

2001

Kent W. Holman and Alfred G. Kessler, dba Golden Spike Reality and Construction v. Blair W. Sorenson and Marjean Sorenson : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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KENT W. HOLMAN and
ALFRED G. KESSLER, dba
GOLDEN SPIKE REALTY
and CONSTRUCTION,

Plaintiff,

vs.

BLAIR W. SORENSON and
MARJEAN SORENSON,

Defendants.

Case No. 14305

BRIEF OF RESPONDENTS

Appeal from Judgment of the District Court
of the Third Judicial District
in and for Salt Lake County, State of Utah
Honorable James S. Sawaya, Judge

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

KENT W. HOLMAN and
ALFRED G. KESSLER, dba
GOLDEN SPIKE REALTY
and CONSTRUCTION,

Plaintiff,

vs.

BLAIR W. SORENSON and
MARJEAN SORENSON,

Defendants.

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Case No. 14305

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Plaintiffs, Kent W. Holman and Alfred G. Kessler, Contractors doing business as Golden Spike Realty and Construction, filed suit against the Appellants' for the foreclosure of a mechanics lien; for damages for the breach of a construction contract and for attorneys fees, court costs and punitive damages. The Defendants counterclaimed asserting breach of contract.

DISPOSITION IN LOWER COURT

The District Court found that the Appellants' had breached the Contract and awarded Plaintiffs the sum

of \$7,321.00. The Court also found that the Plaintiffs breached the Contract and held that each of the parties should bear their own attorney's fees and costs. The Court foreclosed the lien of the Plaintiffs and one asserted by Fashion Cabinets Manufacturing, Inc., which had priority, and stayed execution of the judgment for six months.

RELIEF SOUGHT ON APPEAL

The plaintiffs ask the Court to affirm the Judgment of the Trial Court.

STATEMENT OF FACTS

Alfred G. Kessler and Kent W. Holman, Plaintiffs below, operated as a partnership under the name of Golden Spike Realty and Construction. Mr. Blair Sorenson, who wished to construct a fourplex on Green Street in Salt Lake City, approached Mr. Kessler and later Mr. Holman, who were building such a unit, and solicited a bid for his project on which he then had no plans and specifications. (R. 4,5)

The plans and specifications were drawn by William Hargreaves, who acted as both architect and engineer. The prospective Contractor, did not assist with the preparation of the plans. (R. 6) The parties, after some discussion, executed an Earnest Money Contract, Exhibit P-1, which was later supplemented by additional terms, Exhibit P-2. The parties later signed a Construction Agreement, Exhibit P-3, and a Supplement to General Building Contract, Exhibit P-4.

The Plaintiffs, in signing the contract documents, relied on the original plans and specifications drawn by the Defendants architect, to which a basement was, at the Defendants request, later added. (R. 15)

Early on, a subcontractor arranged for by Plaintiffs was to demolish the premises for the salvage value, without additional charge. (R. 16) Before demolition commenced, the Plaintiff, Mr. Holman, found several women removing items from the premises with the approval of the Defendant, Mrs. Sorenson. The women were instructed by the Contractor to take nothing more from the site than they had already taken. As a consequence of those directions, Mr. Holman received a letter from F. Briton McConkie, the first of three attorneys to have represented the Defendants in these proceedings, directing Golden Spike to cease construction under the "intended" Construction Contract because the Defendant, Marjean Sorenson, and not her husband, Blair Sorenson, was the "owner" of the property, and because the Contract was consummated "against her will." Mrs. Sorenson, the attorney said, was not "in sympathy with the proposed construction" and although she acknowledged that her husband had an interest in the property in the event of her death, would not "permit" the project to be built. (Exhibit P-6)

The letter was received only 10 days after the Defendant, Blair Sorenson, had signed the Construction Agreement, Exhibit P-3, representing that he was the "OWNER" and that he had "acquired" and held the property at 2305

Green Street in Salt Lake City in "FEE SIMPLE." (See Recital 1) The letter threatened litigation if demolition continued.

