRODUCTION	1
POINT I "LACK OF LICENSE" IS NOT AN AFFIRMATIVE DEFENSE	2
A. License is an "affirmative" defense to a trespass action that must be specially pleaded	2
B. The Rules of Civil Procedure did not shift the burden of pleading "lack of license" to plaintiffs	4
C. Defendants must still state a cause of action in their counterclaim	5
D. An affirmative defense raises matters outside the prima facie case	8
E. Proof of a valid contractor's license is part of defendants' prima facie case	10
F. The case of <u>Olsen v. Reese</u> still accurately sets forth the law of this state	11
G. Defendants' cases relating to plaintiffs' failure to plead are inapplicable to the facts of this case	13
H. Plaintiffs could maintain an action on the contract without waiving the defense of defendants' failure to license	15
1. An unlicensed contractor may be sued on the construction contract	15
2. Even if sued on a construction contract an unlicensed contractor may not avoid the consequences of his failure to be properly licensed	18
I. Plaintiffs diligently sought to ascertain if defendants were licensed	21
1. Plaintiffs first discovered defendants were not licensed on September 1, 1976	21
2. Clifford Berg is chargeable with knowledge that the partnership was not licensed	23

	3. The burden of ascertaining and pleading the existence of the license was defendants'	24
	J. Defendants' conclusions concerning plaintiffs' failure to plead "lack of license" are erroneous	25
	K. Denying recovery to an unlicensed contractor in this state is sound public policy	26
POINT II	THE AWARD OF ATTORNEY'S FEES TO THE PARTNERSHIP WAS IN ERROR	29
	A. The Labor Payment Bond is different than the Performance Bond	29
	B. Only Material Bonds are required for private contracts in this state	30
	C. The cases cited by defendants are inapplicable	31
	D. Defendants' other attempts to support the erroneous award of attorney's fees must be rejected	34
POINT III	DEFENDANTS' SUMMARY OF ELECTRICAL EXTRAS IS ERRONEOUS AND CANNOT SUPPORT THE JURY VERDICT AWARDING JUDGMENT AGAINST PLAINTIFFS	35
	A. Defendants have manufactured an inaccurate exhibit in an attempt to justify the mistaken award of damages	35
	1. Defendants' summary contains many duplications	36
	2. Defendants' summary contains many unsubstantiated charges	38
	B. Defendants cannot distinguish between those "extras" that were included in the contractor's contract and those that were not	40
POINT IV	DEFENDANTS' CLAIM OF PERJURY IS WHOLLY UNJUSTIFIED	43
POINT V	DEFENDANTS' BRIEF FAILS TO RESPOND TO MANY OF PLAINTIFFS' POINTS AND CONTAINS MANY INACCURATE STATEMENTS	45
	CONCLUSION	51

STATUTES CITED

Utah Code Annotated

Section 14-2-1	30
Section 14-2-3	30,32,50
Section 14-2-5	30
Section 14-1-8	30
Section 58-23-1	7,15
Section 58-23-10	28
Section 104-8-6 (1943)	4,12
Section 104-9-1 (1943)	4,12

Utah Rules of Civil Procedure

Rule 7(c)	6
Rule 8(c)	2,5,8,9,10,11
Rule 12(b) (6)	6,7
Rule 75(c)	34
Rule 75(e)	34,35

Utah Rules of Evidence

Rule 19	35
-------------------	----

AUTHORITIES CITED

Annot., 82 A.L.R. 2d 1429 to 1468	15
15 Am. Jur. 2d, Licenses and Permits, §63	27
17 Am. Jur. 2d, Contracts, §228	16
61 Am. Jur. 2d, Pleading, §73	5
75 Am. Jur. 2d, Trespass, §71	3
87 C.J.S., Trespass, §49	2
1 J. Chitty, A Treatise on Pleading and Parties to Action (10th Ed. 1847)	3,5
6 Corbin on Contracts, §1510	17
5 Cyclopaedia of Federal Procedure (3d ed. 1968)	7
2A J. Moore, Federal Practice	6,7,8
Restatement of Contracts, §§599 and 601	16
L. Wade, Some of the Purposes and Effects of the New Utah Rules of Civil Procedure, 2 Utah L. Rev. 21 (1950)	6,7
15 Williston on Contracts, §1766 (3d ed.)	27

CASES CITED

Allen v. Miller, 150 NYS 2d 285 (1955)	17
Armstrong Construction Co. v. Thompson, 390 P.2d 976, 64 Wash. 2d 191 (1964)	32
Barbizon v. Joannes Bros. Co., 231 Wis. 426, 286 N.W. 21 (1939)	2
Bathroom Design Institute v. Parker, 317 A.2d 526 (D.C. App. 1974)	17
Bennett v. McIntire, 23 N.E. 78 (Ind. 1889)	2
Bryan Builders Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968)	14,17
Cohen v. Mayflower Corporation, 86 S.E. 2d 860, 196 Va. 1153 (1955)	16
Cox v. Painter, 7 Carrington and Pains, English Nisi Prius Reports 767 (1837)	2
Dahl-Beck Electric Company v. Rogge, 80 Cal. Rptr. 440 (1969)	20
Dias v. Houston, 315 P.2d 885, 154 Cal. App. 279 (1957)	17
Dubuque Fire and Marine Ins. Co. v. Union Compress and Warehouse Co., 143 F. Supp. 128 (W.D. La 1950)	2
Eklund v. Elwell, 116 Utah 521, 211 P.2d 849 (1949)	4,10
Farmer v. Farmer, 520 S.W. 2d 539 (Tenn. 1975)	27
Fillmore Products, Inc. v. Western States Paving, Inc., 561 P.2d 687 (Utah 1977)	13,18,
Food Management, Inc. v. Blue Ribbon Beef Pack., Inc., 413 F.2d 716 (8th Cir. 1969)	19
Rex T. Fuhriman v. Jarrell, 21 Utah 2d 279, 445 P.2d 136 (1968)	51
General Ins. Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976)	8,9,10
Gronour v. Daniels, 7 Blackford 108 (Ind. 1844)	2,3
Hamilton v. Windolf, 36 Mo. 301 (1872)	2,3

Jary v. Emmett, 234 So. 2d 530 (La. App. 1970)	27
Johnson v. Dahlgreen, 59 N.W. 987 (N.Y. 1901)	27
Lindhout v. Ingersoll, 58 Mich. App. 446, 228 N.W.2d 415 (1975)	20
Meridian Corp. v. McGlynn/Garmaker Co., 567 P.2d 1110 (Utah 1977)	11,20,28
Millman v. Dolwell, 2 Campbell Nisi Prius Reports 378 (1810)	3
Mosley v. Johnson, 22 Utah 2d 348, 453 P.2d 149 (1969)	18,19
Olsen v. Reese, 114 Utah 411, 200 P.2d 733 (1948) . .	4,10,11 12,13,16
Rodgers v. Kelley, 128 Vt. 146, 259 A.2d 784 (1969) .	27
Scott-Daniels Properties, Inc. v. Dresser, 281 Minn. 179, 160 N.W.2d 675 (1968)	19
Sheftol v. Zipperer, 133 Ga. 488, 66 S.E. 253 (1909) .	2
Smith v. American Packing & Provision Co., 102 Utah 357, 130 P.2d 951 (1942)	4,10,24
Sumner Development Corp. v. Shivers, 517 P.2d 757 (Alaska 1974)	11,20,28
George H. Weinrott & Co. v. Burlington House Corp., N.J. Supr. 91, 91 A.2d 660 (1952)	27
Whyte v. Christensen, 550 P.2d 502 (Utah 1976)	8,9

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CLIFFORD M. BERG and *
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APPELLANTS' REPLY BRIEF

INTRODUCTION

This Reply Brief is directed to the Brief filed herein by the defendants-respondents (hereinafter called Defendants' Brief) and will address the points raised therein, although not in the same sequence as in Defendants' Brief, the more pivotal issues being addressed first.

Defendants' Brief employs the same shot-gun "accusatory" approach employed at trial. It appears designed to gloss over the fundamental fact that judgment was rendered in favor of a legal entity other than that with which plaintiffs-owners contracted (Plaintiffs' Brief, pp. 37-45).

Point I.

"LACK OF LICENSE" IS NOT AN AFFIRMATIVE DEFENSE.

Defendants claim that simply because the term "license" is found in Rule 8(c), U.R.C.P., plaintiffs were required to plead affirmatively that defendants did not have the necessary contractor's license or else that defense was waived. A careful review of the applicable statutes and cases indicates that this contention is erroneous.

A. License is an "affirmative" defense to a trespass action that must be specially pleaded.

The defense of license relates primarily to trespass actions, not actions on a construction contract. It has been stated that "consent or a valid license from the owner of land is a good defense to an action in trespass for acts within the scope of the license." 87 C.J.S., Trespass, §49 (emphasis added). Numerous cases have recognized "license" as a defense to a trespass action. See, e.g., Dubuque Fire and Marine Ins. Co. v. Union Compress and Warehouse Co., 143 F. Supp. 128 (W.D. La 1950); Barbizon v. Joannes Bros. Co., 231 Wis. 426, 286 N.W. 21 (1939); Sheftol v. Zipperer, 133 Ga. 488, 66 S.E. 253 (1909); Bennett v. McIntire, 23 N.E. 78 (Ind. 1889); see also Plaintiffs' Brief, pp. 73-74. In order for one to avail himself of the defense of license in a trespass action, however, that defense must be specially pleaded. Hamilton v. Windolf, 36 Md. 1 (1872); Gronour v. Daniels, 7 Blackford 108 (Ind. 1844); Cox v. Painter, 7 Carrington and Pains, English Nisi Prius Reports 767

(1837) (also found in English Reports Full Reprint, Vol. 173, 334); Millman v. Dolwell, 2 Campbell Nisi Prius Reports 378 (1810) (also found in English Reports Full Reprint, Vol. 170, 1190); 1 J. Chitty, A Treatise on Pleading and Parties to Action (10th ed. 1847); 75 Am. Jur. 2d, Trespass, §71. In enunciating this principle the court in Millman v. Dolwell stated,

"The defendant allows that he intermeddled with goods which were the property and in the possession of the plaintiff. By so doing he is presumed to be a trespasser; and if he has any matter of justification, he must put it upon the record. The plea of not guilty only denies the act done, and the plaintiff's title to the subject of the trespass. If the defendant has any authority, general or particular, express or implied, from the plaintiff, it must be specially pleaded by way of excuse."

