1979

Cliff Prince, Dba Prince Construction Company v. R. C. Tolman Construction Company, Inc v. Western Surety Company, Inc. v. Genevieve A. Prince : Brief of Appellant R. C. Tolman Construction Company

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CLIFF PRINCE, dba PRINCE CONSTRUCTION COMPANY,

Plaintiff and Respondent,

v.

R. C. TOLMAN CONSTRUCTION COMPANY, INC.,

Defendant, Third Party Plaintiff and Appellant,

v.

WESTERN SURETY COMPANY, INC.

Third Party Defendant and Fourth Party Plaintiff and Respondent,

v.

GENEVIEVE A. PRINCE

Fourth Party Defendant and Respondent.

BRIEF OF APPELLANT R. C. TOLMAN CONSTRUCTION COMP

Appeal From The Judgment of the Second Ju... Court For Davis County, The Honorable Thorn... Judge.

WATKISS & CAMPBELL
Michael F. Heyrend, Esq.
Attorneys for Respondent
Cliff Prince, dba Cliff Prince Construction Co.
Twelfth Floor
310 South Main Street
Salt Lake City, Utah 84101

HANSON, RUSSON, HANSON & DUNN
Tim Dalton Dunn, Esq.
Attorneys for Respondent
Western Surety Company, Inc.
702 Kearns Building
Salt Lake City, Utah 84101

STRONG &
Don R. S...
Attorney...
R. C. TO...
COMP...
197 South ...
P.O. Box ...
Springvill...

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STATEMENT OF THE CASE

The facts of the case are basically set forth in the Findings of Fact and Conclusions of Law entered by the court (R-151 through R-154). R. C. Tolman Construction Company, Inc., defendant and appellant, and hereinafter called "Tolman" was awarded a contract for construction of roads and other facilities for the United States Forest Service near Fishlake. Tolman subsequently, by a written subcontract agreement subcontracted (R-49 through 52, R-84 through 87) eleven specific bid items of work to Prince Construction Company, plaintiff and respondent, and hereinafter called "Prince." Prince performed part of the subcontract items but by late summer or early fall of 1973 Prince had not performed three of the contract items. Tolman took over these contract items and completed the work. It was not until sometime later after the contract work had been completed that the parties became aware of a problem with payment under the contract and a dispute arose.

There are several matters which are not disputed. First, there is no dispute that the subcontract agreement is the document governing the relationship between the parties. Secondly, the court found that Tolman gave actual notice of taking over the work from Prince. There is also no question that Tolman, in fact, took over the work and it was Tolman who completed each of the three remaining contract items. The court was called on to determine the proper measure and method of compensation to both parties. The court applied the doctrine of

quantum meruit in arriving at the amounts to be awarded each party. The detail of the courts award of compensation will be detailed hereinafter. Basically, the court determined the value of the three subcontract items since those are the ones in dispute and subtracted from the subcontract net value the cost of Tolman's work to complete the work along with some offsets and awarded the remaining balance of $18,386.34 to Prince (R-156).

It is from the procedure used by the court in applying the doctrine of quantum meruit to the fact situation that Tolman appeals. The facts show that Tolman had an unbalanced bid for the three contract items in question in that Tolman had misunderstood the contract and entered a bid in excess of its costs to do the work. Appellant contends that the three contract items generated the excess fund for the amount of the judgment so that when the court applied its version of quantum meruit the court simply credited Tolman for the cost of the work done to complete the subcontract agreement and gave the remaining value of $18,386.24 to Prince by way of Judgment. Tolman contends that the excess amount of $18,386.34 in the three contract items should have been awarded by the court to Tolman instead of to Prince.

DISPOSITION IN LOWER COURT

The matter came before the court for trial in two parts. The first trial before the court was on the issue of liability. The issue of damage was heard by the court some months later. The court entered its Findings of Fact and Conclusions of Law

November 30, 1978. The court awarded Prince the sum of $18,386.34.

