

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 Respondents

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,

Plaintiffs and Respondents,
vs.

C. H. HUGHES and AUSTIN L.
HUGHES, Co-partners, doing business
under the firm name of Hughes Brothers
Contractors, and HUGHES BROTH-
ERS CONTRACTORS, a co-partner-
ship,

Defendents and Appellants

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

Plaintiffs and Respondents,
vs.

C. H. HUGHES and AUSTIN L.
HUGHES, Co-Partners, doing business
under the firm name of Hughes Brothers
Contractors, and HUGHES BROTH-
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ship,

Defendents and Appellants.

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Cases No.
7544 & 7545

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

Counsel for the appellants have, in their brief, considered these two cases together. While the cases grow out of different transactions and the parties are different, the matters involved on these appeals are similar and we have no objection to their consideration together.

STATEMENT OF FACTS

We cannot agree with counsel's statement of the facts in its entirety.

The action in the Burningham case was commenced in the District Court of Davis County in June, 1949 to recover damages claimed by the respondents against the appellants for the improper construction of respondent's dwelling house at Bountiful, Utah. Complaint is made that the concrete used in the foundations of the said house and in the retaining wall at the rear thereof, all of said matters being a part of the same construction contract, was not properly mixed and that an insufficient proportion of cement was used therein, and as a result of such deficiencies the said concrete is and has become porous and is disintegrating and ground water passes through the same, thereby further weakening the said foundations and rendering said building musty and wet. (Amended complaint, Trans. p. 16). It is further alleged that in the plastering of the said dwelling house, the appellants used improper and defective materials, and also plastered the same with improperly mixed plaster, and "also improperly fastened or joined the rock lath thereon, without staggering the pieces of such lath and without covering the seams formed by the joining of the several pieces of said rock lath with metal lath, as good construction required,

and as a result thereof, the plaster throughout the said building and every room thereof and along said rock plaster seams or joints, and elsewhere, has cracked in many and divers places; that the said cracks extend over, across, along and through walls and ceilings of the several rooms of said dwelling house; that said cracks are unsightly, are enlarging and will continue to enlarge, and the plaster along and adjoining said cracks breaks and will continue to break and fall, and, in the opinion of the plaintiffs, said plaster should be removed and said building properly replastered, all to plaintiffs' damage in the sum of \$3,000.00." Amended complaint, Trans. p. 16 and 17).

The contention of the defendants in denying liability in both these cases may be strikingly pointed out by use of the following analogy:

Let us assume that Mr. A, a private citizen, goes to Mr. B., a licensed contractor in the State of Utah and says to him. "I want you to build me a house pursuant to certain specifications which have been prepared, and you are to use the best workmanship and materials that you are able to obtain."

During the building of this house, the contractor purchased all materials, hired all the labor, supervised the construction of the building and when it was completed, A pays him the total cost as submitted by the contractor and moves in the house. Shortly thereafter, when the first rain comes, the roof leaks so badly that the interior of the house is damaged. Several of the pipes in the bathroom and kitchen

burst and in addition to that, plaster cracks and falls on the floor. Mr. A goes to contractor B and says "there has been some faulty construction or materials used, I demand that you make up whatever losses I have sustained and that you repair the excessive damage done to my walls. Then contractor B turns to Mr. A and says: "So sorry—you'll have to go to Mr. Smith, he shingled the roof, he's the man who will have to take care of that; you'll have to go to Mr. Brown, he's the man who did the plumbing, he's the man you will have to repair that damage. In addition, you'll have to look to Mr. Peck, the plasterer to repair the plaster—there is no liability on me because these men all sub-contractors of mine, and, therefore, I owe you nothing."—That is the exact position of the Appellants here.

Now, in carrying out the defendants and appellants contention that there was no liability on their part because of their hiring a man to do the plastering; the appellants in September, 1949 over the objection of these respondents obtained an order from the trial court permitting the joining of one Clarence E. Peck as a party defendant. It was charged as a basis for such application that Peck was the individual who did the actual plastering of said building and, therefore, it was he and not the appellant who is liable in this case.