In Gronour v. Daniels it was stated by the court that:

"Here, the tendency of the evidence is not to show that the defendant has not cut down and carried away the plaintiff's trees, but to show that he was justified, by a license from the plaintiff, in committing the alleged trespass. Such a defense, it is well settled, must be specifically pleaded."

Further, in Hamilton v. Windolf, the court there said:

"If a license had been specially pleaded, as must be done in actions of trespass when the defendant seeks to justify by the authority of the plaintiff, or those under whom he claims, . . . the evidence offered would have been clearly admissible in bar of the right to recover . . . but license from the plaintiff not having been specially pleaded, the evidence was inadmissible to defeat the action under the general issue simply."

Chitty has stated, "An excuse of the trespass, as on account of . . . a license from the plaintiff . . . must be pleaded specially." 1 J. Chitty, *supra* at 505.

The Rules of Practice in existence prior to the time the present Rules of Civil Procedure were adopted provided that an answer must contain "(2) a statement of any new matter constituting a defense or counterclaim." Section 104-9-1, U.C.A. (1943). Failure to raise a defense resulted in its waiver. Section 104-8-6, U.C.A. (1943). Thus we see that a plea of license, i.e., permission, being a statement of new matter constituting a defense, had to be pled affirmatively even under what defendants characterize as "the old pleading practice" or it was waived. It is interesting to note, however, that even under the "old pleading practice" the courts of this state determined long ago that when a contractor was attempting to recover upon a contract--as opposed to an action in trespass--the burden of pleading and proving the existence of a valid license was upon the contractor and that there was no waiver if "lack of license" was not raised as a defense to that action. Eklund v. Elwell, 116 Utah 521, 211 P.2d 849 (1949); Olsen v. Reese, 114 Utah 411, 200 P.2d 733 (1948); Smith v. American Packing & Provision Co., 102 Utah 357, 130 P.2d 951 (1942). Thus, one must conclude that the "license" that is a prerequisite to a recovery by a contractor must be pleaded as part of the contractor's affirmative case, not as a defense thereto.

B. The Rules of Civil Procedure did not shift the burden of pleading "lack of license" to plaintiffs.

Apparently defendants would have this Court believe that the adoption of the Rules of Civil Procedure in 1950 by some magical sleight of hand transferred to the owners the burden of

pleading "lack of license" relating to the defendant contractor. Plaintiffs submit that this contention is in error. The enumeration of the affirmative defenses in Rule 8(c) and particularly the word "license" is merely a codification of the practice that has existed for over one hundred years. In other words, Rule 8(c) codifies the requirement that in an action for trespass "an excuse of trespass as on account of a license from the plaintiff must be pleaded specially." 1 J. Chitty, supra. Had the drafters of the Rules of Civil Procedure intended to impact the contractor's license issue, they would have listed "lack of license" as the affirmative defense.

C. Defendants must still state a cause of action in their counterclaim.

While it is true that the Rules of Civil Procedure removed some of the technical formalities of pleadings, they do not relieve a party from the requirement of stating a cause of action. As has been stated:

"While modern procedural statutes and rules of practice relieve the plaintiff of much of the formality in the statement of his claim required under common law practice, the requirements are still substantially the same as under the common law respecting a statement of his cause of action." 61 Am. Jur. 2d, Pleading, §73.

While defendants quoted extensively from Professor Moore (Defendants' Brief, pp. 64-66), they neglected to cite the Court to one key paragraph. After making the statements relied upon by defendants, Professor Moore goes on to say:

" . . . the pleadings still must state a 'cause of action' in the sense that it must show 'that the

pleader is entitled to relief.' It is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant and the court can obtain a fair idea of what the plaintiff is complaining and can see that there is some legal basis for recovery." 2A J. Moore, Federal Practice, §8.13, p. 1705 (1975 ed).

Justice Lester Wade, the leading jurist involved in the adoption of the Utah Rules of Civil Procedure, stated:

"A party should not plead the evidence and is not required, as under the code, to detail the ultimate facts. Allegations may take the form of what under the code would be called conclusions of law, for most of the statements contained in the forms would have been so classified. The new rules do require a short, plain statement, with sufficient detail so that the adversary can be reasonably required to frame a responsive pleading thereto, which statement must cover the field sufficiently to show that the pleader is entitled to relief, or, to use a code term 'state a cause of action'. Although the new rules do not require as much detail as the code, they do require that the pleadings cover the same necessary elements to show that the pleader is entitled to relief as is necessary under the code to state a cause of action. If one or some of those necessary elements are omitted, then the pleading is subject to a motion to dismiss under Rule 12(b)(6), for 'failure to state a claim upon which relief can be granted.' On the hearing on such a motion, the Court might admit outside evidence and treat it as a motion for summary judgment under Rule 56, thereby disposing of the case on the merits." L. Wade, Some of the Purposes and Effects of the New Utah Rules of Civil Procedure, 2 Utah L. Rev. 21 (1950). (emphasis added).

Thus, while it is true that the demurrer, as such, was eliminated by Rule 7(c), the concept of determining the legal sufficiency of a complaint has been retained by Rule 12(b)(6) which requires a complaint to state a claim upon which relief may be granted. What was known as a demurrer under the code is

now designated as a motion under the new rules. L. Wade, supra, p. 12. Professor Moore states, "A motion to dismiss under 12(b) (6) performs substantially the same function as the old common law general demurrer." 2A J. Moore, supra, §12.08, p. 2265. It has been further stated that:

"Motions to dismiss for failure to state a claim on which relief can be granted have the force and effect of demurrers. . . . They have been viewed as a substitute for, as supplanting, as serving the function of, as equivalent of, or as largely partaking of the nature of demurrers; and raising the same legal issues as formerly raised by demurrers; i.e., the legal sufficiency of the complaint." Cyclopedia of Federal Procedure, Vol. 5, §15.150, p. 109 (3d ed. 1968) (citations omitted).

Justice Wade recognized that the Utah Rules of Civil Procedure require the pleader to cover in his prima facie case the same elements to show that he is entitled to relief as was necessary under the Code to state a cause of action. Prior to 1950 the cases are clear that in Utah it was necessary for a contractor to allege and prove as a part of his affirmative case that he was licensed in the State of Utah as required by §58-23-1, et seq. Plaintiffs submit that the authorities uniformly hold that the pre-1950 requirements have not been changed by the adoption of the Utah Rules of Civil Procedure and proof of licensing is still a necessary element of a contractor's case.

To contend, as defendants do, that it is no longer necessary for a party to state a cause of action under the present Rules of Civil Procedure is sheer nonsense, particularly in view of Rule 12(b)(6), which, as Justice Wade has pointed out, is the vehicle by which the sufficiency of the pleadings are tested

and which clearly requires that a party state a cause of action in order to remain in court.

D. An affirmative defense raises matters outside the prima facie case.

Defendants base their argument that the burden of pleading "lack of license" has shifted to the plaintiffs upon the dicta found in one case, Whyte v. Christensen, 550 P.2d 502 (Utah 1976); careful analysis indicates clearly that their reliance upon that case is ill-founded. In General Ins. Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976), this Court stated:

"A defense that merely controverts plaintiff's prima facie case is negative in character and should be pleaded in accordance with Rule 8(b) and Rule 8(c) then becomes inapplicable, for an affirmative defense raises matter outside the scope of plaintiff's prima facie case." (emphasis added).

As authority for this proposition, the Court cited to Moore's Federal Practice. Professor Moore states in his treatise:

"Matter which merely controverts plaintiff's prima facie case is a negative defense.

"A true affirmative defense raises matters outside the scope of plaintiff's prima facie case and such matter is not raised by a negative defense." 2A J. Moore, supra, §8.27(4).

Professor Moore goes on to remark that the above stated principle is equally applicable to a defendant's counterclaim. Id., at Footnote No. 1. Thus, Rule 8(c) only comes into play when matters outside the scope of a party's prima facie case are to be raised as a defense.