The Contractor, to facilitate the construction, permitted the unanticipated removal of the furnace and of other fixtures by the Defendants. There being, then, no profit in the salvage, the subcontractor for demolition refused to perform. Another subcontractor was then hired for cash. (R. 20)

Later, in violation of the terms of the Contract, the Defendants failed to give the notice required of the approval and recording of the bank loan, of the finalization of the plans and of the approval for construction by the municipal authorities. (R. 21) It fell to the Plaintiffs to obtain the required permits, the terms of the Contract notwithstanding. The Defendants plans, prepared by the agent, Mr. Hargreaves, were not initially acceptable under the Code and their approval was not obtained for nearly two months after the Construction Agreement was signed. (R. 24) Construction did not commence until July 27, 1973.

During excavation, the Plaintiffs struck water. The plans, from which the Contractor was to build, had specified that the soil conditions were clay. The responsibility for the unanticipated problem was, contractually, that of the Defendants. The project was temporarily abandoned to see if the condition would correct itself. (R. 25) It did not and the Plaintiffs recommendation that the Defendants

permanently abandon the basement, which had not been a part of the original plans, was ignored. (R. 27,28) New and revised plans were devised to implement the construction of a basement in the face of the water table problem and included, among other things, retaining walls, a plan for raising the foundation above grade and directions to waterproof the concrete. (R. 28,29)

On September 1, 1973, the parties defined the responsibilities for the work required by the changed plans in a Letter Agreement, Exhibit P-8. (R. 33) The Plaintiffs agreed to undertake certain of the tasks (see especially paragraphs 3 and 4) for specified prices. Mr. Sorenson, who was to assume responsibility for part of the construction under the arrangement between the parties, agreed to comply with the City Ordinances respecting the construction of a building above grade. (R. 34) He was, among other things, to build the retaining walls and, Mr. Holman said, to provide for the backfill.

The Plaintiffs, who were to be paid for the work as it was completed, performed the tasks required by the September 1 arrangement (Exhibit P-8), but were never paid for the materials furnished or for their services. (R. 35, 36,37)

There were a multitude of other problems during construction. The Defendants plot plan, Mr. Hargreaves plan, was inaccurate and the setback was inadequate. The Plaintiffs, because of the error in the plans, were obliged by

the City to remove footings already poured, dig new ones, move the building back and to shorten the mansard roof.

(R. 37,38,39) Mr. Sorenson piled railroad ties at the site for the construction of the retaining walls. They proved to be an impediment to the delivery of materials and to construction. The railroad ties were not permitted by the Building Code and the idea to use the ties, instead of concrete, was subsequently abandoned. Mr. Sorenson's subcontractor misplaced the footings on the concrete retaining walls, misplaced and left out necessary rebar and poured concrete in cold and freezing weather. (R. 41) As a result of poor workmanship, the wall cracked when the area was back-filled. Dead men were required to stabilize the faulty construction. (R. 42) The Defendant Sorenson who denied any responsibility to backfill the retaining walls did not complete his construction of those walls until January of 1974, some eight months after the parties signed the original Construction Agreement. (R. 45,46) The City issued a stop order in connection with the stairs in the front of the four-plex, Mr. Sorenson's responsibility. (R. 47,48) A variance was required for which additional plans had to be drawn. The requirement for a variance involved the necessity for a public hearing and a meeting with the Board of Adjustment and occasioned delays on the job.

Other problems, attributable to Mr. Sorenson's heavy handed interference in every phase of the project, concerned the payment of the Contractor's funds. The

Defendants did not deposit funds equivalent to the contract price in the loan-in-process account at American Savings as permitted by the Contract and agreed by the parties.

(Paragraph 3, Exhibit P-4) The Defendants deposit was short by \$6,000.00. (R. 49,50) Failure to make such a deposit resulted in diminished draws to the Contractor, when the progress payments were made, (R. 51,52) which problem was further exacerbated by the lenders right to deduct costs, (R. 52) such as construction interest, for which Mr. Sorenson was responsible. (R. 53) The second draw was withheld by Mr. Sorenson because, the Defendants claimed, there were pitmarks on the basement floor caused by leakage from a rainstorm. The amount of the draw, \$8,000.00, exceeded by forty times the cost of the repairs for the floor, approximately \$200.00, and the draw withheld did not concern concrete at all, but rather a payment for the lumber and materials required to bring the building to the square. (R. 54)