RELIEF SOUGHT BY THIS APPEAL

Tolman asks this court to either reverse the judgment of the District Court and award the $18,386.34 to Tolman or to remand the case back to the District Court with instructions that the court is to correctly apply quantum meruit such that the award of $18,386.34 be made to Tolman who performed the work on the three remaining contract items and not to Prince who did not do the work on the three remaining contract items.

STATEMENT OF FACTS

Prince and Tolman entered into a subcontract agreement dated October 7, 1972 relating to certain road building and related construction work connected with a contract Tolman received from the Forest Service titled United States Forest Service Fish Lake Sanitation Project. (R151). Prince started work in the fall of 1972 on the $73,521.48 subcontract which had 90 calendar days for completion on eleven separate bid items. (R49 through 52, R84 through 87) (Exhibit A). Prince worked for eleven days during 1972 (tr page 14 line 5) and returned to the project in July of 1973 (tr page 15 line 19). Prince testified that there were three contract items he could not do in July of 1973 to wit: 2222-1, 2230-1 and 2230-2 (tr page 25 line 2224). Prince continued to work on the other 7 items of work. The final item was for crushed aggregate and could not be done until items 2222-1, 2230-1 and 2230-2 the hauling and roadway borrow was done. Prince did not have the equipment to do the three items and was arranging with a Mr. Wirthlin to do

the remaining work. (tr p. 28-30). When the time had gone past the 90 days set forth in the contract sometime in October, Tolman told Prince he would do the borrow, the overhaul and the second overhaul on items 2222-1, 2230-1 and 2230-2. (tr 25 line 26 etc.) Tolman thereafter did all of the work on the items listed above (tr 37 line 29 to page 38 line 11) (tr 39 line 27 etc.) (tr 40 line 1-6 etc.). Thereafter, Prince was paid for the work he completed on seven of the items but was not paid on the three items listed of 2222-1, 2230-1 and 2230-2 because Tolman did that work along with some others. Prince was paid $48,160.19 by Tolman (tr page 42 line 18-22). A dispute arose between the parties as to how such Prince should be paid and a settlement of differences attempted (tr p. 43). Subsequent to the dispute arising Prince testified that he expected the total subcontract price for the overhaul and borrow items even though he didn't physical do the work and he was asking for the full bid price based on the contract. (tr 45 line 16-28). When Prince was asked about the provisions in the contract that any assignments of portions the work had to be approved by Tolman, Prince said that he knew that and Wirthlin knew it and the change was never requeste or permission to subcontract to anyone else given (tr 82 etc.). It was also clear that without subcontracting the work to someon else, Prince had no capability to complete items 2222-1, 2230-1 and 2230-2. (tr 82 etc.). The most Prince had was a "verbal agreement" subsequently denied by Tolman that he had "subcontrac the three items back to Tolman. (tr p. 91). The testimony was clear that Prince never told Wirthlin to come and do the work on the three items (tr 102 line 27-30 p. 103 line 1-12).

Tolman then testified that he did items 2222-1, the road barrow; 2230-1, the roadway haul; and 2230-2, the roadway haul; and contracted to a third party item 2240-1, the crushed aggregate (tr 134,135,). Tolman told Prince in "the latter part of September that he would have to step in and do these things," meaning the 3 above listed items (tr 136 line 18-30, page 137 line 1 to 5) but gave the notice verbally and not in writing. At the time the verbal notice was given, Prince continued doing other things and Tolman completed the three items. (tr 142 - etc.) Tolman stated his reason for pressing Prince to complete the work and ultimately to take over the work was pressure from the Forest Service Engineer. (tr 142-line 26) Tolman testified the work for 2222-1, 2230-1 and 2230-2 was scheduled to be done by June of 1973. (tr 162 line 4 - line 23) so that the asphalt could be in place in 1973. (tr 162 line 24-30 . Tolman testified that there was some urgency to put the asphalt on because of the fuel shortage and scarcity of petroleum products (tr 163 line 1-16). The engineer informed him he as lagging and he went to Prince to see if the work could be hurried along (tr 164). Thereafter Prince did no work on the three items (tr 165). Tolman had no agreement with Prince to do Prince's haul work (tr 168 line 18-23). The work took four weeks (tr 169 line 9) and the asphalt was not placed in 1973 (tr 169 line 16-24). So that the work scheduled for 1973 went through the winter to be completed in 1974. Prince was invited to return to the job in 1974 to complete his items but did not return (tr 169,170).. The court stated after the

