

1951

Vern F. Johnson and Teresa E. Johnson and Lloyd I. Burningham and Ruth Squires Burningham v. C. H. Hughes & Austin L. Hughes dba Hughes Brothers Contractors : Brief of Appellants

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

VERN F. JOHNSON and TERESA E.
JOHNSON, his wife,

Respondents,

vs.

C. H. HUGHES & AUSTIN L. HUGHES,
co-partners, doing business under the firm
name of Hughes Brothers Contractors, &
HUGHES BROTHERS CONTRAC-
TORS, a co-partnership,

Appellants.

Cases No.

LLOYD I. BURNINGHAM and RUTH
SQUIRES BURNINGHAM, his wife,

Respondents,

vs.

C. H. HUGHES & AUSTIN L. HUGHES,
co-partners, doing business under the firm
name of Hughes Brothers Contractors, &
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Appellants.

7544 & 7545

APPELLANTS' BRIEF

FILED

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APPELLANTS' BRIEF

STATEMENT OF FACTS

These cases were tried together and an appeal was taken in each case, but so far as concerns the questions to be presented to this court, they are limited to the

Burningham case (except the comment on the last page hereof, which applies to the Johnson case), and all references hereafter are to the parties concerned and the record in said cause number 7545.

In March 1947, plaintiffs and defendants entered into a contract whereby defendants agreed to build a home in Bountiful, Utah, for the plaintiffs in accordance with certain plans and specifications prepared by the defendants, for the total sum of \$11,300.00. There were some extras, so that the total price actually paid was \$12,000.00. A supplementary oral contract covered a retaining wall in the rear of the house, a garage, patio, etc., for \$2,091.31 (Tr. 16). The defendants themselves did the carpenter work, including the roof of said dwelling, but the plaster work on the walls and ceilings throughout the structure was done by one Clarence E. Peck, as subcontractor.

After the building was completed, the plaintiffs complained of numerous cracks extending throughout the walls and ceilings and claimed that the plaster work was done in an unworkmanlike manner and with improper materials. They also claimed that the concrete in the *foundation of the house and in the retaining wall* was defective. They alleged damages by reason of the defective plastering in the sum of \$3,000.00, and in the sum of \$500.00 on account of the defective construction of the foundation and retaining wall (Amended Complaint, Tr. pp. 16-17). These are the only items of damage alleged.

Before the trial of the case, defendants applied to the court to have Clarence E. Peck, the subcontractor, made a party defendant to a cross-complaint of the defendants against him and an order was entered granting such application.

In their cross-complaint against Peck, the defendants alleged:

“That on or about the 16th day of June, 1947, cross-complainants entered into an agreement with the defendant Clarence E. Peck, by the terms and provisions of which the said defendant undertook and agreed to plaster the dwelling of the plaintiffs at Bountiful, Utah, in accordance with the requirements of the principal contract between said plaintiffs and cross-complainant, providing for one coat of plaster and one finish coat, using first-grade materials in a good workmanlike manner. That defendant Clarence E. Peck selected, supplied, prepared, mixed and applied the plaster for said dwelling. That plaintiffs have alleged that the plaster work was not performed in accordance with the requirements of the principal contract. That if the allegations of the plaintiffs that the plaster was defective and improper in its selection or application are proved at the trial, the defendant Clarence E. Peck should be required to save complainants free from any and all liability resulting from the defective performance of the defendant Clarence E. Peck (Tr. 21).

In his answer to the cross-complaint, Peck denies that the plaster work was improperly done (Tr. 25).

The court found that the plaintiffs had been damaged by reason of the defective construction of the *retaining wall and patio* in the sum of \$100.00; by reason of improper roof construction in the sum of \$250.00 and because of defective plastering in the sum of \$2,000.00. As to the issues raised by defendants' cross-complaint against Peck, the court made no findings whatever, except finding number 8, which reads as follows:

“8. That the court is of the opinion that this action should be dismissed as to defendant Clarence E. Peck.”

There is a conclusion of law similar to the foregoing finding and the judgment dismisses the action against Peck

ASSIGNMENT OF ERRORS

1. The court erred in its finding number 5 (b) that the construction of the roof was contrary to good construction methods in the particulars set forth in said finding.

2. The court erred in its finding number 5 (c) that the lathing of said house was improperly done, thereby rendering the plaster susceptible to breaking and cracking.