Once the principle that an affirmative defense deals with matters outside of the plaintiff's prima facie case is brought into focus the dicta of the Court in the Whyte case is easily understood. The Whyte case was not an action by a contractor suing upon a construction contract; rather, it was an action by an employee-plaintiff suing an employer for back wages. Under the facts of that case the employee's prima facie case was adequately stated when he alleged the existence of the employer/employee relationship, the work done and the amount owing. Thus, under those circumstances, the claim by the defendant that plaintiff was not an employee but, rather, was an independent contractor, and an unlicensed independent contractor at that, would be a defense that "raises matter outside the scope of plaintiff's prima facie case," Gen. Ins. Co. of America v. Carnicero Dynasty Corp., supra, and thus would have to be pleaded as an affirmative defense. But, that fact situation is vastly different from the instant case. In the instant case one of the parties to a joint venture, which joint venture was the contractor, was seeking by way of counterclaim to recover upon a construction contract. Leaving aside for a moment the question of the propriety of this procedure (see Plaintiffs' Brief, pp. 37-45), we have a situation where the entity (partnership) seeking to recover did not plead that it was properly licensed at the time in question (T. 1387). Thus, defendants failed in their pleading to even state a prima facie case and, in the words of this Court, Rule 8(c) became inapplicable since,

"an affirmative defense raises matter outside the scope of the plaintiff's prima facie case." Gen. Ins. Co. of America v. Carnicero Dynasty Corp., supra.¹

E. Proof of a valid contractor's license is part of defendants' prima facie case.

The issue presented to this Court then is whether a contractor's prima facie case may now be made out without pleading or proof of a valid existing contractor's license.² There can be no question that prior to the enactment of the Rules of Civil Procedure a contractor was required to prove as part of his prima facie case that the valid contractor's license existed. Eklund v. Elwell, supra; Olsen v. Reese, supra; Smith v. American Packing Co., supra. Defendants cite no applicable cases and no treatises to support their contention that in spite of the clear mandate of the legislature, §78-2-4, U.C.A., and in spite of the views of Justice Wade, that this substantive requirement has not been shifted over to the owners. Plaintiffs submit that the more recent cases of this Court clearly show that proof of a valid contractor's license is indeed still a part of the prima facie case; that a contractor must prove in order to recover on a construction contract (Plaintiffs' Brief, p. 69). This position was affirmed:

¹This Court also held "lack of" consideration was not the same as failure of consideration under Rule 8. Plaintiffs submit that "lack of" license is also not the equivalent of "license" under that rule.

²If, indeed, one may say that a legal principle re-enunciated by this Court as recently as 15 months ago can still be an issue in the trial courts of this state.

by this Court as recently as July of 1977 when it specifically reaffirmed its prior holding in the case of Olsen v. Reese. See Meridian Corp. v. McGlynn/Garmaker Co., 567 P.2d 1110 (Utah 1977). Nor does Utah stand alone in this matter. As previously cited to this Court (Plaintiffs' Brief, pp. 76-78), the Supreme Court of Georgia dealt with this precise issue and held that under their equivalent of our Rules of Civil Procedure it was incumbent upon the person claiming compensation in an occupation for which a license was required to prove the existence of that license. Plaintiffs submit that such is still the state of the law in Utah; the burden of pleading a license was upon the defendant since license was a portion of defendant's prima facie case; plaintiff had no obligation to raise "lack of license" as an affirmative defense; further, the term "license" as used in Rule 8(c) refers to the plea of justification or excuse for an action of trespass and has no application to this case. The issue is properly raised by a general denial and a defense that the complaint fails to state a claim upon which relief can be granted. Plaintiffs so pled (Plaintiffs' Brief, pp. 79-80).³

F. The case of Olsen v. Reese still accurately sets forth the law of this state.

An observation on the case of Olsen v. Reese is required because of comments contained in Defendants' Brief. Defendants

³In the case of Sumner Development Corp. v. Shivers, 517 P.2d 757 (Alaska 1974) an unlicensed contractor was precluded from recovering on the construction contract due to his failure to obtain the necessary license. Defendants did not plead "lack of license" but, rather, pled that the complaint failed to state a claim. When the lack of license became known, defendants then moved for summary judgment which was granted.

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argue that since the demurrer was abolished that case has also met its demise. A careful reading of that case, however, indicates that the results would be the same if that matter arose today under our present rules. The defendant there filed a general demurrer to plaintiff's complaint which was overruled. Thereafter, the defendant filed an answer but did not raise the issue of lack of a contractor's license. Judgment was entered for the contractor in the city court and the defendant appealed. During cross-examination of the contractor in the district court, evidence was adduced for the first time that the plaintiff was not properly licensed. Upon motion of the defendant the action was dismissed because the plaintiff had not alleged and had not established that he was a licensed contractor. It was obvious to the trial judge that the plaintiff in fact did not have a license. The motion of defendant was called a demurrer by the trial court. Respondents' characterization of the action being dismissed on a general demurrer, however, is inaccurate. Further, the action was dismissed in spite of defendants' failure to plead "lack of license" and in spite of §§104-9-1 and 104-8-6 U.C.A. (1943) dealing with "affirmative defenses" and waiver. The dismissal was upheld by this Court.

There are at least two key similarities between the instant case and Olsen v. Reese: (1) In both cases the issue of the contractor's license was not pled by any party, and (2) the fact that the contractor was not licensed came to light during the course of the trial. Plaintiffs submit that the

results of both cases should also be the same, the contractor's claim in the instant action should have been dismissed when plaintiffs so moved.

G. Defendants' cases relating to plaintiffs' failure to plead are inapplicable to the facts of this case.

After calling the 1948 case of Olsen v. Reese "old," defendants cite to two cases decided in 1917 and 1928, respectively, in support of their argument on waiver (Defendants' Brief, p. 63). The facts of those cases are totally inapposite here. One case dealt with a separate suit to set aside a judgment after it had been entered. The other case concerned a motion to set aside a default judgment filed some 23 months after judgment had been entered. Plaintiffs have no quarrel with a waiver being imposed under the facts of those cases, but they have no application to the instant case.

Defendants seek relief from their failure to license based upon the case of Fillmore Products, Inc. v. Western States Paving, Inc., 561 P.2d 687 (Utah 1977). Several distinctions between that case and this, however, are readily apparent. There a general contractor was attempting to avoid payment to a "sub-contractor." The Court held that the general contractor had a special duty to deal only with licensed contractors and thus could not avoid payment solely because it had dealt with an unlicensed subcontractor. There also the entire project was under the supervision of a licensed project engineer. Further, the subcontractor had not held itself out to the public as being licensed.

None of these criteria fit the instant case. Here the contracting owners were members of the general public, the very class the statute was designed to protect; further, the contractor held itself out to the public as being a contractor under the laws of the state of Utah. The general contractor was also primarily on its own regarding supervision of the project. Defendants attempt to fit within the narrow holding of Fillmore, therefore, must be rejected.

Defendants also claim plaintiffs should have pleaded "illegality," but the case of Rathke cited by them provides defendants with little support. There the issue of illegality was not pled by defendant but was raised for the first time on a motion for summary judgment at the conclusion of plaintiff's case. The trial court dismissed the action with prejudice and the supreme court affirmed noting that it was not necessary to plead illegality and that that matter can be raised at any time. Further, the court said where illegality appears at any stage of the proceedings it becomes the duty of the court to refuse to entertain the action. Plaintiffs submit, however, that the "illegality" contemplated in Rule 8(c) differs from the conduct of defendant here. See Bryan Builders Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968). That such contracts may be enforced by the party which is not an unlicensed contractor is more fully set forth in pp. 15-20 of this Brief.

The other "illegality" cases cited by defendants have no relevance here. Brown dealt with the illegality of a promisor's note which issue was raised for the first time on appeal. In

Seaboard Surety defendants pled illegality but that defense was stricken by the trial court. Intercontinental Promotions dealt with the 1974 heavyweight title fight between Muhammad Ali and Sonny Liston. Though totally irrelevant to the issues presented in this appeal, it does contain a fascinating history of boxing.⁴

H. Plaintiffs could maintain an action on the contract without waiving the defense of defendants' failure to license.

The trial court, in its Memorandum Decision (R. C1395-1397), was apparently of the opinion that Lignell and Todd had waived the defense of lack of license by bringing suit on the contract. Defendants argue that by suing on the contract, plaintiffs affirmed it as valid and enforceable (Defendants' Brief, p. 20). The court's ruling and the statement by defendants raises two questions: (1) may members of the public sue to enforce a contract with an unlicensed contractor; and (2) if a member of the public does so, what is the effect upon an unlicensed contractor's ability to use the contract as the basis for a defense or counterclaim. A good collection of cases on the subject is found at 82 A.L.R. 2d 1429 to 1468, §§3(b) and 6(b).

1. An unlicensed contractor may be sued on the construction contract.

Section 58-23-1, as amended, was enacted for the protection

⁴For instance, we learn that the first time gloves were used in a heavyweight title fight was in 1892 in the bout between Gentleman Jim Corbett and John L. Sullivan.

of the public. Meridian Corp. v. McGlynn/Garmaker Co., supra; Olsen v. Reese, supra. In such cases, 17 Am. Jur. 2d, Contracts §228, states the rule as follows:

"The rule governing cases in which the parties are not in pari delicto is frequently applied where the transaction is in violation of a law made for the protection of one party against the acts of the others; as they are not equally guilty, the party protected may recover. Where a class of contracts is prohibited for the protection of particular parties thereto, the adverse parties cannot take advantage of the illegalities of such contracts. Moreover, if the refusal to enforce such a contract would produce a harmful effect on the party for whose protection the law making the bargain illegal exists, it will be enforced."

The Restatement of Contracts in §§599 and 601, reports a similar rule:

"Where the illegality of a bargain is due to (a) facts of which one party is justifiably ignorant and the other party is not, or (b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law, the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain.

"If refusal to enforce or rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed."

An excellent opinion holding that an innocent party can maintain an action for breach of contract, even though the contractor had not obtained the required license, is found in Cohen v. Mayflower Corporation, 86 S.E. 2d 860, 196 Va. 1153 (1955). In that case, Mayflower Corporation sought judgment

against an unlicensed contractor, Cohen, and his surety to recover damages for breach of two written contracts. The defendants argued that since a license had not been obtained, the contracts were illegal and void, and that consequently an action for damages for breach of the contracts and recovery under the performance bond could not be maintained. The court decided the issue against the contractor in a richly annotated opinion, citing Corbin, Williston, Restatement of the Law of Contracts, Am Jur., and California, Montana, Indiana, and New Jersey cases. Citing Corbin on Contracts, Vol. 6, Section 1510, p. 962, the court writes:

"There can be no doubt that a bargain made by an unlicensed guilty dealer, broker or lawyer, with another person who is innocent of offense, is not totally void. It would be a rare or non-existent case in which such an innocent person could not maintain some kind of action for breach of the agreement by the guilty party who is wrongfully engaged in business. . . . This view is based upon the principle that such innocent parties are among the class of persons designed to be protected by such statutes, that he is not in pari delicto with the unlicensed party, and is therefore entitled to relief. Or, to state the matter another way, to deny relief to the innocent party in such cases, would defeat the purpose of the statute and penalize the person intended to be protected thereby."