The uncontroverted facts admitted by both the appellants and the respondents in this case, are as follows:

a, That the appellants and defendants Hughes

Brothers agreed to build and did build a house for the plaintiffs Burningham pursuant to a written contract. (Exhibit "A" Record 4-81)

b. The defendant and appellant Hughes Brothers agreed to build and did construct and build a house for the plaintiffs Johnson on a cost plus 10% basis.

c. That excessive and unsightly plaster cracks developed in the walls and ceilings of both houses and in addition, moisture seeped through the basement of the Burningham house and the concrete driveway at the Johnson house cracked and disintegrated, shortly after completion.

d. That the excessive plaster cracks in the walls and ceilings of both the Burningham and Johnson houses were due to one or more of the follownig causes:

1. Improper construction of both houses by the Hughes Brothers.
2. Improper lathing.
3. Improper application of plaster.
4. Plaster of poor grade, improperly mixed with improper ingredients.
5. Faulty construction of the roofs of both houses which caused them to move with the winds.

It doesn't matter which of the above defects contributed to or caused the excessive plaster cracking of the walls and the ceilings of the two houses, because the simple facts remain that the Hughes Brothers were the sole contractors. They alone furnished the men, materials and equipment, supervised the construction, and, thereafter, the houses were found to be defective.

On March 17, 1950, we gave notice to the appellants, and filed in the said cause, written notice that on Friday, March 31, 1950, we would ask leave of the court to amend plaintiff's amended complaint by inserting in line 8, after the words "as good construction required" the following: "and also in the construction of the roof of said building the defendants Hughes Brothers Contractors, used therein rafters made from materials of too small dimension and failed to properly brace or tie the said rafters together, thereby weakening the said roof and permitting the movement thereof by wind or otherwise." (Trans. p. 219.) On March 31, 1950, upon our motion, the trial court entered an order allowing the said amendment. (Trans. p. 219).

ARGUMENT

We find it convenient to follow the same general plan in presenting these matters as that followed in appellants brief. They first discuss their assignments of errors Nos. 1, 4 and 5.

Assignment of error No. 1, is to the effect that the court erred in making finding Number 5 (b) that the construction

of the roof was contrary to good construction methods in the particulars set forth in said finding. Finding 5 (b) is “that in the construction if the roof on said building, contrary to good construction methods, the defendants used and placed therein rafters made from 2x4s spaced with 24 inch centers; that the bracing of said roof was completely insufficient to and did not produce a strong, solid or workmanlike job; that there are numerous openings in the said roof which can and do allow rain water to pass through the same, thereby also weakening the said plaster; that the valleys of said roof are not of sufficient width and are of too light material and do not have proper connections with the outlets or downspouts; that as a result of the said improper and unworkmanlike construction of the said roof the said roof was and is weak and moves and vibrates excessively from normal and other wind action, thereby causing the plaster in said building to crack and break.” (Trans. p. 32.)

Assignment of errors Nos. 4 and 5 are as follows:

No. 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.

No. 5. The court erred in rendering judgment against defendant for \$2,350.00.

Mr. Miles E. Miller, a practicing architect with offices in Salt Lake City during the past 40 or more years, at the request of the respondents made an examination of the construction of the Burningham building. He said, “I simply examined the building from top to bottom inside and out.” (Trans. p. 221).

He testified, among other things, with regard to the Burningham house as follows:

“Now over in that corner, apparently there was no cracks at all to amount to anything, and in my opinion of that would be purely the question of just the way the roof was set on that; This corner, the southeast corner is very severely cracked. The whole corner seemed to have a tendency to be giving there. (Trans. p. 227).

My observation was that your roof construction—they have winds heavier in this section up her than what we do in Salt Lake City, in fact you have had past experience of a lot of destruction. I think that is the case up there.. The winds are heavier. In my opinion the roof rafters, when they have been placed, have not been placed with the thought of taking care of a condition of that kind. (Trans. p 227).

Counsel state that nothing was said about the wind in that area in our proof, but the foregoing is a very clear statement of the actual wind conditions prevailing there. The witness stated that, in his opinion, the roof rafters had not been placed with the thought of taking care of a condition of that kind. Appellants are residents of the same area and of course were familiar with the general conditions.

Mr. Miller further testified:

“Now those spans of those rafters, I judge from where they were nailed to the plate until they hit the ridge row above, would be all, in excess of eight or ten

feet. I'll say eight feet. In particular, now you can see by laying a two-by-four on a bearing here and coming out here eight feet, you are going to get a sag, and if you have a wind blowing against it, you are going to get a movement on anything as thick as a two-by-four. ." (Trans. p. 228.)