testimony that "with regard to plaintiff's claim, that he entered into a subcontract with Mr. Tolman to haul what has been referred to as borrow, the court would find that claim is not supported by the evidence. Mr. Prince, the court understands your testimony was that you were entering into a subcontract for Mr. Tolman to haul this material... but the court cannot find that to be a contract, because your evidence does not support the requirements of a contract, which would be a meeting of the minds or evidence that Mr. Tolman also understood that to be the contract. When an attempt is made to alter the terms of a written contract by an oral contract, there is a substantial burden placed upon the party making the claim of an oral contract. This court cannot find that the parties made that agreement. The court would find that Mr. Tolman did in fact take over the hauling and will find that he gave no written notice as provided by the contract. This leaves Mr. Tolman somewhat vulnerable as to his position ... (tr 189 line 18-30, 190 line 1-7).

The court went on in TR 190 to find there was evidence to support an agreement for Tolman to do the hauling and that no time restrictions were violated such that there would be a breach of contract. (tr 191).

The court found no evidence of manipulation on the part of Mr. Tolman to get out of a part of the contract where he saw a loss and hold onto the part where he was a gain (TR 192 line 2-6). The court very importantly found the contract to be divisible (TR 192 line 7-8). The court found that "the form

items were taken over by Mr. Tolman and he is entitled to payment for taking over these items. And, at this point, the court is inclined to feel that it should be on the basis of quantum meruit (TR 192-11-14). The court also found that Prince had actual notice from Tolman that the work would be taken over. (Tr 192 line 26-30).

With the evidence as to liability before the court and the court committed to the concept of quantum meruit, the trial proceeded to the second phase of damages wherein the court found that Tolman had received payments of the three items as follows:

a.	Item No. 2222-1 Barrow Road	$13,630.00
b.	Item No. 2230-1 Overhaul Road	20,454.00
c.	Item No. 2230-2 Overhaul Road	17,965.00
	Total Paid	$52,049.00
	Less adjustments for additional work over and above the contract amount	15,269.00
	Net Payment on three items	$39,586.00
	The court then allowed offsets for the cost of work done on the three items by Tolman of	15,269.67
	Sub Balance	$24,316.33
	and the court allowed other adjustments and offsets of:	5,929.99
	Final Balance	$18,386.34

The $18,386.34 which represents payment of the subcontract price to Tolman by the Forest Service less the cost of Tolman's work and other offsets left a balance which the court awarded

to Prince despite the fact that Prince did not do the work of the three items which generated the fund of money the judgment ultimately was taken from.

ARGUMENT

POINT I

THE COURT ERRED IN THE WAY IT APPLIED THE DOCTRINE OF QUANTUM MERUIT TO THE FACT SITUATION.

The subcontract sets forth the basic quantum meruit doctrine in paragraph 2. It is important that the court follow the subcontract provisions or the well established rules which surround the concept of quantum meruit.

Paragraph 2 of the subcontract agreement designated as "Prosecution of Work, Delays, Commencement and Completion of Work, etc." clearly sets for the circumstances whereby the contractor may take back the work and what the compensation to the contractor will be as follows:

> "any costs incurred by the contractor in doing any portion of the work...shall be charged against any monies due under the terms of this agreement, and in the event the total amount due or to become due under the terms of this agreement shall be insufficient to cover the costs accrued by the contractor in completing the work, then the subcontractor...shall be...liable unto the contractor for the difference."

Appellant submits that the contract provision is nothing more than a restatement of the general principles of contract law in such a situation. Appellant also submits that the court followed the provisions of paragraph 2 in that it gave Tolman credit for the actual cost of the work done. But, appellant submits most strongly that the court failed to correctly apply the doctrine of quantum meruit to the portion of the subcontract agreement which represented the excess amount of money after Tolman was paid for the work he did. The excess amount was

because of an error in bidding which gave Tolman more money than it cost to do the work. The court was correct in giving Tolman credit for the actual work he did, but erred when it awarded what amounts to a balance of the subcontract price on the three items to Prince.