A similar rule is recognized in other jurisdictions, see, e.g., Bathroom Design Institute v. Parker, 317 A.2d 526 (D.C. App. 1974); Bryan Builders Supply v. Midyette, supra; Dias v. Houston, 315 P.2d 885, 154 Cal. App. 279 (1957); Allen v. Miller, 150 NYS 2d 285 (1955).

Plaintiffs submit that the licensing statutes of the State of Utah do not shield an unlicensed contractor from an-
swering for overpayments and faulty work as defendants suggest

(Defendants' Brief, p. 69). The preceding cases so indicate; indeed, a contrary rule would subvert the protective intent of the Legislature and allow an unlicensed contractor to gain an advantage solely from his failure to comply with the law.

2. Even if sued on a construction contract an unlicensed contractor may not avoid the consequences of his failure to be properly licensed.

When a member of the protected class seeks to recover damages or overpayments from an unlicensed contractor, should this "open the flood gates" and allow an unlicensed contractor to recover unpaid amounts on the construction contract?

This Court has apparently not dealt with this question directly but its views can be determined from at least two cases: Mosley v. Johnson and Fillmore Products, Inc. v. Western States Paving, both of which involved contract claims against an unlicensed contractor while at the same time relying upon the defense of lack of license to the claim by the unlicensed contractor. Mosley v. Johnson, supra, an unlicensed well-digger sought compensation for work done. The defendants claimed that Mosley was precluded from recovering because he was unlicensed and filed a counterclaim for the return of a drill bit given to Mosley in partial payment of his claim.⁵ In spite of that counterclaim, this Court held that the well-digger could not recover therefor unpaid amounts under the contract because he was not properly

⁵Mosley concerned itself with payments due under the contract and did not deal with overpayments at all as defendants erroneously state.

licensed. In Fillmore Products v. Western States Paving, Inc., supra, this Court was confronted with a suit by an unlicensed subcontractor against its general contractor and a substantial counterclaim by the general contractor against the subcontractor alleging breach of the contract. The court permitted suit by the unlicensed subcontractor but did so upon the ground that the general contractor was not a member of the class protected by the licensing statute. It is significant that the Court did not say that a suit upon the construction contract (here in the form of a counterclaim) constituted a waiver of the defense of lack of license as defendants suggest. In fact, in neither case was the counterclaim, or suit upon the contract, considered material to the decision. Two cases employing an approach similar to this Court's where failure to license was argued at the same time a counterclaim was filed are Food Management, Inc. v. Blue Ribbon Beef Pack., Inc., 413 F.2d 716 (8th Cir. 1969) and Scott-Daniels Properties, Inc. v. Dresser, 281 Minn. 179, 160 N.W.2d 675 (1968).

The rule tacitly recognized by this Court in Mosley and Fillmore Products has also been recognized in other jurisdictions. Plaintiffs submit that it is a correct statement of the law that while an unlicensed contractor is barred from recovering in an action brought by him, if the action is brought by the other contracting party the unlicensed contractor may, as a defense only, offset against the plaintiff's claim such sums as may be due under the contract. The unlicensed contractor,

however, may only offset amounts due under the contract, he may not obtain affirmative relief even if sued upon the construction contract. See Lindhout v. Ingersoll, 58 Mich. App. 446, 228 N.W.2d 415 (1975); Sumner Development Corp. v. Shivers, 517 P.2d 757 (Alaska 1974); Dahl-Beck Electric Company v. Rogge, 80 Cal. Rptr. 440 (1969); Bryan Builders Supply v. Midyette, supra. A suit on a construction contract, therefore, does not waive the defense of lack of license. As a result, plaintiffs were free to sue upon the construction contract and still maintain their right to raise defendants' lack of license when that fact became known.⁶

Allowing one party to bring suit to recover for damages or overpayment on a contract while denying the unlicensed contractor the opportunity to sue on that same contract is both equitable and cognizant of the regulatory intent of the Legislature. It has at least two beneficial results: (1) It permits a party to recover from the contractor overpayments and damages for defective work, but precludes the unlicensed contractor from benefiting from his violation of the law, and (2) denies the unlicensed contractor the ability to recover unpaid amounts under his contract, thus leaving the teeth in our licensing statute.

⁶The surety here provided a Performance Bond guaranteeing that the project would be built for a certain price. In February, 1974, some \$115,576.10 in funds were advanced by the owners to close the project. These funds were advanced, based upon an agreement with the surety that by so doing the owners would not prejudice any rights that they might have to recover any overpayment on the contract from the bonding company (Exs. 145, 146). Thus, plaintiffs could clearly require the surety to pay back any overpayment under the terms of the Performance Bond and under the conditions of the agreement upon which the final funds were advanced.

I. Plaintiffs diligently sought to ascertain if defendants were licensed.

Lignell, Todd and their attorneys were unaware after reasonable efforts that Berg Brothers Construction Company (the partnership) was unlicensed until after trial had commenced. Immediately upon discovery of that fact, they informed all parties and the court. Further, as earlier discussed, prior decisions of this Court have plainly indicated that lack of license was an element of the contractor's case, not a defense to be asserted by the owners. Under such circumstances, even knowing silence should not be construed as a waiver of defense.

1. Plaintiffs first discovered defendants were not licensed on September 1, 1976.

Respondents' wild speculation which attempts to impute to plaintiffs some sinister motive for the timing of their Motion to Dismiss requires some comment. Defendants base much of their argument upon the statement by plaintiffs that the joint venture did not have a valid contractor's license and that this fact was known to all parties early in the litigation. See Defendants' Brief, p. 68. Defendants are either attempting to deliberately mislead this Court or else, at this late stage of the litigation, are still unwilling, or incapable, of distinguishing between the joint venture (Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company, and Frank C. Berg, an individual, a joint venture, d/b/a Berg Construction Company) and the partnership (Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction

Company). The partnership, not the joint venture, was the entity which filed the counterclaim in this matter. See Plaintiffs' Brief, pp. 37-45. The joint venture, not the partnership, was the entity which made the construction contract and furnished the bonds. It is true that all parties, including defendants, recognized at the inception of the litigation that the joint venture was not properly licensed. Counsel for defendants so stipulated (T. 3048). This, in plaintiffs' view, is the reason that the joint venture--the entity that was the contracting party--did not file any kind of a pleading in this action other than a denial to plaintiffs' complaint. On the other hand, the unlicensed partnership--the non-contracting entity--filed a counterclaim based upon the construction contract upon which recovery was ultimately had. Plaintiffs' point that the partnership had no standing to counterclaim, since it was not the contracting party, is not even discussed in Defendants' Brief, let alone answered. That point alone would require reversal of the judgment below. The point under discussion is that even if, arguendo, the partnership had been the contracting party, it still could not have recovered, since it neither pleaded nor proved that it was licensed to contract.

In their haste to arrive at "inescapable" conclusions after indulging in speculative fantasies concerning the motives of counsel for plaintiffs, defendants have failed to consult the record in this matter. When it first came to plaintiffs' attention that the partnership was not properly licensed, that matter was brought before the trial court. At

that time Mr. Nebeker, counsel for the bonding company, suggested the same thesis that he is proposing in the Brief, to-wit, that the information of lack of license had been known previously by plaintiffs' counsel. In direct response to this allegation, J. Thomas Bowen, one of plaintiffs' attorneys, stated, "Mr. Nebeker, I'll tell you in the record we had no knowledge of the failure to license for those years until the very night we called you " (T. 1411), which was the night before the motion to dismiss the counterclaim was made to the court. The theory again being espoused by counsel for defendants wholly lacks any documentation or support in the record and, indeed, is in direct contradiction to the record and the affidavits on file in this matter.

2. Clifford Berg is chargeable with knowledge that the partnership was not licensed.

It is curious that defendants will go to such great lengths to cast aspersions on the counsel for plaintiffs. One can only assume that they are attempting to obscure their own actions with relation to the licensing issue. One fact is beyond dispute, Clifford Berg knew in July, 1974, that neither he nor his partnership was licensed by the Department of Contractors and that they had not been licensed since April 30, 1971 (Ex. 242-D). How, or whether, Clifford Berg was able to keep this important information from his counsel we cannot say, but his pleadings are totally devoid of any claim by him that he or his partnership was properly licensed, a claim that one would normally expect to find in a suit by a contractor. Defendants

argue that the "equities" in this case should require the Court to find against plaintiffs because of their "deliberate omission to plead." (Defendants' Brief, p. 72). Plaintiffs submit, however, that this contention has no merit. The deliberate omission to plead was, if anyone's, the omission of Berg. Plaintiffs made several telephone calls to the Department of Contractors to ascertain the existence or nonexistence of a contractor's license on behalf of Mr. Berg's partnership (R. C992-996) and were erroneously advised that the partnership was validly licensed. In addition, they made numerous attempts to review the records of the Department of Contractors which were mysteriously not available. Thus, defendants' argument that items in the record were there to be seen does not address the problem that existed, that is, that due to circumstances beyond plaintiffs' control the record could not be located even by diligent effort. Only Berg knew, when the trial started, that the partnership lacked a contractor's license. The onus, if any, must be on him.