"Now, in nailing their collar beams, the collar beam had been shoved right up to the top. . . Here comes one rafter and another this way, and a little beam at the top to tie them together at the top. That's the collar beam. Now if that had been dropped lower, you see, you would have eliminated this possible movement in your rafters. . . Allright, just think of that as movement back and forth in a wind storm. Your movement is transmitted down below because of the end of your rafters. Now that is what I assume kept the plaster cracking continually. . . In fact, the movement acted that way, loose, as though that is the case; in that particular quarter, showing the movement of the roof, showing the valley, the water doesn't reach the downspout or funnel outlet at that point. . . I tried to ascertain what was the cause of the cracks and my feeling completely is that the majority of it is caused by simply too light a roof. (Trans. p. 231).

"The cause of the cracking was the roof construction." (Trans. p 273).

Mr. Miller further testified:

"Well, if these rafters, had been placed 16 inch

centers instead of 24 and a rise brought down from the rafters . . . Well, there was really no ties in this, usual practice, because the ceiling joists are good, two-by-sixes, plenty heavy enough for all spans there, but there is not enough tie between the ceiling joists and the rafters . . . Well, there was really no ties in this, other than the little collarbeam above. (Trans. p. 231.

. . . Along the side coming up from the rafters down below, oh I think there are four or five braces on the east, just small pieces, too close to the wall to really do much good. (Trans. p. 232).

It is apparent that the said roof was not made secure by sufficient braces and any wind action would move it back and forth, which caused the plaster to crack continually. Besides, the roof was not drained properly so that in places the water does not reach the downspouts.

Mr. Miller stated the further fact, as to the retaining wall, that

“On the retaining wall to the back of the building, that of course is just evidence of poor concrete. . . Now, there should have been arrangements made back of that to let this water out that comes down against it, because that simply is not a retaining wall to hold back the dirt. It’s a side of a reservoir. (Trans. p. 232).

The record clearly shows,— in fact no serious attempt

has been made to dispute it, that the plaster on the walls and ceilings of the several rooms of the building has cracked excessively as alleged in the complaint of respondents. But appellants seem to be content to endeavor to place the blame for this condition on Clarence E. Peck who was employed by and did the plastering for and at the instance of the appellants. But whoever did the actual plastering, the appellants are bound under their contract to these respondents, And, whether the plaster cracked because of improper materials or improper or unworkmanlike construction of the building could not alter or reduce appellants' liability. The contract binds them for the entire job and appellants' certainly cannot be relieved because they may have had certain portions of the actual work done by others.

Mr. Jonathan Earl, a plastering contractor of more than forty years experience, testified that the excessive cracking was due, in his opinion, "either in the construction or the way it was lathed." (Trans. p. 111). We will shortly return to the testimony of this witness and give his further views as to the cause of the cracking of the plaster.

The damages claimed by the respondents accrued from the improper and defective plastering, lathing and construction of said building amount to the sum of \$3,000.00 and the damages from defective and improper concrete work amount to the sum of \$500.00. Mr. Earl in his testimony relating to the repairing of said building that "the plaster and lath would have to be taken off and the building replastered and relathed. Personally, I don't know of any other way it could be done." (Trans. p 110) This witness further testified that to take the plaster off would cost four or five hundred dollars,

and that the cost of replastering the building would be around \$1,100.00 and then the trim would have to be restored and the rooms re-decorated. Trans. p.110) To re-decorate the Burningham home would cost around \$425.00 (Trans. p. 130).

Mr. Bjorkman testified that the cost of fixing the foundation and the retaining wall would be from three to five hundred dollars. Mr. Burningham testified that Herman Hughes stated that he had estimates from one or more contractors as to what it would cost to put Burningham's home in first class condition, and Hughes said that the amount of such cost would be between three and four thousand dollars. (Trans. p. 52).

ASSIGNMENT OF ERROR No. 2

Assignment of error No. 2 claims error in the making of finding No. 5 (c), which finding is as follows:

"That the defendants contractors improperly fastened the rock lath without staggering the several pieces thereof and without covering the seams of said rock lath with metal lath, as good construction required, thereby rendering said plaster susceptible to breaking and cracking along the joints or seams of said rock lath." (Trans. p. 32).

