

1953

# Wayne Jackson and Mildred Jackson v. H. T. Cope and T. Truman Cope : Brief of Respondents

Utah Supreme Court

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

WAYNE JACKSON and MILDRED  
JACKSON, his wife, -  
*Plaintiffs and Respondents,*

vs.

H. T. COPE and T. TRUMAN COPE,  
Co-partners, doing business under  
the firm name and style of Cope  
Brothers Lumber Co.,  
*Defendants and Appellants.*

Case No.  
8012

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BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

We vigorously disagree with counsel that "plaintiffs authorized the loaning institution to discharge funds from their account directly to Holmes upon presentation by him of lien waivers from the various laborers and

material men with whom he was doing business.” The fact is that the Union Trust Co. was authorized to advance the funds to Holmes “to pay bills for labor and for materials in the construction of” the Jackson house. (See Defendants Exhibit 1). Counsel in said statement of fact and his later argument is representing to the court that Holmes had the right to draw from the Jackson account money to pay any of his laborers or material men with whom Holmes was doing business no matter which of the many houses Holmes might have worked on or furnished materials for. The agreement speaks for itself. The labor or materials must have been furnished for the Jackson home (Exhibit 1).

We wish also to add to the facts that there is a custom in this community whereby holders of money, such as was the Union Trust Co., in this case, would pay the contractors upon receipt of lien waivers for materials and labor furnished for the particular job for which the money was deposited. The appellants were familiar with that custom (R. 14, 31 and 72). With this knowledge the appellants executed and delivered to Holmes the lien waiver in blank, except as to the amount and the date (R. 33). The appellants left it to Holmes judgment to make out and use the lien waiver properly (R. 35). The respondents had left about \$9,300.00 with the Union Trust Co., to be disbursed according to Exhibit 1 (R. 36). Holmes wrongfully inserted the address of the respondents’ home that he was building at 1777 East 21st South Street and used it to get the \$700.00 from the respond-

ents' account at Union Trust Co. when no materials or services were rendered by appellants on that home (R. 32 and 52). Appellant, H. T. Cope, told respondent, Wayne Jackson, when Jackson went to him to inquire specifically if appellants had furnished any materials on his house, that they did not furnish any. Ten days or two weeks later after appellants had been served with process in this action, H. T. Cope phoned Wayne Jackson at his home at 6:30 in the morning and added they had delivered some lumber to "Holmes' warehouse and that it could have gone anywhere from there" (R. 39).

Respondents claim by the action of appellants in executing the lien waiver in blank, and it being completed and used by Holmes, in a wrongful manner and to the loss of respondents in the sum of \$700.00 that in equity and good conscience appellants should be required to reimburse respondents. The district court thought so and gave judgment to respondents.

## STATEMENT OF POINTS

### POINT I.

CAN A MATERIAL MAN ISSUE TO A CONTRACTOR LIEN WAIVERS SIGNED BY THE MATERIAL MAN IN BLANK LEAVING IT TO THE CONTRACTOR TO FILL IN THE BLANK SPACES AS HE WISHES AND NOT BE RESPONSIBLE TO AN INJURED PARTY WHERE THE LIEN WAIVERS WERE WRONGFULLY COMPLETED AND USED TO OBTAIN MONEY WHICH NEITHER THE CONTRACTOR NOR THE MATERIAL MAN WAS ENTITLED TO?

## ANSWER TO APPELLANTS' POINTS I AND II.

WAS THERE ANY EVIDENCE TO SUSTAIN FINDINGS NO. 6 AND 7 THAT APPELLANTS DID NOT FURNISH ANY MATERIAL OR SERVICE FOR THE CONSTRUCTION OF RESPONDENTS' HOME FOR THE \$700.00 RECEIVED BY APPELLANTS?

## ANSWER TO APPELLANTS' POINT III.

THAT THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSIONS OF LAW AND THE JUDGMENT IS CONTRARY TO LAW.

## ANSWER TO APPELLANTS' POINT IV.

THAT THE TRIAL COURT ERRED IN AMENDING THE PRE-TRIAL ORDER.