3. The court erred in its finding number 6, in fixing \$100.00 as the amount necessary to repair the retaining wall and patio.

4. The court erred in its finding number 6 that plaintiff suffered damage in the sum of \$250.00 by reason of the defective construction of the roof.

5. The court erred in rendering judgment against defendant for \$2,350.00.

6. The court erred in failing to make findings upon the material issues presented by the cross-complaint of the defendant against Clarence E. Peck.

7. The court erred in finding that the action should be dismissed as to defendant, Clarence E. Peck.

8. The court erred in entering judgment dismissing the action against said Clarence E. Peck.

ARGUMENT

ASSIGNMENTS 1, 4 and 5

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ARGUMENT

ASSIGNMENTS 1, 4 and 5

As indicated in the statement of facts, the plaintiffs did not, either in their complaint or amended complaint, set forth any allegation with respect to the construction of the roof and the only witness who referred to the roof as being in anywise defective was Architect Miller. Hughes, one of the defendants, testified that the roof was constructed in accordance with the specifications (Tr. 282), and the description of the roof construction by the various witnesses who examined it, including Miller, shows that it conforms to the specifications set out in the Federal Housing Administration Form, which was used by the parties. Miller's criticisms appear in his testimony at pages

227 to 231. He testified that he considered that the rafters should have been constructed with sixteen inch centers, instead of twenty-four inch centers; but such requirement would be contrary to the specifications which provide that the rafters were to be two by four with twenty four inch centers. He states that the roof was not suitable to resist high winds that he claims prevail in the Bountiful district, and that the cracking in the plaster was, in his opinion, due to the fact that the roof swayed (Tr. 231-234). There is not one scintilla of evidence that there were any heavy winds, which in anywise affected the roof or caused any movement in it. He admits that the condition of the roof had nothing to do with the cracks in the wall plaster (Tr. 234).

The testimony of this witness with respect to the roof is, in our opinion, utterly worthless. His examination was entirely superficial, as indicated by his statement that he thought there was a collar beam on each rafter, *but would not be sure* (Tr. 249). He thought there was only one brace along the side of every other rafter, *but he did not know how many there were* (Tr. 249); *that it was hard to say* whether the roof would meet Federal Housing Administration requirements, but he would not use Federal Housing Administration standards (Tr. 250); that the roof might have been good for a home five miles away (Tr. 254); that he did not think the hip rafter was anchored at the bottom, *but he did not know about it* —*did not go into it to that extent* (Tr. 255), and he

further states that he did not observe whether the ceiling lath on which the plaster was set was tight to the ceiling joists, as he only made an examination in one place and that nothing objectionable appeared (Tr. 247).

Now, this is the only testimony as to any defective condition of the roof. To summarize: The ceiling plaster cracks were caused by the roof being too weak to withstand high winds, when there is no evidence that there were any high winds up to the time of the trial of this case; that the construction was faulty because the rafters had twenty four inch centers instead of sixteen inch centers, when the twenty four inch centers were exactly in accordance with the specifications; and, according to the examination he did make, superficial as it was, it appears that the plaster was fast to the ceiling lath; that is, that there had been no movement in it.

Now, as against this testimony, we not only have the uncontradicted evidence that the roof was constructed as the parties agreed it should be, but Architect Cannon made a particular examination of the roof structure and found that there was no indication of any movement due to wind pressure or any evidence of rocking movement (Tr. 329); that there was no evidence that the roof had moved or twisted (Tr. 330) — (and as before stated, Miller does not testify that he saw any evidence of such condition); that the rafters were properly braced (Tr. 330); that the rock

lath was tight to the ceiling joists, as he discovered from removing the insulation in four or five places (Tr. 329), and that the roof met reasonable construction standards (Tr. 330). Cannon claims, and we shall hereafter demonstrate that his testimony is amply supported, that the cracks in the ceiling, as well as in the wall, were caused by defective plaster and because the plaster was too thin to resist any ordinary movement of the structure, due to drying, variations in temperature, etc. (Tr. 333). Now, notwithstanding this condition of the record, the trial court holds the defendants liable for an item (the roof) with respect to which no claim is made in the complaint and with respect to which there is no competent evidence whatever that the roof was not properly constructed or that it had anything to do with the cracks in the ceiling and when there is not one scintilla of proof of what it would cost to repair or recondition the roof if there had been any competent evidence that repairs were necessary. The \$250.00 item finds no support in the evidence.