Mr. Jonathan Earl, to whose testimony we have already referred as to the lathing of the building, said:

"Well, this is the way we do lathing to prevent cracks. We break the joints in the center of it, doing that all

across the ceiling and wall and put a strip of metal lath across these joints, this way. This is as near as I can tell you from my observations the way the house was lathed. The joints were broke not straight across this way. This is the B part and this A part.” (The Trial Court interrupted Earl and made the following observation:) A refers to the way they do it and B the way he thinks they did it, which would be wrong in his opinion).

“In my 45 years of experience in this business, I would say that its common to find houses cracked as much as this one where they are lathed that way. But if they are lathed properly, its very uncommon. Our experience has been that they don’t do that.” (Trans. p. 108 in Johnson case.)

Mr. Earl further testified that “I think that its the lathing this way that caused the cracking to go that way. It does it and has done it in hundreds of places that I know of with just that type of lathing. It cracks every time you use that system of lathing.” (Trans. p. 110, Johnson case) Exhibit “G” shows (Trans. p. 108 Johnson case) shows in Figure A the way lathing should be done and Figure B the way it was done in this building by the appellants.

Alvin Woollayer, a representative of the U. S. Gypsum Company, testified that what caused the plaster to crack was really a question for their research laboratory. (Trans. p. 127). The testimony of A. L. Hampton, a research engineer of the U. S. Gypsum Company was taken by deposition by the defendents. Mr. Hampton testified that, in his opinion,

the excessive cracking of the plaster was due to the low strength of the base coat. He further said in his written report of his analysis of the plaster taken from the Burningham residence that the low strength of the base coat was due to one or more of the following three factors:

1. Perlite used was of poor quality.
2. Use of both perlite and sand aggregates in the mix with gypsum cement caused a breakdown of the perlite during mixing.
3. Development of a sweatout or partial sweatout condition in the base coat, which would give lower than normal strength. A sweatout condition results when the excess water (That amount of water over and above that required to re-combine with the gypsum but required in the mix to make a plastic mortar is not dried out in normal period of time permitting growth in average size of the gypsum crystals due to slow solution and recrystallization of the fine crystals formed under sweatout conditions. A sweatout condition is the result of lack of adequate ventilation or adequate heat and ventilation after the plaster has set, and may have been further aggravated by the poor aggregate quality and a high mixing ratio. (Exhibit "A" annexed to Hampton's report).

Herman Hughes, one of the appellants testified in open court as follows:

"I think it (referring to the cause of the plaster crack-

ing) was an improper mix or improper materials used, basing that entirely on my experience, comparing it with other homes we have constructed. That is the only thing that I could say it could be.” (Trans. p. 310).

Hughes also testified that they had cracking in other homes—but nothing like the amount in these houses. (Trans. p. 316).

In order to offset the splendid testimony given in behalf of the plaintiffs by Mr. Miles Miller,, the defendants produced a young architect, a Mr. Cannon who attempted to refute both the statements of fact and the professional conclusions as given by Mr. Miller. In his zeal to bolster up the defendants and appellants case, Mr. Cannon evidently over extended himself because in one particular, the Court called him to task as follows:

Q. (By Mr. Hanson attorney for defendant Hughes). Did you observe whether or not there was any water coming through the walls or any moisture, that way?

A. I saw no evidence of moisture in that evidence. I saw effervescence or salt on the wall.

THE COURT: *Mr. Cannon, you are testifying opposite to the testimony; so you had better specifically state what walls he examined because it was specifically stated by other witnesses what walls there was moisture on.*

(Trans. 111-Record page 325.)

At another time, Mr. Cannon in his statement to again bolster up the defendant's case at page 331 (Trans. 117) testified as follows in answer to a question propounded by Mr. Rampton:

Q. Now, does plaster in and of itself have any structural strength?

A. Yes, It does.

Q. And can you give us any example of plaster having structural strength?

A. I have read reports of buildings being—

Mr. Rampton: Now, I object if he has read reports.

A. And seen pictures also.

THE COURT: Well, let him state what it is.

All he has read is reports.

Mr. Rampton: His testimony is whether plaster has structural strength. Your Honor, and at least six witnesses who sat on that stand testified on that and he is going to contradict their testimony and is going to base it on what he has read.

THE COURT: What do you mean by structural strength?

Q. I don't mean that it will hold up a roof. I mean

absorb the normal movement of a roof.

Mr. MacLaughlin, the city chemist for Salt Lake City, testified that this plaster failed to measure up to standard because of the grading of the aggregate and that aggregate was principally perlite. (Trans. p 318).