3. The burden of ascertaining and pleading the existence of the license was defendants'.

The facts of this case demonstrate the wisdom of this Court long ago recognizing that a party claiming a right to recover under a contract for which a license is required is uniquely better able to ascertain the existence of that license. Smith v. American Packing & Provision Co., supra. In the instance although Berg and his partnership were chargeable with knowledge of their lack of a valid contractor's license, plaintiffs submit:

that defendants' counsel believed that the partnership was properly licensed and thus made the conscious election to counterclaim on behalf of the partnership rather than the unlicensed joint venture, thus hoping to finesse the issue of the joint venture's lack of license, or lose the issue in the morass of complexity created by defendants joining the several suits together.⁷

J. Defendants' conclusions concerning plaintiffs' failure to plead "lack of license" are erroneous.

Defendants argue that since lack of licensing had been raised by plaintiffs in the other suits that were ultimately joined that same issue should have been raised against the contractor. In so arguing, defendants ignore the fact that plaintiffs' review of the files of the Department of Business Regulation with relation to the drywall subcontractors occurred in December, 1974, while defendants' counterclaim was not filed until January, 1975. Both Murray Electric and Comstock Electric pled as a part of their prima facie case the existence of a valid contractor's license. Thus, the existence or nonexistence of those licenses was clearly an issue in that case. No such claim was made by the defendant joint venture and the counterclaiming partnership did not plead as part of its affirmative case the existence of a valid contractor's license. Under the case law this was a fatal defect and plaintiffs properly raised

⁷When the facts of lack of a valid license came to light on the second day of the trial between the owners and the joint venture, counsel for the Bergs contacted his clients and "was assured by them that the licenses were intact." (T. 1385).

the issue by pleading that counterclaimants failed to state a claim on which relief could be granted. Plaintiffs should have been permitted to adduce their proof under that issue, but were erroneously denied their right to do so.

K. Denying recovery to an unlicensed contractor in this state is sound public policy.

One further element in this matter of license deserves comment. The dissent in Meridian Corp. v. McGlynn/Garmaker Co., supra, appears to argue that a contract should not be void for lack of the proper license in this state because such a sanction is not expressly provided for in the statute and that if the Legislature had intended for this to be the result it should have so stated. This position, however, ignores the traditional role of this Court as the interpreter of a statute and the interplay between the legislative and judicial branches of government. The fact that the Legislature has not acted throughout the more than 30 years during which this Court unequivocally interpreted the statute to mean that an unlicensed contractor cannot recover upon his construction contract must be taken as an indication that the Legislature concurs with that interpretation of the statute. It is only when the Legislature does not concur with a statutory interpretation that legislative action has any point. To require the Legislature to pass legislation ratifying or agreeing with all the interpretations of statutes by this Court would serve no useful purpose.

The rule that an unlicensed contractor cannot recover on his contract is based on sound public policy and should clearly

be continued within this state.⁸ The fact that the statute does not expressly provide for this remedy, but that it has come about by judicial interpretation, should not affect the validity of that proposition.

A similar judicial prohibition against an unlicensed party maintaining an action is recognized in many other jurisdictions. Farmer v. Farmer, 520 S.W. 2d 539 (Tenn. 1975) (contractor); Jary v. Emmett, 234 So. 2d 530 (La. App. 1970) (architect); Rodgers v. Kelley, 128 Vt. 146, 259 A.2d 784 (1969) (architect); George H. Weinrott & Co. v. Burlington House Corp., 22 N.J. Supr. 91, 91 A.2d 660 (1952) (engineer); Johnson v. Dahlgreen, 59 N.W. 987 (N.Y. 1901) (plumber). See also, 15 Am. Jur. 2d, Licenses and Permits, §63; 15 Williston on Contracts, §1766 (3d ed.).

Further, it is sound public policy that the law should be interpreted and applied so that litigation is kept to a minimum. If an unlicensed contractor dealing with an owner were permitted under certain undefined and undefinable circumstances to enforce his contract, the increase in litigation defining just when it was permissible would ensnare virtually every case involving an unlicensed contractor. Pandora's box would be opened. If a balancing test is applied, every contractor will litigate and appeal hoping that it can tip the scales of justice in its favor. The district courts will undoubtedly do the best

⁸That the public is deeply interested is demonstrated by a recent series on the subject of contractor licensing and the need for enforcement in one of the leading daily Salt Lake newspapers. The specter of the chaos that would result if contracting without a license had as its penalty only a small fine bears careful thought.

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that they can, but it is submitted that every contractor's license case will be appealed to the Supreme Court for another review of the balancing proposition. Plaintiffs submit that a continued affirmation that an unlicensed contractor cannot recover in this state will have many beneficial aspects: (1) It will provide certainty in this area of the law thereby forewarning contractors that they must be licensed, (2) it will diminish litigation in this field since the determination that a contractor is not licensed will preclude his recovery, and (3) it will greatly increase the probability that construction work in this state is done only by qualified parties.⁹

The ability of the state to control the construction industry will be greatly diminished if a person can ignore the licensing statutes with impunity or with a modest fine, which would be the equivalent of impunity. Indeed, if such were the case, the refusal of the administrator to issue a license (§58-23-10) would have no practical effect and the protection of the public envisioned by the Legislature would be nonexistent

As has been stated:

"Anyone engaged in building trades must be charged with awareness of the pervasive system of licenses and permits designed to enhance the public safety and confidence in the industry. Engrafting equitable exceptions onto the enforcement policy at best aids the ignorant and gullible, whom the legislature sought to regulate, and at worst creates fertile fields for the growth of sharp practice." Sumner Development Corporation v. Shivers, supra, p. 763.

⁹Section 58-23-10 establishes as a prerequisite to obtaining a construction license that the applicant satisfactorily show experience, financial responsibility, knowledge of building safety and health laws, and provide a bond.

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Point II.

THE AWARD OF ATTORNEY'S FEES TO THE PARTNERSHIP WAS IN ERROR.

Defendants admit in their Brief that the action brought against them by plaintiffs was upon the Performance Bond and further admit that they were sued upon the Payment Bond by the two subcontractors (Defendants' Brief, pp. 50-51). After thus acknowledging the existence of two bonds the defendants attempt to obscure that fact, apparently in the hope that this Court will not distinguish between the Labor and Material Payment Bond and the Performance Bond issued in this matter. There is no doubt that they are two separate bonds and that the defendant surety has and continues to recognize them as such. The Findings of Fact, prepared by surety, recite that there was a Labor and Material Payment Bond and a Performance Bond (R. C1412). Even a most cursory reading of the two bonds clearly shows that there are differences between the two documents.

A. The Labor Payment Bond is different than the Performance Bond.

The Performance Bond provides that no right of action shall accrue to anyone other than the owner named therein. The subcontractors, therefore, have no right to sue upon that bond and have not done so. It further requires that suit based thereon must be instituted before the expiration of two years from the date on which final payment under the contract falls due.

The Labor and Material Payment Bond, on the other hand, provides that certain subcontractors may sue directly upon that

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bond without notice of their intention to do so. That bond further provides that suit based thereon must be brought within one year of the date on which the principal ceases to do the work.

B. Only Material Bonds are required for private contracts in this state.

Defendants contend that §14-2-1 requires the owner to obtain both a performance bond and a labor and material payment bond. Such is not the case! Section 14-2, et seq., deals with a "bond to protect mechanics and materialmen". There is absolutely nothing said therein respecting a performance bond. The statute relied upon by surety was enacted by our Legislature in 1963. At that time, the Legislature also enacted the majority of what is now §14-1, et seq., relating to public contracts. A review of that chapter clearly indicates that the Legislature was well aware of the distinction between a performance bond and a labor and material payment bond.

In §14-1-5 the Legislature provided that both a performance bond [§14-1-5(1)] and a payment bond [§14-1-5(2)] were required where public contracts were concerned. The attorney's fee provision relating to public contracts provides that "in an action brought upon either of the bonds provided herein" a reasonable attorney's fee may be recovered (§14-1-8). The statute relied upon by the defendants (§14-2-3), however, provides for attorney's fees only "in any action brought upon the bond." "The bond" referred to in §14-2-3 is a bond to protect mechanics and materialmen. As defendants well know, and as the Legislature was

well aware at the time the subject statute was enacted, a mechanics and materialmen's bond ("the bond") is not the same as a performance bond. Defendants' claim for entitlement to attorney's fees, therefore, must fail in light of the clear Legislative intent of the statute and in view of the fact that there was no suit brought upon a material payment bond in which plaintiffs were directly involved by the time the attorney's fee issues were before the trial court.¹⁰ Even the disputed Findings of Fact adopted by the Court specifically recite that the bonds were issued to Berg Construction Company (the joint venture) not to the partnership, Berg Brothers Construction Company (R. C1412); thus, the partnership, not being a party to the bonds, could not recover thereon. Nonetheless, the trial court erroneously, and confusedly, permitted such a recovery.

C. The cases cited by defendants are inapplicable.

Defendants cite several cases and annotations dealing with the award of attorney's fees based upon the foreclosure of a mechanic's lien, or in actions relating to a tort or breach of contract, none of which are applicable to the situation here. Defendants have never claimed that they were entitled to attorney's fees for foreclosure of a mechanic's lien. Tort was not an issue between plaintiffs and defendants and consequential damages flowing from a contract breach was neither pled nor tried to the jury. Defendants' sole claim for entitlement to attorney's

¹⁰Plaintiffs had been involved in suits with the subcontractors but were the "successful party" in all such matters (Plaintiffs Brier, pp. 48-50).

fees is based upon §14-2-3. The cases cited, therefore, are inapposite to the facts of this case.