ASSIGNMENT 2

Peck testified that the lathing in the house complied with the plan; that it was according to the method generally used and that he had no objection to the method of lathing; that it appeared to be a well-lathed, good job (Tr. 121-132), and Peck admits that where the lathing is defective, he would turn down the job or have the owner or contractor straighten it up to his

liking (Tr. 136). If he would require the lathing to be satisfactory so that he could make a good job of plastering, it was likewise his duty, as testified by Architect Cannon, to see that the screeds were thick enough so that he could put on a plaster of sufficient thickness.

Alvin Woollayer, a gypsum representative, testified that the lathing was done according to the company's recommendations (Tr. 126), and he declined to testify as to the cause of the cracks in the plaster, but stated:

“That really would be a question for a man from our research laboratory to answer.”
(Tr. 127).

In view of Peck's admission that the lathing was a good job, he cannot attribute the cracks in the plaster to improper lathing.

ASSIGNMENTS : end 5:

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ASSIGNMENT 2:

The court erred in its finding number 5(c) that the lathing of said house was improperly done, thereby rendering the plaster susceptible to breaking and cracking.

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"That really would be a question for a man from our research laboratory to answer."
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In view of Peck's admission that the lathing was a good job, he cannot attribute the cracks in the plaster to improper lathing.

ASSIGNMENTS 3 and 5:

3. The court erred in its finding number 6 in fixing \$100.00 as the amount necessary to repair the retaining wall and patio.

5. The court erred in rendering judgment against the defendant for \$2,350.00.

57) and that that person was Bjorkman (Tr. 64); but Bjorkman denies that he ever gave such an esti-

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“That really would be a question for a man from our research laboratory to answer.”
(Tr. 127).

In view of Peck's admission that the lathing was a good job, he cannot attribute the cracks in the plaster to improper lathing.

ASSIGNMENTS 3 and 5

There is no evidence whatever to support the finding that the amount necessary to repair the *retaining wall and patio* is \$100.00. Plaintiffs make no claim on account of the patio. Their claim is for \$500.00 damage on account of the *foundation and retaining wall* (Tr. 17). True, Burningham testified that one person estimated the cost of fixing the *basement and retaining wall* at \$500.00 (Tr. 53, 56, 57) and that that person was Bjorkman (Tr. 64); but Bjorkman denies that he ever gave such an esti-

mate (Tr. 120). The allowance of the \$100.00 item finds no support in the evidence.

ASSIGNMENTS 6, 7 and 8

Now, let us consider the evidence with respect to the wall plaster. Here again, let us refer to Architect Miller, a mainstay for the plaintiffs. Miller says the cracks around the windows *could have been from normal expansion* (Tr. 237). He *did not measure the plaster* or make any note of it (Tr. 237). He says the plaster, independent of the lath, was not five-eighths of an inch (Tr. 239); that if the plaster was less than five-eighths to three-quarters of an inch, it would not be of sufficient thickness for normal construction (Tr. 239); that if the plaster was three-eighths of an inch thick, *there was a question whether it would sustain normal movement of the house* (Tr. 240-241). *He would rather not say* whether the thickness of the plaster would be a factor in its strength, but that anything less than three fourths of an inch from the base to the outside of the plaster *would be weak* (Tr. 241). He declares that there were *no cracks in the brick work* so far as he could observe (Tr. 236), and this expert further declares that plaster itself *has no structural strength* (Tr. 252). He gives it as his opinion that there was a settlement of the foundation because the footings were not tamped (Tr. 222-223), and that the wall cracks *could have been caused* by minor settlement in the building, or that the horizontal cracking *might have been due* simply to the drying out

of the lumber (Tr. 234-35); that the condition of the roof had nothing to do with the wall cracks (Tr.

if he does not see that this is done, so that he can put on plaster of sufficient thickness. He says that a plasterer will not put on plaster thicker than the screeds indicate (Tr. 336). He says that the plaster was three-eighths of an inch thick (Tr. 346); that it was weak; that the manufacturers recommend a full one-half inch of gypsum lath (Tr. 343); that a plaster one-half inch thick is twice as strong as plaster three-eighths of an inch thick (Tr. 348), and he declares, contrary to Miller's statement, that plaster does ~~not~~ have structural strength (Tr. 231-232). McLaughlin, a chemist, testified that the plaster itself in the Burningham home was defective; that the sample brought to him by Burningham showed that it was a mixture of one of plaster to five of perlite, and that it was soft and spongy (Tr. 88); that there was no sand in the plaster (Tr.

mate (Tr. 120). The allowance of the \$100.00 item finds no support in the evidence.