Mr. Earl testified that the cracking of the plaster was due as heretofore pointed out to the improper lathing done by the appellants. Mr. Hampton stated that the cracking of the plaster was due to the use of aggregate of poor quality; and Mr. McLaughlin agrees in the main with that statement. And defendant Mr. Hughes himself fully agrees that the cause of the cracking was due to an improper mix or improper materials. Counsel state in their brief (page 9) that "In view of the admission of Peck that the lathing was a good job, he cannot attribute the cracks in the plaster to improper lathing." Even if Peck may not, certainly the owners may do so in view of their contract with the appellants.

The court meticulously set forth in its findings the facts on which it predicated the finding for \$250.00 for damages in the defective roof. Nowhere in the Appellants' Brief do they ask this court to reverse the Johnson case or the judgment rendered therein by the trial court for anything more than \$250.00, and we submit that even if this Court should find the \$250.00 judgment for the defective roof was erroneously entered, then the judgment should be affirmed for the balance.

We also respectfully call the Court's attention to page

12 of the Appellants' Brief in which they admit as follows:

"A. L. Hampton, a research engineer, in his deposition states that the bond failure and excessive cracking of the plaster was 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." In plain language, they admit one of the essential elements of plaintiffs' case, namely, that the plaster job was defective, but, they seek to avoid liability by attaching the blame directly on Mr. Peck because of the quality of the work and the materials used by him. Since Mr. Peck was not employed directly or indirectly by plaintiffs and respondents herein, and since he was working directly for the Hughes Brothers and under their supervision and direction, and since they paid for all the materials used and paid for the labor of Mr. Peck in applying the materials, we submit that they have admitted one of the essential allegations on which plaintiffs are entitled to have judgments affirmed by this Court.

We also wish to point out to this Court that the trial Judge visited both the Burningham and the Johnson houses accompanied by the plaintiffs, the defendants, and all the attorneys in these cases. Both sides pointed out to him the various cracks, defects, the construction of the house, and the Judge even got on a chair and looked up into the roof and examined the interior very carefully. He went downstairs in the Burningham house, examined all the walls where the moisture was seeping through, he carefully examined the roofs and ceilings. He went around the outside of the house, noticed the cracking in the foundation; then he carefully

examined the patio and retaining wall in the presence of all parties. He then went to the Johnson house and in the presence of all parties, and their attorneys, examined the walls and ceilings, asking questions about the cracks and also about the structural defects, about the bracing, about the lathing, also asked to see the places in both walls where the plaster had been taken out for analysis by the Chemist and Gypsum company. He went outside and saw the concrete driveway at the Johnson garage, which had practically disintegrated and then went back to the Court House and heard additional testimony and evidence on the part of both parties to the law suits. After both parties had rested and the cases were submitted to the trial court;—with the consent of counsel for both parties, he made another trip to the Johnson and Burningham houses alone and spent a good deal of time again going over both premises very carefully, even getting on a ladder and crawling into the attics of both houses to examine the braces and construction and, thereafter, made and rendered his decision.

We submit, therefore, that the trial court in this case not only had before him the various contractors, architects, expert witnesses on gypsum and plaster, but he also had opportunity to observe the conduct of both the plaintiffs and defendants in open court and to judge for himself which side was telling the truth. And, in addition to all of that, he made two personal visits to the premises and personally examined all material matters which were litigated in these law suits, before rendering his decision.

ASSIGNMENTS OF ERRORS Nos. 3 and 5

Assignment of error No. 3 is that the court erred in fixing in finding No. 6 the amount necessary to repair the retaining wall and patio at the sum of \$100.00. In our discussion of assignment No. 1, we point out that Mr. Bjorkman testified that cost of fixing the foundation and retaining wall would be from three to five hundred dollars. Appellants claim that Mr. Bjorkman denied that he made an offer to do the repair work on the foundation and retaining wall for \$500.00. But the only thing he denied was that he submitted an offer to do such work at the price mentioned, but in court he stated that the cost of repairing the foundation and retaining wall would be between three and five hundred dollars. (Trans. p 123.)

ASSIGNMENT OF ERRORS Nos. 6, 7 and 8

When the court made the order requiring the respondents to amend their complaint and make Peck a party defendant, the appellants filed a cross-complaint against Peck. (Trans. p. 21). Later the action was dismissed by the court against Peck (Trans. p. 35) which of course carried the cross-complaint out of the action. Appellants have not cross-appealed or sought to have that action of the court reviewed in the manner provided by Rule 74. And since no review of the action of the court in dismissing the cross-complaint is sought, the judgment dismissing the case as against Peck is final, and that matter is not before this court.