Restatement of the Law of Contracts, Section 246: Corbin on Contracts, Section 1089 says with emphasis added, states:

> "When a contractor [Prince in this case] fails to perform a construction contract, the owner [Tolman in this case] is entitled to complete the work or have it completed by a third party. The contractor [Prince] is then liable for the costs incurred in such completion decreased by the amount of the contract price for the work which the owner [Tolman] then does not have to pay the contractor.

Implicit in both the restatement and the subcontract provision is the concept that if the contract costs more to complete than was bid, the subcontractor must pay for the difference. However, our situation is unusual because the subcontract, after paying Tolman for the work done, still has $18,386.34 which is in excess of the work Tolman did, plus other adjustments. Counsel submits that the law is that when the work is taken back and actually done by the contractor that the one who does the work is entitled to what value is remaining in the subcontract.

There is no question that Prince did any of the work so the calculations under the subcontract provision and the restatement are very simple to calculate. There is simply no credit given to Prince for the work since he didn't do any. All of the cost should go to Tolman. That is what happened in this case except that the court did not address itself to the remaining [illegible] which was left in the subcontract. The court erred

in awarding the balance of the subcontract which did not represent work done to Prince. The court should have awarded the $18,386.34 which represents remaining money in the subcontract because of an unbalanced bid to Tolman.

In Judge Swan's order entered at R122, the court says, "The court outlines the Findings of Fact and further finds that the four items were taken over by Mr. Tolman and he is entitled to payment for taking over those items. At this point the court is inclined to feel that it should be on a quantum meruit basis." Appellant agrees that by applying quantum meruit, the court is correctly following the intent of the Restatement of Law and the subcontract provision of the subcontract agreement. Appellant agrees that the court did, in fact, apply quantum meruit to the point of crediting Tolman for the work he did. However, appellant disagrees with the court in awarding the balance remaining in the subcontract to Prince because that conclusion does not follow if the court had properly applied the doctrine of quantum meruit. Had the court applied quantum meruit as it indicated in the transcript and the rules the court would have awarded the remainder of the money in the subcontract agreement to Tolman.

The following agreement is inssupport of the concept that the Judge should have awarded the remaining monies in the contract to Tolman. Language from the Oklahoma Supreme Court summarizes this situation very well:

> "It is an elementary principle of the law of concepts that in order to recover upon a contract, the contractor... must first establish his own performance or a valid excuse for his failure to perform. Since plaintiff failed... to complete the work he contracted to do, without valid excuse for such failure, he was entitled to no judgment against defendant. "Miller v. Young, 197 Okl. 503, 172 P.2d 994, 995 (

That language was quoted with approval as the law in this State in Lowe v. Rosenlof, 12 Utah 2d 190, 364 p.2d 418 (1961).

> "A party generally cannot recover without showing full performance of his part [of the contract]. Any right of recovery as a result of part performance is on a quantum meruit. [There may be recovery] where only part performance has been rendered if such partial performance was accepted by, or was of benefit to the other party "Ardoin v. Royden" S.W. 2d (Tex. Civ. App. 1959); Lowe v. Rosenlof, Supra.

Prince cannot show performance for any of the $18,386.34. The court has ruled that Tolman took over the work and completed it. Under the doctrine of quantum meruit there is no justification for Prince to receive any more for the work he did than what he received. He did none of the work, therefore, he should have received no money for that work done by Tolman.

Certainly there is no prejudice to Prince if he receives quantum meruit for what he did. There is no question that Prince was paid for what he did. He received over $48,000 for work done. The question is who gets the remaining $18,386.34 in the contract. Prince was paid for what he did and Tolman was paid for what he did and because of the unbalanced nature of the bid, there is s still $18,386.34 remaining. By rules of quantum meruit, appellant submits the court erred because Prince did nothing by way of performance to warrant any award to him of any more than what he did. By requiring Tolman to show what work was required to complete the contract and reducing the amount in the subcontract by that amount is simply the reverse of having Prince show what he did and reducing it for the subcontract amount the amount of $18,386.34 would remain.