ASSIGNMENTS 6, 7 and 8:

6. The court erred in failing to make findings upon the material issues of the cross-complaint by the defendants against Clarence E. Peck.

7. The court erred in finding that the action should be dismissed as to defendant, Clarence E. Peck.

8. The court erred in entering judgment against the action dismissing Clarence E. Peck.

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of the lumber (Tr. 234-35); that the condition of the roof had nothing to do with the wall cracks (Tr. 234). He admits, however, that the *plaster had a lot to do with the cracks* (Tr. 227). He also complained of the excessive span of the floor joists (Tr. 225), but that the condition of the floor joists had nothing to do with the plaster cracks (Tr. 248).

There is ample evidence that the cracks in plaster and ceiling were due to the use of defective and improper materials which Peck himself selected (Tr. 135) and to the fact that the plaster was of insufficient thickness. Architect Cannon states that it is the duty of the plasterer to have the contractor put on screeds that are thick enough (Tr. 335), and that he is at fault if he does not see that this is done, so that he can put on plaster of sufficient thickness. He says that a plasterer will not put on plaster thicker than the screeds indicate (Tr. 336). He says that the plaster was three-eighths of an inch thick (Tr. 346); that it was weak; that the manufacturers recommend a full one-half inch of gypsum lath (Tr. 343); that a plaster one-half inch thick is twice as strong as plaster three-eighths of an inch thick (Tr. 348), and he declares, contrary to Miller's statement, that plaster does ~~not~~ have structural strength (Tr. 231-232). McLaughlin, a chemist, testified that the plaster itself in the Burningham home was defective; that the sample brought to him by Burningham showed that it was a mixture of one of plaster to five of perlite, and that it was soft and spongy (Tr. 88); that there was no sand in the plaster (Tr.

92-94); that perlite is not as strong as sand (Tr. 89), and more perlite makes the material weaker (Tr. 90), and that building contractors were having trouble in Salt Lake City with perlite.

A. L. Hampton, a research engineer, in his deposition states that the evidence indicates that the bond failure and excessive cracking of the plaster were caused by low strength of the base coat, which was due to the use of perlite of poor quality mixed with the gypsum cement plaster, and that the plaster was not of normal strength.

Now, in the face of all this evidence going directly to the quality of the work and materials of Mr. Peck, the court utterly ignored the question of Peck's liability and summarily dismissed the complaint against him. This court has held on numerous occasions that it is error for the trial court to fail to find upon material issues.

"The findings of the trial court must be within the issues when compared with the pleadings and must cover all material issues raised, whether arising on allegations in the complaint and denied in the answer, on an affirmative defense pleaded in the answer, or on a counterclaim denied or treated as denied by the plaintiff."

Dillon Imp. Co. vs. Cleaveland, 32 Utah 1.

"A court must find on all the material issues, including those raised by counterclaim, regardless of the insufficiency of the evidence to

support them, or though no evidence in their support is introduced.”

Everett vs. Jones, 32 Utah 489.

In the Everett-Jones case the court reversed the judgment and remanded the case because with respect to certain issues, the findings were silent.

See also:

West vs. Standard Fuel Co., 81 Utah 300.
Duncan vs. Hemmelwright, 112 Utah
 262, 269.

In the Johnson case, we make the following assignment of errors:

1. The court erred in its finding number 4(b) that the roof was defectively constructed as in said finding set forth (Tr. 20).
2. The court erred in its finding number 7 that \$250.00 is a resonable amount for the repair of said roof (Tr. 21).
3. The court erred in entering judgment for said \$250.00 (Tr. 22).

ARGUMENT

In case number 7544, the same argument with reference to the roof presented in case 7545 is applicable. There is no allegation in plaintiff's complaint concerning any defect in the roof; the evidence is that its construction was the same as in the Burningham

house (Tr. 272) and there is a total lack of evidence that there were any high winds that caused the roof to shift or become loose in any place or that its position was changed in any respect from its condition as originally constructed and yet the court finds and awards \$250.00 for the defective construction of the roof (Tr. 21).

We respectfully submit that the judgments should be reversed.

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