The Defendants delayed construction by their conduct (R. 60,61,62,63,64,65) and the Court so found. (Finding 7, R. 525) The Defendant Sorenson "many" times called the Plaintiff, Holman, and kept him on the phone till midnight. (R. 58) The Defendant after initiating discussions with the State Contractor's Office, refused to submit his complaints to arbitration, something to which the Plaintiffs agreed. (R. 67) The Defendant Sorenson dealt directly with the Plaintiffs subcontractors without Plaintiffs approval (R. 75) and ordered changes in the quality and nature of the

finished materials required by the plans without advance consultation. (R. 78)

It is clear from the record that the plaintiffs bid was a very good one, lower than that of the other bidders (R. 74) and providing for a very narrow margin of profit. (R. 73) It became apparent, as the project progressed, that there would be no profit for the plaintiffs and the Trial Court's award, if fully affirmed, will not change the loss equation.

The Plaintiffs, who estimated that they were only a day and a half from the completion of their responsibilities, were dismissed from the job on May 30, 1974 (R. 78) by means of a letter from the Defendants second attorney, Mr. Hollis S. Hunt, who subsequently handled the case at trial. At the time of the dismissal, the plaintiffs were on the job hanging and adjusting doors. (R. 80)

On August 26, 1974, the Plaintiffs initiated a lawsuit against the Defendants, who filed a Counterclaim.

The plaintiffs testified as to their damages, establishing the contract price, the amount paid and the value of extras and credits. The Court found damages in the amount of \$7,321.00, awarding no costs or attorneys fees. The Defendants moved for a clarification of the Judgment and later made a motion for a new trial. The Defendants did not set the latter motion for hearing, and did not appear when the plaintiffs did so.

The Defendant Sorenson then engaged the services of Mr. Rand Hirschi, a third attorney, for purposes of the appeal.

It is worth noting that the Defendants subpoenaed sixteen witnesses to testify (Returns on Service for fifteen are in the record at 482-515), actually calling nine and dismissing a number of others. The Plaintiffs testified themselves, Mr. Kessler very briefly, and called only one other witness.

ARGUMENT

POINT I

THE COURT'S FINDING OF MUTUAL BREACH WAS AN EFFORT TO AVOID THE IMPOSITION OF PLAINTIFF'S ATTORNEY FEES.

Section 38-1-18 U.C.A. 1953 provides as follows:

"In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys fee, to be fixed by the Court, which shall be taxed as costs in the action."
(Emphasis supplied)

The Supplement to General Building Contract, Exhibit P-4, provided,

"In case of default in performance of this Contract, the defaulting party agrees to pay all expense of enforcement, including a reasonable attorney's fee."

The Earnest Money, Exhibit P-1, also provided for an attorney fee.

With these statutory and contractual provisions in mind, the plaintiffs asserted at the trial that they were

entitled to attorney fees of \$2,400.00 incurred prior to the trial, and to \$350.00 per day for the three to three and a half days spent in Court. The figures were admitted by a stipulation of counsel found at pages 186 and 187 of the record.

The Court did not wish to impose attorney fees on top of the judgment and advised counsel, in chambers, in connection with a discussion of the attorney fee provisions, and before a ruling, that it might be inclined to a finding of mutual breach, presumably to avoid what appeared to be the mandatory language of the statute, 38-1-18 U.C.A. Counsel on this appeal, Defendants third attorney, was not privy to the discussion nor a participant at the trial.

The effect of a finding of mutual breach was the avoidance of Plaintiffs attorney fees, an advantage to the Defendants. Such fees would have increased the judgment, which, considering the circumstances, was minimal, by 50%. The Court said as much. In its direction to Counsel, which Appellant has included as Appendix "A" to the Brief, the Court said,

"It is the Court's further opinion that the Plaintiffs have breached the contract in the respects alleged by the Defendants, however the above computation is inclusive of the amounts to which they have been damaged and to which they are entitled; therefore Plaintiff is entitled to judgment for the above amount with no attorney fees being awarded to either party, and each party to bear its own costs." (Emphasis supplied)

The relationship of attorney fees to the finding that the plaintiffs had breached, an afterthought, is obvious.