## ARGUMENT

### POINT I.

CAN A MATERIAL MAN ISSUE TO A CONTRACTOR LIEN WAIVERS SIGNED BY THE MATERIAL MAN IN BLANK LEAVING IT TO THE CONTRACTOR TO FILL IN THE BLANK SPACES AS HE WISHES AND NOT BE RESPONSIBLE TO AN INJURED PARTY WHERE THE LIEN WAIVERS WERE WRONGFULLY COMPLETED AND USED TO OBTAIN MONEY WHICH NEITHER THE CONTRACTOR NOR THE MATERIAL MAN WAS ENTITLED TO?

On or about October 27, 1950, the Cope Brothers Lumber Co., appellants, received a \$700.00 check and a blank lien waiver from J. H. Holmes, Contractor. In return for that check the lien waiver was signed by appellants and the amount of \$700.00 was placed thereon



and the date, and then that lien waiver was sent back to Mr. Holmes, the appellants having full knowledge of the fact that Mr. Holmes was going to be able to collect \$700.00 from some person's account on the strength of that lien waiver. The appellants had no idea at all whose account was going to be diminished by their having signed that lien waiver, for the person's name for whom materials should have been furnished was not filled in. It was left in blank by appellants. It seems, also, that the contractor, J. H. Holmes, was indebted at this time to appellants in the amount of about \$3,900.00 (R. 34). In other words, the \$700.00 received on said October 27, 1950 went to appellants to be applied on this past indebtedness for materials already furnished to J. H. Holmes. There is not a scintilla of evidence in the whole record that any material was furnished by the Cope Brothers Lumber Co. that went into or that was to be used in the respondent's home. In fact, the evidence strongly points the other way. Where is there any showing by appellants that they delivered or furnished any material that was to be used in the Wayne Jackson house?

Mr. Cope himself told Mr. Jackson (R. 38-39) that Cope Bros. Lumber Co. had not furnished any material for his home, and there is no doubt but what that was actually the case. When the \$700.00 was received by appellants on the strength of the blank lien waiver signed by them, the Wayne Jackson home was hardly started, being only in the excavation stage (R. 43). Therefore, any materials furnished by appellants before this time

was no doubt used or to be used on the other jobs of Holmes. In other words, there is no evidence of **any** materials furnished by Cope Bros. Lumber Co. *for use* in the Wayne Jackson Home.

The appellants have cited the case of *Bounds vs. Nuttle*, 30 Atlantic 2nd 263, in their brief at page 18. We feel that this case does not apply to the instant case. The mechanics lien law as a protection to material men seems to be the thing in issue there, and deals with an owner who negligently paid money out to a contractor and did not see to it that it was applied to the payment of the materials *going into the building after the material man had delivered the materials for the particular job*. In the case at hand, the owner received no materials for his job from the material man. The material man must at least see to it that the materials for which he is paid are delivered.

The respondents in the trial court proved that the Cope Brothers Lumber Co. had received some \$700.00 for materials from the account of Wayne Jackson but that none of their materials were furnished for the construction of his home. The respondent proved that the materials which went into their home came from entirely different sources, as was testified to by Mr. Felt of the Mill Creek Lumber Co. Mr. Felt had made visits, kept careful records of deliveries to the Wayne Jackson job, and knew that their materials were being furnished for this particular job (R. 51, 52, 53, 54 and 55).

The trial court, in view of this evidence, was certainly justified in holding as it did that the Cope Brothers

Lumber Co. did not furnish any material nor render any service for the construction of respondents' home at 1777 East 21st South Street, Salt Lake City, Utah (R. 72). The appellants did not in any way rebut this evidence. In fact, the Cope Brothers Lumber Co. had no records, data or recollection at all either for materials furnished that were used in respondents' home or for materials that were furnished *for the use* in said home. Appellants certainly had some burden there, and they failed completely.

The appellants in their Brief, Point III, place particular stress on the fact that the judgment is contrary to the law. This certainly is not the case. The evidence clearly shows that there were no materials of Cope Brothers Lumber Co. actually used in the structure of respondents, and that there was no delivery of their materials to *respondents' premises* for use in their home, whether actually used there or not. Appellants have referred to a number of citations in their brief dealing with the point that a material man is entitled to a lien whether his materials were actually incorporated into the structure or not. We should like to emphasize here, however, that even these references indicate that the materials furnished must have been for a *particular building or improvement*. Where is there any evidence that appellants furnished any materials for the particular Wayne Jackson job? There is none. Is a material man entitled to a lien on all the properties on which the contractor purchaser is doing work when material is

obtained by that contractor and the material man does not know for what job or for what purpose the material was obtained? Certainly that could not be the law. The inequities that would result from such a situation are obvious. Now coming back again to the law, argued in appellants' brief, we believe that the question is fully answered and discussed in 36 American Jurisprudence, Sec. 72, page 59:

“There is conflict of authority on the question whether a material man is entitled to a lien for materials not actually incorporated into the structure. Some courts have taken the view that under mechanics' lien laws a material man is not entitled to a lien for materials unless they were actually used or incorporated into, and became part of the structure against which the lien is sought to be enforced.”