It should be remembered that quantum meruit which is the doctrine of the court applied, is not a contractual doctrine but an equitable doctrine designed to equitably and fairly achieve a balanced result in a case. By only partially applying the doctrine of quantum meriut, the court has achieved a result that is unfair and unjust to Tolman who did the work and unjustly enriching to Prince who under the judgment, will be paid for what he did but did not do.

The quantum meruit basis of recovery is equitable in nature and is not predicated on the contract.

> [U]nder such circumstances, where benefits have accrued to the owner by reason of material furnished or labor performed by the contractor, equity will sometimes require the owner to account for the reasonable value of the benefits received, not because the contractor who has breached his contract has any right to rely thereon, but because it would be inequitable for the owner to receive and retain something for nothing at the expense of the contractor. United States Pipe & Foundary Co. v. City of Waco, 100 S.W. 2d 1099 (Tex. Civ. App. 1936).

Thus, plaintiff must show it would be inequitable for Tolman to retain the benefits, if any, from the four items in question before plaintiff can recover on quantum meruit. Some courts have said that plaintiff must show unjust enrichment of defendant before a quantum meruit recovery will be allowed. Nelson v. Hazel, 433 p.2d 120 (Id. 1967).

Prince contends that he should be paid at the contract price for the four items in question. Tolman submits that under the rules of law discussed above, such payment would not be proper. Prince did not earn payment at the contract price by full performance of the items nor did he establish a valid excuse

for his failure to perform. His maximum recovery on those items is thus limited to quantum meruit. Since Prince did nothing on the contract items plaintiff would not be paid for those items.

Tolman submits that the case should be remanded back to the court to apply the doctrine of quantum meruit fairly for both parties. The court only partially applied the doctrine relying on a mixture of adherence to the contract yet applying an equitsale doctrine of quantum meruit.

Except for the extra $18,386.34 which neither party did any work to receive, the court applied the doctrine of quantum meruit. However, it is unjust and unfair to award the $18,386.34 to Prince simply because the money was the remainder after Tolman was paid for his work.

POINT II

THE COURT IN ITS CALCULATIONS APPLIED QUANTUM MERUIT TO CREDIT TOLMAN FOR WORK ACTUALLY DONE BUT FAILED TO APPLY QUANTUM MERUIT TO THE REMAINING BALANCE OF $18,386.34.

If the findings of fact are not disputed so that there are notquestions of fact remaining, it is obvious that the court's logic in applying quantum meruit is exactly reversed from what should have been. The court had Tolman calculate the value of what he did on the subcontract, but did not require Prince to do the same thing. Had the court required Prince to calculate what he did on the project, the court could have then easily calculated which party receives what part of the contract. If the court paid Tolman for what he did and if the court paid Prince for what he did the court would still have roughly $18,000 left in the contract

to distribute. If the court then applied the normal rules of quantum meruit since Prince did not complete the work nor perform on the items of work then the court would have awarded the $18,000 to Tolman because he is the original contractor. When Prince did not do the work the subcontract was taken over by Tolman and Prince was paid for what he did.

It is interesting to note how consistent the numbers would be if the court had reversed the situation so that the proof of the numbers would be on Prince. The contract price roughly $87,000 with no adjustments. Prince was paid roughly $48,000 on the items which he did. ($87,000 less $48,000 = $39,000) Then you reduce theamount Tolman got credit for of roughly $15,000 for the work done on the three contract items. ($39,000 less $14,000 = $24,000) Then reduce again by the roughly $6,000 Tolman got credit for in the offsets for work the next year in 1974, etc. ($24,000 less $6,000 = $18,000) The $18,000 roughly corresponds to the Judgment amount of $18,386.34 which the court awarded to Prince bacause it was what was left in the subcontract agreement.

What this shows is that either way the court applies quantum meruit to pay both the parties their share of work actually causes around $18,000 to remain in the subcontract agreement. Appellant submits that it is clear that the $18,000 is simply an excess amount after deducting for work actually done by both parties and the balance of $18,000 would roughly remain in the subcontract agreement using either approach.