Appellants' appellate counsel seeks to turn the finding of mutual breach into a theoretical dilemma with far reaching implications. The issue as to whether a Contract has been breached is ordinarily a question of fact for the trier of facts if the evidence is conflicting or if different reasonable inferences may be drawn. See: 17 AmJur 2d, "Contract," section 355, p. 793, 794. It is also for the trier of the facts, Judge Sawaya in this instance, to determine from the facts and circumstances whether the omission of some act stipulated in the Contract or a departure from its terms is substantial, that is whether it is a matter vital to the Contract, material or essential, or merely an omission or departure in an unimportant detail. See: Porters v. Traders Ins. Co. 164 NY 504, 58 NE 641, University Club v. Beakin 265 Ill 257, 106 NE 790.

In this case, Judge Sawaya found a breach, which conveniently nullified Respondents' attorney's fees and costs, but not, the judge thought, the Contractor's right to damages arising from the Appellants' far more serious conduct.

Whereas a plaintiff cannot prevail in an action for nonperformance of a Contract if he alone is responsible for the nonperformance, Porto Rico v. Title Guaranty and S. Co. 227 W.S. 382, 57 L ed 561, 33 S. Ct 362, William B.

Hughes Produce Co. v. Pulley 47 Utah 544, 155 P. 337, if the impossibility of performance arises directly or even indirectly from the acts of the promisee, it is a sufficient excuse for nonperformance. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned. Columbus R. Power and L G v. Columbus 249 U.S. 399, 63 L ed 669, 39 S. Ct 349, 6 ALR 1648, Bewick v. Mecham 26 Cal 2d 92, 156 P.2d 757, 157 ALR 1277, Ford v. Norton 32 NM 518, 260 P. 411 (recognizing principle but finding it inapplicable), Williams v. Yellow Pine Box and Lumber Co. 126 Wash 380, 218 P. 245. See: ANNOTATION: 84 ALR 2d 65 12 (b).

Where the facts are in dispute, as they clearly were, where different reasonable inferences could be drawn, as they clearly could, Judge Sawaya sitting without a jury was entitled to determine whether one had performed, Heywood v. Ogden Motor Car Co. 71 Utah 417, 266 P. 1040, 62 ALR 1323, substantially or sufficiently, New v. New 148 Cal App 2d 372, 306 P. 2d 987, or had failed to perform. See: Terry v. United States Fidelity and G. Co. 196 Wash 206, 82 P. 2d 532, 119 ALR 1276.

The Court concluded that the Defendants breached the Contract from the very beginning, in that they,

".....interfered with demolition, denied ownership of the property, caused variations from the plans and specifications, made unauthorized substitutions, and despite repeated and continued demands, failed to make progress payments in the time and manner specified, failed and refused to pay for extras that

had been commissioned, or for the balance due under the Contract, delayed the completion of construction, withheld percentages from the payments which were in fact made and ordered the plaintiffs, in violation and breach of the parties contractual arrangement, not to proceed with or complete the project." (Finding 7, R. 525)

The plaintiffs failed to complete the project, the Court found, in the time specified, and left, at the time of their withdrawal, (they were, of course, dismissed) some work to be completed. (Finding 9, R. 526)

The situation, with respect to the consequences of the Trial Court's finding that there was a mutual breach and the implication of such a finding for the issue of damages, is well covered by traditional contract principles. As a rule, a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. Imperial F. Ins. Co. v. Coos County 151 U.S. 452, 38 L ed 231, 14 S. Ct 379, Williston, Contracts 3d ed 812 et seq. He can neither insist on performance by the other party, Nakdimen v. Baker (C A 8 Ark) 111 F. 2d 778, cert den. 311 U.S. 665, 85 L ed 427, 61 S. Ct 22, nor maintain an action against the other party for a subsequent failure to perform. Lynch v. McDonald 12 Utah 2d 427, 367 p. 2d 464. Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom rests all the liability for the nonperformance. Anvil Min. Co. v. Humble 153 U. S. 540, 38 L ed 814, 14 S. Ct 876, Buckman v. Hill Military Academy, Inc. 190 Or. 194, 223 p. 2d 172.

In Lynch v. McDonald, supra, this Court accepted the principle that the party who commits the first breach cannot maintain an action against the other for a subsequent failure to perform. Under the circumstances, the Owner, Mr. Sorenson, was not entitled to "Damages Measured By His Cost to Complete" the project, or to any damages.

POINT II

THE TRIAL COURT APPLIED ESTABLISHED CONTRACT PRINCIPLES TO THE COMPUTATION OF DAMAGES.