Furthermore, if the judgment dismissing the action

against Peck is final, appellants' claim of error that no sufficient finding was made upon the matter of the dismissal of Peck becomes meaningless and entirely without merit. If a finding of fact was necessary upon the dismissal of the cross-complaint the obligation was upon the appellants to request the making of such finding by the court and have the same entered. They had the trial court make Peck a party defendant over our objection and they then filed their cross-complaint against him. A finding or the basence of finding upon the dismissal of the cross-complaint could not affect plaintiffs' judgment. That matter is, as to the plaintiffs' immaterial. Failure to make a finding upon an immaterial matter is not error. *Mills v. Gray*, 50 Utah 224, 167 Pac. 358. Also failure to find upon issues which will not affect the judgment is not ground for reversal. *West v. Standard Fuel Co.* 81 Utah 300, 17 Pac. (2d) 292; *Duncan v. Hemmelwright*, 112 Utah 300, 186 Pac. 2d) 965.

THE JOHNSON CASE

We note that on page 13 of Appellants' Brief, they have assigned only three errors in the Johnson case. The first one being that the court erred in finding that the roof was defectively constructed. We respectfully call the court's attention to the testimony of Mr. Miles Miller, the architect, relative to the bracing of the roof which he said in his opinion was one of the factors which caused the cracking of the walls and he also elaborated in detail the reasons for the cracking, in his opinion, as set forth in pages 138 to 141 inclusive in the transcript of testimony.

The Appellant also assigned as error, the finding of the Court that \$250.00 is a reasonable amount for repairing the roof and also for entering judgment of \$250.00. In this connection, we respectfully call to the Court's attention the complaint and the amended complaint of the plaintiffs' on file herein in which plaintiffs' pray for \$3,000.00 general damages for the cracking of the plaster in the Burningham case and the prayer for \$3,000.00 for general damages for the cracking of the walls and ceilings in the Johnson case.

We have discussed the same or similar assignments made in the Burningham case. Without repeating these observations, we ask that they be considered in connection with the Johnson case.

At page 153 in the Transcript, Mr. Peck testified as follows:

Q. I call your attention to the summer of 1947, do you recall having done a job for Mr. Johnson at that time?

A. Yes, we done Mr. Johnson's home, but we took the contract from Mr. Hughes.

Q. Did you submit a bid on that job?

A. We were doing Mr. Hughes' work at that time.

Q. How many jobs had you done for him?

A. I don't know exactly. I imagine in the neighborhood of ten.

Q. Ten jobs at the time you done this one?

A. At least that many.

Q. And did you submit a bid to him on this particular job?

A. Well, we had more a less a word contract with him at so much a yard.

Q. How much was that, a yard?

A. 80 cents a yard.

Q. Did you do the job at Mr. Johnson's home for 80 cents?

A. Yes.

CONCLUSION

We submit that there is no merit to either of these appeals. Both houses are clearly shown by the evidence to have been constructed in an unworkmanlike manner and with defective materials as heretofore pointed out. The evidence would have justified and supported judgments for much greater amounts than allowed. The said judgments should be affirmed.

The arguments presented by the appellants in their very short brief have all the earmarks of what might be termed an attempt at confession and avoidance, in that not only did one of the Hughes Brothers admit on the witness stand that the only reason that he could see for the cracking of the walls and ceilings with regard to both houses, was either a defective plaster or faulty application of the plaster, and, as noted above, they even admit in their brief by quoting the testimony of Mr. Hampton, the Research Engineer, that the perlite was of an inferior quality. In other words, the appellants herein do not deny that something was wrong with the construction and the materials used in both dwelling houses which they erected, but they seek to avoid any liability by alleging that even though there was some defective materials or workmanship, the fault wasn't theirs, and they are now attempting to pin it on their employee Peck. Nowhere in their brief do they deny that the walls and ceilings were cracked excessively, that the construction was an unworkmanlike job; but now they come before this Court to ask a reversal because of something which they contend was done by a man whom they employed, whom they supervised, to whom they furnished the materials on the job and to whom they paid a wage after the job was completed and for whose work and labor they are fully liable.

Respectfully submitted,

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