Thus the real question is one of which party should get the excess $18,000.

POINT III

THE COURT IN FINDING THE CONTRACT DIVISIBLE SHOULD HAVE AWARDED THE EXCESS AMOUNT OF THE SUBCONTRACT AGREEMENT LESS APPROPRIATE PAYMENTS TO THOSE WHO DID THE WORK TO TOLMAN WHO ACTUALLY PERFORMED THE WORK OF THE THREE CONTRACT ITEMS WHICH ACTUALLY CREATED THE EXCESS AMOUNT.

The court found that the "items of the subcontract agreement were divisible." This is important because of the area in which the $18,386.34 judgment comes from. The court found that Tolman took over the work on three specific items and was paid by the Forest Service with adjustments for additional work the sum of $39,000.00 as follows:

a.	Item No. 2222-1 Borrow Road	$13,630.00
b.	Item No. 2230-1 Overhaul Road	20,454.00
c.	Item No. 2230-2 Overhaul Road	17,965.00
	Total Paid	$52,049.00
	Less adjustments for additional work	15,269.00
	Net Paid	$39,586.00

The court then allowed offsets for the cost of work done and some other adjustments as follows:

Net paid on three items	$39,586.00
Less cost of work done by Tolman	15,269.67
	$24,316.33
Less Offsets	5,929.99
Total Judgment	$18,386.34

The judgment is basically the amount of money left in the contract after both parties have been paid for the work that they did. The court is then left with a judgment for $18, 386.34 which simply is the excess of the contract price over the cost of the work.

It is important that the contract is divisible because the basic fund of money that caused the surplus in the first place arises from the three items of work which Tolman took over and performed. If quantum meruit is applied or if the contract provision number 2 is applied, the surplus amount of $18,386.34 should go to Tolman.

It could be argued that the subcontract which is the subject of this action called for Prince, the subcontractor, to eleven items of the work required by the prime contract between defendant, the prime contractor, and the forest service. The amount of compensation which Prince was to receive for each of those items was separately stated in the subcontract. Because that compensation was so stated item by item, the contract betwe the parties was, as the Court found, divisible in nature.

This divisible contract is, in effect, several separate contracts between the parties which may be independently complet and paid for. Prince is entitled to payment at the contract price for the items of the divisible contract which he completed and any breach or dispute concerning the other items does not affect that right to payment. On all items on which there is a dispute or breach of the contract, however, the normal rules of contract law apply to measure the damages for the breach and to determine which party is responsible for those damages.

The court found that defendant, Tolman, took over the three items stated above of the items in the contract because Prince had not performed on those items. The court also found that Prince had actual notice that Tolman was going to take over those items as Tolman was allowed to do by paragraph 2 of the contract. Prince made no protest or objection to the take over by Tolman of those items.

Because the contract is divisible, Prince is entitled to recover the contract price on the items which he completed. The maximum which he can recover on the other items is to be determined on the basis of quantum meruit. That is the rule which fits the situation in this case. Each of the separate items is treated, in effect, as an entire contract an on each of the items:

Since the amount saved by Tolman by not having to pay Prince to complete them, Tolman is not entitled to recover any damages from Prince on those items.

On the other hand, since Prince did not complete the items in question, he is not entitled to recover the contract price from Tolman. Restatement, Section 246(b).

Prince may argue that Tolman is not entitled to proceed as under paragraph 2 because the five days written notice referred to in that paragraph was not provided. The court found, however, that Prince had actual notice of Tolman's intent to take over the four items. Prince would have been no better off as far as remedying the breach of the contract is concerned had the written notice been given. Because of the actual notice, Prince was in no way damaged by the lack of the written notice.

It is quite clear that the language quoted above from paragraph 2 of the contract between the parties does not allow Prince to recover the contract price for the items which were done by Tolman. That language provides that Prince is liable for the costs incurred by Tolman in completing the four items and that Tolman could charge those costs against monies "due or to become due" to Prince under the contract. In other words, Tolman could, if necessary, charge the costs of completion against monies which were to be paid to Prince for his completion of the other items covered by the subcontract agreement. Nowhere does the contract, nor any principle of contract law, provide that Prince is to be paid for the items completed by Tolman. The payments for the four items done by Tolman never became due to Prince because Prince did not do the work and earn the payment.