Defendants place particular reliance on the case of Armstrong Construction Co. v. Thompson, 390 P.2d 976, 64 Wash. 2d 191 (1964). In that case, however, the court denied the sought-after award of attorney's fees, finding no statutory or contractual basis upon which such an award could be made. Further, those cases cited by defendants dealing with torts or contracts require good faith, a reasonable probability of success and a determination that the fees incurred could not have been avoided. There was neither pleading nor proof on any of these issues. In the instant case it must also be remembered that a significant portion of the attorney's fees incurred by defendants resulted from their assisting the subcontractors rather than defending against their claims. See Plaintiffs' Brief, pp. 58-59. Mr. Nebeker, counsel for surety, on at least two occasions in fact signed papers in this matter on behalf of the Bergs (R. B38-39, 651-6) and openly boasted on another occasion that the surety, the contractor and subcontractors had banded together against the owners (Supp. T. 15). Defendants' Brief is also revealing on this point. Defendants contend that Mr. Knowlton, counsel for the drywallers, called and examined witnesses, on behalf of the contractor and surety, to rebut testimony of the owners' experts concerning the quality of the drywall (Defendants' Brief, pp. 77-78).¹¹ Plaintiffs submit this is highly unusual

¹¹ Defendants' contention that plaintiffs raised no objection is in error. In actual fact, the trial court excluded this "buttal" testimony as to the plaintiffs (C. 2266, 2269-2270).
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conduct for truly "adverse" parties, since the point of the owners' testimony was simply that the contractor, not the dry-wallers, owed the owners a set-off for defective work.

Defendants readily confessed liability to the subcontractors (T. 262) but, nevertheless, required them to participate in the lawsuit. Further, at trial defendants took the position that the subcontractors were entitled to compensation and aided them in their claim (Plaintiffs' Brief, pp. 58-60).¹² This is precisely opposite to the type of conduct that might justify an award of attorney's fees. Rather than mitigating their damages, defendants collaborated in compounding them and now seek to pass them on to plaintiffs.

Having issued a Labor and Material Payment Bond on the project, it was surety's duty to pay all legitimate claims. It could then seek from the owners such sums as it claimed were due it. Certainly the surety cannot claim it had insufficient funds to pay the subcontractor's claims. The contractor may have made such a claim, but that would in no way relieve the surety of its obligation under the Labor and Material Bond.

The full consolidated trial was the result of a deliberate choice made by surety not to mitigate. This Court should not reward that conduct by requiring plaintiffs to pay attorney's

¹²This Court will recall the numerous times the parties were before it arguing the propriety of the cross appeal and of continuing the consolidation on appeal. Now defendants inform us that all of the time spent was wasted, the subcontractors have been paid (Defendants' Brief, p. 2). This is typical of defendants' conduct throughout this case. No real dispute existed, the subcontractors were retained in the litigation merely for tactical reasons by the defendants.

fees for the cost of this combination.

D. Defendants' other attempts to support the erroneous award of attorney's fees must be rejected.

Defendants go far beyond the bounds of reasoned legal precedent when they rely upon a federal civil rights case awarding attorney's fees where perjury was found and then deciding between themselves that since, in their opinion, the testimony of Lignell was "tantamount to perjury" they should, therefore, be entitled to attorney's fees. Mr. Lignell's testimony was accurate in all respects and is being unfairly distorted by defendants. See pp. 43-45 of this Reply Brief.

Equally wide of the target is defendants' claim for attorney's fees under Rule 75(c), Utah Rules of Civil Procedure. That rule provides for an award of attorney's fees for the unnecessary substitution of evidence in a question and answer form for a fair narrative statement proposed by another. In the instant case, as required by this Court, plaintiffs provided an abstract.¹³ Defendants apparently are the ones that want a substitution of evidence in question and answer form, presumably feeling that justice is better served by having each member of the Court seek to extract the pertinent testimony from the voluminous transcript and the enormous number of exhibits. Thus

¹³Defendants contend no order was made by this Court respecting the filing of an abstract (Defendants' Brief, p. 56). Actually, on June 27, 1977, the Court, through its clerk, Geoffrey Butler, ordered, "Inasmuch as the record appears to be extensive and voluminous, the Court orders that transcripts of evidence be abstracted and printed in accordance with Rule 75(e), U.R.C.P., as amended 2-15-75."

defendants have the facts just reversed; under Rule 75(e), it is the plaintiffs and not the defendants that would be entitled to attorney's fees.

Point III.

DEFENDANTS' SUMMARY OF ELECTRICAL EXTRAS IS ERRONEOUS AND CANNOT SUPPORT THE JURY VERDICT AWARDING JUDGMENT AGAINST PLAINTIFFS.

Defendants do not deny that Clifford Berg had no knowledge concerning the components of the charge for electrical extras made by him against the plaintiffs. He so testified. See Plaintiffs' Brief, pp. 19-26. Defendants' response to their failure to provide an adequate foundation for this portion of their Exhibit 210 is to divert the Court's attention from this critical fact by concocting an exhibit which purports to come reasonably close to the amount of money claimed by Berg, although no such exhibit existed at trial nor was put into evidence (Defendants' Brief, pp. 17-21). This, however, does not cure Mr. Berg's lack of knowledge at trial and his failure to meet the evidentiary requirements of Rule 19, U.R.E.¹⁴ Further, the concocted summary simply does not support the jury verdict.

A. Defendants have manufactured an inaccurate exhibit in an attempt to justify the mistaken award of damages.

¹⁴Defendants' citations to the record relating to the electrical portion of Exhibit 210 do not help. They cite to T. 2515 and 2517 but fail to cite to T. 2516 where Berg, on examination by his own counsel, stated that the "\$40,000 figure" had not been discussed or billed to Lignell. Further, he testified, Q. "Have you ever had the opportunity to compute that figure out?" A. "No, I haven't."

This Court should not be impressed that a year after the trial counsel for defendants can, in the quiet solitude of their offices, derive a set of figures that come close to the amount awarded; rather, this Court's inquiry should be directed to the question of whether at the time of trial adequate foundation was presented, in this case by Mr. Berg, to allow his testimony and Exhibit 210 relating to electrical extras to be admitted. Plaintiffs submit that there was not (Plaintiffs' Brief, pp. 26-29).

Defendants freely acknowledge that there were many duplicate change orders (Defendants' Brief, pp. 13-14) and have apparently gone to great lengths in an attempt to eliminate these duplicate charges from their summary. They cannot say, however, that the jury was able to make that same exclusion. Plaintiffs submit that the defendants have merely determined the figures that they wanted and then backed into them with selected work tickets. The summary of exhibits prepared by defendants is inaccurate and misleading.

1. Defendants' summary contains many duplications.

In spite of defendants' efforts, their summary contains many duplicate and erroneous charges. Although the testimony was uncontroverted that the price to the owners for the additional 22 apartments, including wiring, was \$201,300.00 and that the charge to the contractor by the electrician for wiring the additional 22 apartments was \$19,250.00, defendants' summary contains not only the \$19,250.00 charge but also some eight other charges

that relate solely to those additional units.¹⁵ Other duplications or improper charges include enlarging the elevator power feed,¹⁶ three-phase power, ¹⁷ circuit breakers,¹⁸ and exit lights.¹⁹

What this all shows is that defendants, even on quiet reflection in their offices, without the threat of cross-examination, still made numerous errors, duplicated exhibits and

¹⁵For instance, "Wire complete added apt., Building C"; "Add additional service to additional apt., Building B" (Defendants' Brief, p. 20, #3 and #8); "Install hood fans for added apt., 23 apts. x \$20.00"; "Add telephone feed to 22 apts." (Defendants' Brief, p. 21, #1 and #2); "Change main switch and meter assembly to cover the additional apt. to Buildings A and B"; "Add on to telephone service to cover added apartment in Buildings A & B" (Defendants' Brief, p. 17, #4 and #6); "Install telephone feed in added apt., Building C"; "Install panel subfeed in added apt., Building C" (Defendants' Brief, p. 19, #6 and #7); all relate to the wiring for the additional units. In addition, Exhibit 100, utilized by defendants in deriving their summary (Defendants' Brief, p. 17), also contains a charge of \$865.00 to "pipe and wire apartment in Building C."

¹⁶Compare Defendants' Brief, p. 18, Item #2, and p. 19, Item #12.

¹⁷On page 17 of their Brief, defendants list a charge of \$297.00 to add three-phase power for the elevator in Building A; on page 21, however, defendants list an additional charge of \$320.00 to install three-phase power for elevator in Building A. Exhibit 58-2 listed in lump sum by defendants also contains a charge for three-phase power to Building A. See also Plaintiffs' Brief, p. 23.

¹⁸On page 21 defendants list a charge of \$3,251.95 to "change breaker on all A/C units" and cross reference that charge to change order #95730 which is listed on page 18. Ticket No. 95730, however, recites a charge of \$25.00 per apartment, not \$53.31 as is utilized by defendants on their "exhibit." In addition, the Murray Electric change orders, Exhibit No. 53-3, contain a charge of \$29.00/unit to change the breakers on the air conditioning units.

¹⁹Defendants claim \$425.00 for exit lights (Defendants' Brief, p. 21, #9) although Berg agreed at trial that this charge was in error (T. 2939).

doubled in charges that they are attempting to pass on to the plaintiffs. There is no evidence that the combinations selected by defendants correspond in any way to what the jury considered. In fact, the thought that the jury could have kept these multiple cases and confusing billings straight is beyond belief.

Defendants have included in their summary in one lump sum the "extra work" performed by Murray Electric under change orders which totalled some \$2,198.27 (Exhibit 58-P, Defendants' Brief, p. 22). Besides the duplicate charges set forth above, the testimony was uncontroverted that the majority of these change orders related to repair work for defective items that had been done by Murray's predecessor on the job, Comstock Electric (Plaintiffs' Brief, pp. 24-25) and should not legitimately be charged back to the owners.