Of course this is the law that respondents contend is the proper law to be applied to this case, and there are numerous cases to support it. There are other courts, however, that have held the opposite view, but there are qualifications to be noted under this view. Again quoting from 36 American Jurisprudence, Section 74, page 61:

Even in those jurisdictions in which a lien may be acquired for material furnished although it has not actually been incorporated in the building, structure, or improvement, it is *generally* held that the lien cannot attach in the absence of a delivery of the material upon the premises, or other act equivalent thereto, as notice to or an implied assent by the owner.”

In the instant case there was no such delivery of materials upon respondents' premises from the Cope Brothers Lumber Co. The only thing that was done by appellants evidently was to credit J. H. Holmes account \$700.00 for past indebtedness.

Therefore it is our contention that there was no right of lien at any time in the Cope Brothers Lumber Co. in respect to the Wayne Jackson property. Consequently when appellants signed said blank lien waiver, they were giving no consideration. They were not giving up a remedy (a lien right), for they had none. Yet appellants were fully aware that said lien waiver, in essence, represented money—some \$700.00. The Union Trust Company had instructions to only withdraw from the Wayne Jackson account when lien waivers were properly filled out. Yes, we believe there was a duty on the part of the Cope Brothers Lumber Company to properly fill out said lien waiver and to know that they had actually furnished materials *for the particular job from whence the money was coming*; this was not done in the instant case, and consequently this negligence on the part of appellants resulted in respondents' loss. The burden of this loss should properly be shifted then to the shoulders of the party whose negligence made the loss possible.

We refer to the case of *Imperial Valley Box Co. v. Reese* (233 P 2nd 629), in which the doctrine is cited that "where one of two innocent persons must suffer by the act of a third, the one by whose negligence it happened must be the sufferer." Again from 2 American

Jurisprudence, Section 70, page 701, "one delivering an instrument in blank is estopped to deny liability." Aside from the question of negligence which we feel the trial court could also have allowed a recovery on, the respondents believe that said court was fully justified in holding as it did on the theory of "Money Had and Received." We have already noted that this action lies when defendant has obtained money from plaintiff which in equity and good conscience should be returned to plaintiff—How the Cope Brothers Lumber Co. could obtain \$700.00 from the Jacksons in this instance by means of signing a blank lien waiver, and having failed to render to them \$700.00 worth of service or materials, and still claim that in equity and good conscience they should not have to return said money is beyond our understanding.

We feel it is a simple matter in that the appellants have received something for which they have given nothing in return when they were under obligation to do so, and therefore they ought, in good conscience, to return that which they have received.

Respondents wish to answer the various Points argued in appellants' brief as follows:

## ANSWERING POINTS I AND II.

WAS THERE ANY EVIDENCE TO SUSTAIN FINDINGS NO. 6 AND 7 THAT APPELLANTS DID NOT FURNISH ANY MATERIAL OR SERVICE FOR THE CONSTRUCTION OF RESPONDENTS' HOME FOR THE \$700.00 RECEIVED BY APPELLANTS?



It is admitted in the pre-trial order that appellants received the \$700.00 on the lien waiver (R. 31).