Plaintiffs Damage Recapitulation, Exhibit P-11, which was illustrative of Mr. Holman's testimony, was prepared according to principles enunciated in this Court's decision in the matter of Keller v. Deseret Mortuary Company 23 Ut 2d 1, 455 P. 2d 197.

Deseret Mortuary, like the present Appellants, claimed at the trial that the Plaintiff, Mr. Keller, had breached the Contract in that he had not completed the work in time nor in a satisfactory or workmanlike manner. The Trial Court found the issues for the Plaintiff and awarded damages. This Court, saying that there was "substantial, reasonable and credible evidence" to support the Trial Judge's findings, chose not to overturn the Court's decision on grounds of delay or poor workmanship.

The Appellants, in Keller, argued that the Plaintiffs recovery should be limited to the reasonable value of the work performed and the materials furnished. This Court noted that there was a "definite Contract" upon which the

claim of the Plaintiff was based, and that the assessment of damages by the Trial Court was "consistent with the general principle which underlies the ascertainment of damages for breach of contract: that the non-breaching party should receive an award which will put him in as good position as he would have been in had there been no breach." Citing 5 Williston on Contracts, 3824, Sec. 1363; 1 Restatement of Law, Contracts, 578, Sec. 346, Comments (g) and (h); 5 Corbin on Contracts, Sec. 1094. The Court found no error in an award of damages based upon the total amount promised for the project less the reasonable cost of completing it.

The formula used by the Plaintiffs in this case, as illustrated by Exhibit P-11, which showed damages slightly in excess of \$7,300.00, and the formula used by the Trial Judge and approved on appeal in the Keller case are virtually identical. P-11 was prepared with the Pacific Reporter open to the Keller case. It includes extras, which in this instance were required to ascertain the total contract price, and offsets and contract credits to the Appellants, which were, in view of the relationship between the parties, required to adjust the total contract price. Otherwise, the formula applied looked to the Contract and to the amount paid by the Defendants, the balance if the job had been completed and the reasonable cost of completion, the product being the measure of Plaintiffs damage.

There can be no doubt that the Trial Judge also relied on the Keller principle in computing damages. The item entitled "Credits due Defendants" on the Court's July 9 letter to counsel, Appendix "A" to Appellants Brief, included, the Court found, costs of completion. (Finding 9, R. 526)

Reference to the Keller case at page 198 and the Court's letter to counsel (R., between 515 and 516), and to Finding 9, indicates the Court followed the standard enunciated in Keller.

The Trial Court concluded that the Defendants "breached the Contract," "caused the delay in construction" alleged by the plaintiffs and caused damage, the amount of which was then specified. (July 9 letter to counsel, Appendix "A" to Appellants Brief) The unspecified breach of the plaintiffs, invoked to avoid the imposition of attorney's fees and costs, did not operate to avoid the award of damages or to remove the application of the principles established by this Court in the Keller case to determine the amount of such damages. The fact that the Court below found a breach by the plaintiffs should, under the circumstances, alter nothing. Professor Williston, quoted by this Court in Keller as authority for the proposition that the non-breaching party may recover damages equivalent to the fruits of his bargain, would not quibble over a Contractors "minor deviation from the required performance." vol 11, Williston on Contracts, 1363, p. 340,

See also: Jacob and Youngs Inc. v. Kent 230 NY 239, 129 NE 89, 23 ALR 1429, Shell v. Schmidt 164 Cal App 2d 330, 330 P. 2d 817.

Judge Sawaya, whose duty it was to determine whether a breach was material, a simple omission or an unimportant detail, did not find that the Plaintiffs' breach precluded the Plaintiffs' claim for damages measured by Keller principles.

POINT III

THE TRIAL COURT'S FINDINGS SHOULD BE UPHELD ON APPEAL.

The Brief of the Appellants' is filled with references to the Trial Court's Findings on the issues of damage. It re-examines, in confusing detail, the constituent factual elements of the Findings and challenges their accuracy. It is of little value, on appeal, for this tribunal to re-try the case on damages or to become involved in the morass of detail which complicated the case from its inception. The facts on damages were controverted and disputed, conflictory and susceptible to varying inferences. The Court made its findings based on the testimony of the witnesses and the proofs which were submitted. Counsel submits that the veracity of the Defendants can be quickly ascertained, even from the cold record, by the most cursory examination of the Accounting Summary, Appendix "C" to Appellants Brief. (Which is not an Exhibit and which is improperly included in the Brief) The document is inflated and totally unreliable. The

Court's utter rejection of the summary, given the testimony and the circumstances, was entirely inevitable.