2. Defendants' summary contains many unsubstantiated charges.

In attempting to arrive at a figure in the neighborhood of \$86,000.00, defendants have included a charge of \$9,375.00 for "increase in the wire size from #4 to #2" (Defendants' Brief, p. 22). Defendants acknowledge that Mr. Comstock conveniently "remembered" this charge at the time of trial. There is, however, no testimony that Berg was making this same charge against the plaintiffs or who caused the charge, the electrician, contractor or owner. Further, Comstock testified that he didn't know whether or not that work was actually done for Buildings A and B (T. 935-16). Indeed, there is no testimony that the work was ever performed. The defendants, nevertheless, include

that charge in their summary.²⁰

Perhaps the most curious figure in the entire summary is the charge for "material left on the job" in the amount of \$14,788.32 (Defendants' Brief, pp. 24-25). The record is totally devoid of any claim by Berg for any electrical inventory left on the premises! The electrician brought a conversion action against the owners in the consolidated case, seeking compensation for materials it claimed were left on the job. That claim was rejected by the jury and judgment of no cause was rendered on behalf of the owners (R. C1024). There was no claim made by the electrician against the contractor for any materials and no claim was ever made by Berg against the owners for any electrical inventory items. Further, Mr. Berg testified that the owners had paid for materials before they were installed on the project (T. 697). Mr. Weaver, the electrician's employee on the job, testified that when he left the project most of the materials claimed by the electrician had, in fact, been installed (T. 935-93 to 935-94). In addition, Defendants' Exhibit 210 contains not one whisper about "material left on the job". This is yet another example of defendants' grasping at any convenient figure to plug into their total in order to come close to the amount the jury awarded. Absent this spurious charge, defendants' "summary" comes up woefully short. Defendants' "summary" also fails to give the owners credit for items admittedly not done.

²⁰Mrs. Comstock's inventory placed a maximum price on #2 wire of 26¢ (Ex. 83-P). If the 30¢ price difference claimed by defendants really existed this would make the price of #4 wire 44¢.

These come to a minimum of \$5,250.00 (Plaintiffs' Brief, pp. 21-28-29). Additionally, many of the charges relating to the extra 22 units contained in the "summary," would have to be reduced proportionately since much of that work was admittedly not completed. See Plaintiffs' Brief, pp. 21-22. At a minimum, the amount awarded is simply wrong, requiring re-trial.

B. Defendants cannot distinguish between those "extras" that were included in the contractor's contract and those that were not.

Defendants' electrical summary contains the same fatal flaw as did all of its exhibits relating to damages: (1) It fails to differentiate between those charges which are extras to the contractor but not extras to the owner, and (2) It assumes that the price charged by the subcontractors to the contractor is the same price that was charged by the contractor to the owners.

Berg agreed to construct the apartments and the additional units for a fixed price. The additional apartments were to be constructed for \$201,300.00. Whether this price from the contractor to the owners included an allowance for wiring of \$10,000.00 or \$10,000.00 was immaterial to the owners. If the price the contractor had to pay for the electrical work was more or less than was figured in the bid, the contractor would either profit or lose by the difference.²¹ At the trial, however, Berg was allowed to pass on to the owners all of the claimed electrical

²¹Berg so testified (T. 1068). In fact, the amount allowed for electrical in the bid was \$117,000.00 but the contract with the electrician was \$107,000.00, thereby causing an immediate \$10,000.00 profit to the contractor (Plaintiffs' Brief, p. 7).

cal "extras" relating to the 22 units by lumping them together in his accounting exhibit. Thus, in addition to the charge of \$19,250.00 to "wire 22 added units" which may or may not have been the amount figured by Berg in the bid, the owners were also charged for many other items relating solely to the additional units (Plaintiffs' Brief, pp. 22-25).²² Berg knew, for example, that range hood fans were required when he prepared the bid for the extra units (T. 1164, 2922). These would be an extra from the electrician to the contractor but were included in the fixed price bid to the owners. Nevertheless, this charge was passed through to the owners by Berg (Defendants' Brief, p. 21, #1); therefore, the owners have been charged twice for this item, once when the price of the units was established and again when the "extra" was passed through to them. Since there was no attempt to show which "extras" did not relate to the 22 units, many of the contractor's "extras" may in fact be the result of an underbid by it of the basic structure or the added units. If one assumes, for example, that the contractor figured everything correctly for the added 22 units except for the electrical charges which it figured as \$9,250.00 (rather than \$19,250.00) even without considering the duplicate charges, this \$10,000.00 underbid would, under the accounting permitted in this case, be passed on to the owners as an "extra" making their price for the additional units not the agreed \$201,300.00

²²This would hold true for other extras relating to the apartment and the 22 units, such as lumber, carpentry, glass, plumbing, etc.

but \$211,300.00. If the contractor made any other errors in calculations they would likewise be passed on to the owners, further inflating the price of the added units.²³ Although defendants loudly protest against cost plus contracts, this is precisely what has been inflicted on the hapless owners in the instant case. Defendants were totally unable to state, particularly with relation to the electrical, which "extras" were due to changes in the plans and specifications, if any, and which were the result of an underbid on the part of the general contractor.²⁴

It should further be pointed out that Berg testified that the sum of \$18,000.00 (as contained in Defendants' Exhibit 210) was to cover all electrical extras to that date (T. 2939). Neither that exhibit nor the one contained in their brief differentiates between those "extras" that were included in the \$18,000 and those that were not.

At a minimum, the question of what, if anything, is due from the owners to the contractor should be re-tried even if

²³This same rationale is applicable to the basic 125 unit structure; thus, rather than holding the contractor to a fixed price contract, the partnership was allowed to recover on a cost plus basis with their cost overruns being passed on to the owners under the guise of "extras."

²⁴After admitting that there were some 234 change orders, many of which were duplicates (Defendants' Brief, pp. 13-14), defendants go on to acknowledge that the verdict of Murray Electric against the Bergs was "based upon all of the written change orders" (Defendants' Brief, p. 40). Defendants make no distinction between duplicate change orders, change orders to the contractor that were not changes to the owners or change orders in excess of the amount of the contractor's bid, thus giving further evidence that the amount awarded defendants against owners is highly inflated.

the "lack of license" and "wrong counterclaimant" issues are decided against appellants.

Point IV.

DEFENDANTS' CLAIM OF PERJURY IS WHOLLY UNJUSTIFIED.

Nothing more clearly demonstrates the perverse and inflammatory reasoning of defendants which permeates their entire brief than their claim that Lignell's testimony was "tantamount to perjury." That charge is totally unsupported by the record, however, plaintiffs cannot let such a charge pass unchallenged. One subcontractor did present a claim of fraudulent misrepresentation by Lignell to the jury. On the basis of Lignell's testimony the charge of fraud, as well as all the other issues between the subcontractors and the owners, were determined in the owners' favor--clearly establishing that his testimony was considered worthy of belief.

Defendants concluded between themselves that perjury was committed by quoting portions of the transcript out of context relating to plaintiffs' claim to a set-off. Lignell testified that there had been a meeting with Clifford Berg wherein certain items which were deleted from the plans or simply omitted by the contractor had been traded for some of the so-called "extras." At the time of the trial, however, Berg refused to honor that agreement and listed the items the owners thought had been settled and traded among the items for which the counterclaimant was still seeking compensation. Lignell's point was that if the trade-off were to be disavowed, both sides should be restored

to their claims. Berg should not be permitted to disavow his credits to the owners while still keeping the credits the owners had given him in exchange. Lignell testified that there had in fact been a meeting and a set-off regarding some of the items defendants were then proposing as compensable extras (T. 3307-3312). On cross-examination Attorney Beesley's question was whether the trade-off occurred in 1972, to which Lignell said "no." Beesley then asked if it was Lignell's position that the trade-off occurred in 1974, to which Lignell said "yes" (T. 3347). Lignell responded negatively to Beesley's inquiry as to whether "these two items were traded off for each other in addition to putting cedar on one of the bedroom walls," but did agree that the trade-off did include, but was not limited to, those items (T. 3347). Lignell stated that most, but not all, of the items "traded" were discussed (T. 3348). Mr. Beesley kept contending, however, that if any trade-off occurred it occurred in 1972. Mr. Beesley's last question on the subject was: "Isn't it a fact, Doctor, that in the meeting of January of 1974, no agreement was reached; as a matter of fact, you both went out of the place rather stewed you say, you and also Mr. Berg?" Lignell replied, "No, sir, I don't agree with that." (T. 3350). Later, on re-direct, Lignell reaffirmed that in fact certain set-offs had been made (T. 3363).

Rather than denying a set-off as the version in Defendants' Brief implies, Lignell consistently maintained that there had been a set-off. Defendants' counsel, on the other hand,

contended that there had not (T. 3350). Defendants' tortured interpretation of the record can hardly be characterized as "devastating" and certainly cannot be used as a springboard to justify punishment by way of sustaining an erroneous award of attorney's fees.

Point V.

DEFENDANTS' BRIEF FAILS TO RESPOND TO MANY OF PLAINTIFFS' POINTS AND CONTAINS MANY INACCURATE STATEMENTS.

Defendants' Brief is essentially an emotional appeal to the Court to punish the plaintiffs because a confused jury brought in an unsupportable verdict. Emotionalism is not, however, a substitute for legal analysis. Defendants' Brief is equally notable for what it does not say and what it does not challenge. Because of the length of this Reply Brief, plaintiffs cannot catalogue all of the contentions put forth in Plaintiffs' Brief to which defendants have not responded.