The divisible nature of the contract places the emphasis of what work was done in proper perspective because each item can be calculated as a single entity which the court did not do. Had it looked to those areas where the surplus money existed to create the judgment it would have realized that it was in the items of work done by Tolman and would have correctly applied the laws of quantum meruit.

The court did find that Prince relied on a conversation between Prince and Tolman wherein Prince felt that Tolman would do the hauling. The subcontract agreement does not provide for such changes and without a writing as required there can be no actual agreement but the court found no breach of contract on either plaintiff or defendant's part. The reliance on the conversation apparently kept Prince from breaching the contract but does not set up an actual change in the subcontract agreem

which the court found defendant took over pursuant to paragraph 2 with actual notice. Defendant did not protest the take over. It is important to note that Prince under provisions of the subcontract agreement cannot assign or subcontract any part of his subcontract without approval of the defendant. No part of the subcontract agreement was ever assigned or subcontracted as there is no document or evidence to show that it was.

Defendant submits that the evidence clearly shows that Defendant did the hauling work covered in the three contract items. Secondly, the evidence is clear that plaintiff did not do the hauling work and would be unjustly enriched if it were paid for something it did not do. Thirdly, the court found that defendant gave actual notice and the items were taken back by the defendant. Fourth, the court found that there was no subcontract agreement between Prince and Tolman but did find that Prince relied on a conversation he had with Tolman which Tolman does not remember which keeps Prince from breaching his contract. The law is clear as to how the damages in such a situation are to be handled which law is merely a restatement of the subcontract agreement which gives Tolman the payment for the contract and if the expense of the work exceeds the amount of the contract price, Prince would be responsible for the excess of expense over contract price. In this case the expense of the work did not exceed the contract price and both the law and the subcontract agreement would pay the contract price to the one who did the work, namely, the defendant, Tolman.

SUMMARY

The evidence is not in question. It is clear that no matter how one views the evidence the same basic facts appear as follows:

1. Tolman had a contract with the Forest Service which he subcontracted to Prince.

2. Prince did part of the subcontract, but Tolman gave actual notice to Prince that Tolman would complete the contract.

3. It is not relevant to the Doctrine of quantum meruit what reliances were had or what agreements were made. It is simply important who does the work and who performs the effort.

4. Both the contract document and the Restatement are quantum meruit doctrines and the court attempted to apply quantum meruit.

5. The contract is divisible in nature and because it is divesible in nature the court should have looked to what factors created the fund for the judgment award. In this case the court obviously added up the three contract items to determi the available monies and then subtracted out appropriate adjustments.

6. If the court had correctly applied quantum meruit and given proper recognition to where the money of the judgment came from the court would have recognized that it basically came fro three items of work which were done by Tolman and were not done by Prince.

7. Prince is not prejudiced in any way not to receive the $18,386.34 because he did not do the work in the three contract items which created the money from which the judgment came.

8. Tolman is prejudiced because he took over the three items of work which were all that needed to be completed and completed those three items and it was from those three items that the money for the judgment comes from and yet he gets none of the money even though he did the work.

9. It is clear that the $18,386.34 is an excess of subcontract price less the payments to the parties who did the work. If Tolman is paid what work he did and if Prince is paid what work he did there is still $18,386.00 or so left to be awarded by the court.

Appellant submits that because Tolman did the work the $18,386.34 should be awarded to Tolman. If the doctrine of quantum meruit had been followed by the court, the court would have awarded the $18,386.34 to the party who actually performed the work which party would have been Tolman.

Appellant prays that the court reverse the judgment of the District Court and award the $18,386.34 to Tolman or remand the case back to the District Court with instructions pursuant to the doctrine of quantum meruit to award the $18,386.34 to Tolman.

Respectfully submitted this 26th day of July, 1979.

Don R. Strong, Attorney for Appellant, R. C. Tolman Construction Company, Inc.