The Respondents' find it unhelpful to be drawn, on appeal, into a minute and detailed discussion of the elements of the damage award. The evidence is in the Record, the Abstract and in the Damage Recapitulation, Exhibit P-11, which was modified to some degree by the Court, and by the testimony, both up and down.

Where there is a dispute in the evidence, this Court has repeatedly supported the findings of the Trial Court, assuming that

"....the Trial Court believed those aspects of the evidence, and drew the inferences which could fairly and reasonably be drawn therefrom, which tend to support the findings and judgment...." Casey v. Nelson Brothers Construction Company 24 Utah 2d 14, 465 P. 2d 173 (1970). See also: Winger v. Gem State Mutual of Utah 22 Ut 2d 132, 449 P. 2d 982.

If upon the review of the record, there is a reasonable basis in the evidence to support the Court's findings, they will, of course, not be disturbed. Barrett v. Vickers 24 Ut 2d 334, 471 P. 2d 157.¹ There is, on this record, competent testimony supporting all of the Court's critical factual findings. The Trial Court made its find-

1. An action for breach of contract is an action at law, rather than equity. Flynn v. Schocker Construction Co. 23 Ut 2d 140, 459 P. 2d 433. In an action at law, the Appellate Court does not reverse on issues of fact where the Trial Court's findings are supported by the evidence or the absence of it. Martin v. Martin 29 Ut 2d 413, 510 P. 2d 1102.

ings some of which are cumulations of elements from the testimony of both Plaintiffs and Defendants, after hearing disputed and contradictory evidence from the parties. This Court has frequently indicated that where competent evidence supports the fact finder's conclusions, it cannot "substitute" its judgment for that of the Trial Court, even if it disagrees with the findings. Pitcher v. Lauritzen 18 Ut 2d 368, 423 P. 2d 491.

POINT IV

THIS COURT'S DECISION SHOULD RESOLVE, FINALLY AND FOREVER, THE ISSUES BETWEEN THE PARTIES.

The decision in this case should, finally and forever, resolve all matters in controversy between the parties. The Trial Court, and Judge Stewart M. Hanson, Jr., earlier in the record, forever barred lien claims of other potential claimants as against the property in question, excluding only the claims of the Plaintiffs and those of Fashion Cabinets Manufacturing, Inc. The Plaintiffs, who have been delayed in receiving payment for their work for several years, should, as a result of this decision, be fully free from further problems with these Defendants. This decision, and the decision of the Trial Court, should be res judicata on all issues between these parties as a result of the agreement for the construction of a fourplex at 2305 Green Street in Salt Lake City, Utah.

CONCLUSION

The Trial Court did not award the plaintiffs their attorney fees or costs, nor did its computation include the full face value of the extras asserted by the plaintiffs. In the face of some orchestrated confusion, concerning damages, the Court kept its own counsel making, apparently, some deductions and additions for which there was and is no precise itemization. Balancing the claims of the litigants, evidenced by a confusing record, the Court arrived at its figures, independently, after the trial concluded. The Court recorded counsel's final arguments which, while unreported, contained the somewhat modified figures which remained at the conclusion of all the evidence. It found the extras to amount to \$3,900.00, a reduction of over \$1,500.00 from the amount the plaintiffs initially claimed.

Where factual findings are confusing and disputed, technically based, it is difficult to match the advantaged position of the lower Court. The Trial Court was able to gauge, first hand, the credibility of the parties and the problems raised by vastly contradictory facts.

The findings of the determiner of the facts, because of his close proximity to the witnesses and the trial and because he is the exclusive judge of the credibility

of witnesses and of the "weight to be given evidence",²
should be upheld on this appeal.

Respectfully submitted,

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Attorney for Respondents

2. DeVas v. Noble 13 Ut 2d 133, 369 P. 2d 290 (1962)
certiorari denied -- S. Ct 37, 371 U.S. 821, 9 L ed 61.

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