Defendants apparently do not contest the claims made in Appellants' Brief that the plaintiffs were deprived of a fair trial by virtue of the consolidation of the several cases (Plaintiffs' Brief, pp. 85-96), that the contract standards respecting the owners and the contractor were different from those between the contractor and his subcontractors (Plaintiffs' Brief, pp. 14-15, 17), a distinction not reflected in the verdict or the judgment, and that, as between the owners and the contractor, much of the work either was not done by the contractor or was below the standard required by the construction contract-- yet no adjustment was made in the award to reflect those items

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(Plaintiffs' Brief, pp. 15-18, 24-25)

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p. 27) but neglect to point out that these and other items were added to the plans by the city building department by October 20, 1971 (T. 976-980), and that Berg was aware of the additions before the contract was signed (T. 1009).

4. Defendants state that it is "obvious" that Berg's documents were just "worksheets" (Defendants' Brief, p. 29). If so, where's the bid? It is interesting to note that the account book (Ex. 255) given by Cliff to his brother, Frank, follows almost exactly Exhibit 127, the document identified by Lignell as being the bid that he received (T. 1239), and that Berg admitted that the figures on Exhibit 127 are what he quoted to Lignell (T. 1063-1067).

5. Defendants state that ACT Construction performed work which was not on the plans (Defendants' Brief, p. 34). This is true. Defendants neglected to mention, however, that these costs were billed separately by ACT to the owners and were not included in the \$14,266.91 payment charged to the contractor (T. 2080).

6. Defendants state that Barry Ingham prepared a second contract in the name of "Clifford M. Berg and William R. Berg, an individual, a joint venture, d/b/a Berg Construction Company " (Defendants' Brief, p. 43). Defendants omitted, however, the reference in the contract to Frank Berg. Actually, the contract prepared by Ingham listed the contractor as "Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction and Frank C. Berg, an individual, a joint venture, d/b/a Berg Construction Company." (Ex. 9-D).

7. Defendants state that there was no attempt by the owners to prove that Cliff Berg had authority to sign for Frank Berg and that "no documents were executed by the joint venture agreement" (sic) (Defendants' Brief, p. 44). Defendants have overlooked the affidavit of Cliff Berg (Ex. 164-D) setting forth his authority to execute documents on behalf of the joint venture the Subordination of Lien Request (Ex. 165-D) signed by all participants of the joint venture (Plaintiffs' Brief, pp. 44-45) and the bond application in the name of the joint venture signed by Frank Berg (Ex. 255). Copies are found in Plaintiffs' Brief.

8. Defendants imply that Berg did not know about the requirement of a bond until after the contract was signed (Defendants' Brief, p. 43). Actually Berg submitted an application for a bond on the project in June, 1971, some 4 1/2 months before the contract was signed (Ex. 256).

9. Defendants state that Lignell verbally requested all extra electrical work to be done (Defendants' Brief, p. 47). This statement, however, is belied by another section of their Brief which states that the extra electrical work "had, in fact, been requested by Berg" (Defendants' Brief, p. 16).

10. Defendants make several references to the fraud claim brought against Lignell (Defendants' Brief, pp. 10, 53), apparently in a deliberate attempt to influence this Court to conclude that Lignell is "guilty" because that claim was filed against him. Defendants neglect to point out that the jury returned a verdict of no cause on the fraud claim thus exonerating Lignell from any such claim.

11. Defendants argue there was "no meeting of the minds" relating to the extras included in the contract addendum (Defendants' Brief, p. 29). In actual fact, Mr. Berg testified that he discussed the extras extensively with Lignell (T. 1194-1195).

12. Defendants imply that Exhibit 255 was read to the jury without objection (Defendants' Brief, p. 76). Objection was clearly made to reading extracts to the jury (T. 3179). That exhibit, however, only related to Frank Berg and not to the other members of the joint venture. Objection was made to the introduction of Exhibit 256---the bond indemnity agreement signed by Cliff and Bill. That document was admitted over the objection of plaintiffs (T. 3189). Since there was no dispute between surety and the Bergs the sole purpose for these exhibits was sympathy (Plaintiffs' Brief, p. 90).

13. Defendants state that Berg never considered the joint venture (Defendants' Brief, p. 44), but fail to point out that Berg testified that not only did he consider it, he discussed it with his brothers and they all agreed to it (T. 1081).

14. Defendants imply that there were no objections lodged against their accounting exhibits (Defendants' Brief, p. 76). Plaintiffs vigorously objected to Ex. 210 because of the reasons set forth in this appeal (T. 2628, 2307). Exhibit 252, being a summary of 210, contained the same fatal defects as did Ex. 210. The Court, however, had previously decided to admit Ex. 210.

There are many additional inaccuracies in Defendants'

²⁵For instance:

1. Defendants contend Lignell instructed the drywallers to prepare a contract (Defendants' Brief, p. 10). Actually the contract was prepared by Mr. Knowlton, the drywallers' attorney at their request (T. 278-279).

2. Defendants contend that the completion date was extended to September 30, 1973 (Defendants' Brief, p. 12). The letter of Earl Tanner was actually a notice to the contractor that it was in default (Ex. 87-D).

3. Defendants claim attorney's fees were awarded to them "in accordance with the well-known legal doctrine of reasonable foreseeability" (Defendants' Brief, p. 54). This is a new thought neither pled nor proven; defendants' award was based solely on §14-2-3 and must rise or fall on that statute. See pp. 30-32 of this Brief.

4. Defendants state that Berg's license was "reinstated" (Defendants' Brief, pp. 60-61). Actually, after revocation Berg received a new license. It had a different number, a different bid amount and was of a different classification than was his previous license (Plaintiffs' Brief, p. 68).

5. Defendants claim Lignell took control of the money from Berg (Defendants' Brief, pp. 8, 9, 75) but fail to state that Berg agreed that payments be made in this fashion (T. 1175, 1181, 1206, 1250-1251), and that the checks were physically delivered to Berg who in turn disbursed them to the subcontractors (T. 685-687). Further, payments were to be made pursuant to draw requests from Berg, and funds were disbursed promptly by the owners after the necessary draw request was received (T. 3158-3172).

6. Defendants apparently claim that the lack of appliances delayed the completion of the electrical work (Defendants' Brief, p. 23). Actually a careful reading of the testimony reveals that although Mrs. Comstock claimed some appliances were missing she did not state that was a reason for the delay in the electrical completion. She further acknowledged that two apartments were so full of appliances that they couldn't get in (T. 631). Mr. Weaver stated emphatically that there was no delay caused by lack of appliances (T. 1757).

7. Defendants repeatedly complain that the owners did not have books of account on the project. This is untrue! Lignell testified that they had records reflecting the change orders. These, he stated were composed of several different documents (T. 1464). But more important, defendants never produced any books kept by the contractor on the project. Berg testified he didn't have any records of his own (T. 1194). Apparently, defendants have concluded that the general contractor was under no duty to maintain his own records.

Defendants ask how the owners could make out-of-pocket expenditures and charge them to the contractor (Defendants' Brief, p. 35). For this authority plaintiffs cite Rex T. Fuhriman v. Jarrell, 21 Utah 2d 298, 445 P.2d 136 (1968).

Defendants have, based solely upon their own suppositions, also liberally sprinkled inflammatory adjectives throughout their Brief. Defendants boldly declare that certain "facts" are "obvious" or "inescapable." There is no question, claim the defendants, that certain hypothecated actions were "deliberate." Further, defendants presume to know and state without equivocation what the jury "realized," what convinced it and why it decided as it did. Such flamboyance, unsupported by the record, should not be persuasive in this cause.

CONCLUSION

In an obvious effort to cover up their own acts of appropriation of materials charged to the owners (T. 2834-2841, 2847-2848, 2856, 2859, 2860-2862), collusion (Supp. T. 15), neglect and incompetence (T. 1268-1270, 1870-1871, 2184-2185), failure to keep records (T. 1194), job abandonment (T. 1285-1289) and lack of license, the defendants both at trial and in their Brief have launched a tirade of charges and innuendos accusing the owners, particularly E. Keith Lignell, of the very things of which they, themselves, were guilty. Plaintiffs submit that these actions, in addition to their "banding together" with the subcontractors, were for the express purpose of distorting the facts and thereby confusing the jury to such an extent that the

normal judicial process was frustrated. Defendants hope to perpetuate that confusion in this Court. The separate claims of the subcontractors and defendants against the owners were so weak on an individual basis that their only hope for success was to consolidate the suits, insist on a jury trial and then assist one another in order to impress upon the jury that the preponderance of evidence was always on their side (four to one).

It seems incomprehensible that although the partnership was being sued by Western (Bailey) and the joint venture was being sued by Comstock Mr. Berg made no attempt to defend either himself or the various entities against such claims, but in fact agreed to any and all of the subcontractors' charges and even went so far as to assist the subcontractors in obtaining judgments against him, the partnership and the joint venture. This created an intolerable situation for plaintiffs since they not only had to defend against the charges brought against them but also had to attempt to bring out the truth about the "facts" which were being badly distorted in the sham trial between the Bergs and the subcontractors of which plaintiffs were not a part. The trial court erroneously allowed these distorted "facts" to spill over into, and taint, the suit between plaintiffs and defendant.

This Court has an opportunity to correct the miscarriage of justice that has occurred by reversing the trial decision. Since the surety derived the trial strategy and it and the Bergs took the gamble of not defending themselves against the subcontractors in the consolidated trial, their plea in hindsight that

they would have approached the matter differently had they known the Bergs were unlicensed reflects the same sort of cynicism that gave rise to their strategy of "confuse and conquer" in the first place and deserves no consideration by a court of justice.

The confusing consolidation, along with the fact that the partnership, as an unlicensed contractor, has recovered a judgment when it wasn't even the contracting party, are the more obvious of an unbelievable series of errors that were committed throughout the entire trial.

Plaintiffs respectfully submit that this Court should reverse the judgment on the counterclaims and deny the award of attorney's fees. At an absolute minimum, the cause between the parties to this appeal should be remanded for a new trial, free of the distracting clutter of the subcontractors' claims.

Respectfully submitted,

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