Ample evidence is in the record to sustain the finding that no material or services were furnished by appellants for respondents' home. Wayne Jackson testified he knows Cope Brothers Lumber Co. did not furnish any lumber in his house (R. 37). Jackson was told by H. T. Cope on two occasions they had no lumber in the house (R. 38 and 39). The \$700.00 which appellants, through Holmes, got out of Union Trust Co. from respondents' account by reason of the fraudulent lien waiver was money which should have been used for valid claims, hence the Jackson account at the Union Trust Co. was depleted \$700.00 In equity and good conscience the appellants should return that money. Besides the positive evidence in the statement by Mr. Cope to Mr. Jackson that they had no lumber in the house, we have the further evidence by Mr. Felt of the Millcreek Lumber Co. that it should cost between \$2500.00 to \$3,000.00 in lumber for a completed house of the size of the Jacksons (R. 54). We have his testimony also that at the time Holmes left the Jackson job the Millcreek Lumber Co. had furnished \$2,329.96 of the lumber for it (R. 55). Then we have Jackson's testimony he spent \$1100.00 more on lumber to complete this job through a contractor named Harry Cook, who bought the lumber from the Sugar House Lumber Co. (R. 60 and 61). It appears then that all of the lumber that went into the house cost \$3,429.96 and that from all this evidence was not the court fully justi-

fied in finding that the appellants did not furnish any of the materials for the construction of respondents' home? Through the whole testimony there is not a scintilla of evidence that any of appellants' lumber went into the Jackson home.

On page 12 of appellants' brief counsel states that Felt of the Millcreek Lumber Co. said it would take \$2500.00 to \$3000.00 in materials to complete while Cope said it would be 40% of the total construction. If the court will refer to the record, page 54, it will see that Mr. Felt was speaking of only the lumber while Mr. Cope was speaking of all material furnished by a lumber company, except plumbing, brick and wiring. Hardware and many other items besides lumber are furnished by lumber companies. So the comparison was not a fair one. If there was a conflict here the court had a right to believe Mr. Felt, a disinterested party, and to disregard the testimony of Mr. Cope, an interested party.

### ANSWERING POINT III.

THAT THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSIONS OF LAW AND THE JUDGMENT IS CONTRARY TO LAW.

We feel that counsel is in error in his points I and II. It therefore follows, if that be the case, the court did not err in entering its conclusion of law and judgment. We think that our statute on liens has no bearing on the issue involved in this case. Appellants presented no evidence that any building materials were sold by them



to Holmes for use in respondents' dwelling. If any materials had been sold for use in respondents' dwelling appellants could have easily proved it by their books but no such evidence was offered. Holmes took respondents money to pay an old account with appellants who no doubt were pressing him. The only way appellants were able to get that \$700.00 was the signing of a blank lien waiver. Had appellants filled out the lien waiver, putting the address of some house they had actually sold material for they would never have got the \$700.00 because the circumstances were such that we could fairly assume Holmes had drawn down as much as he could on those accounts and in order to try to keep his head above water, he had to dip into the newer accounts. The blank lien waiver of appellants made it convenient for Holmes to do that. When they gave Holmes the lien waiver signed in blank, they by such action gave him authority to fill in the blank spaces for them. Hence, in that respect, he was their agent.

We do not agree with counsel that Holmes was respondents' agent. He was an independent contractor. (*Rigney v. DeLaSalle Institution*, 52 P 2nd 579 Calif.). Holmes had a written contract to fulfill with respondents. He was not authorized in any respect to act for them. On the other hand, he was an agent of appellants in respect to the lien waiver. "Agency is created when one is authorized by another to act in some respect for him." Vol 2, Words and Phrases, Perm. Ed., p. 717. He was authorized by them to fill out the blanks in the lien

waiver. As their agent, he wrongfully made it out and was able to get money of innocent parties.

By Holmes and appellants executing the lien waiver in question, the appellants did not give up any right as counsel contends. They had no lien right as against respondents' property, so they could not give up a right.

As to negligence, of course, we claim appellants were negligent when they placed in the hands of Holmes a lien waiver signed in blank by which he was enabled to defraud innocent parties. "Negligence is any conduct . . . which falls below the standard established by law for the protection of others against unreasonable risk of harm." Vol. 28, Words and Phrases, Perm Ed, p. 336. The fact that negligence is involved does not mean that recovery cannot be had on grounds of money had and received or even on both grounds.

"Action for money had and received is equitable in nature, and lies to recover money in hands of defendant which in equity and good conscience belongs to plaintiff." Vol. 27, Words and Phrases, Perm. Ed., page 478.

#### ANSWERING POINT IV.

THAT THE TRIAL COURT ERRED IN AMENDING THE PRE-TRIAL ORDER.

This same question was discussed and decided by this court in *Reich et ux, v. Christopoulos, et al.*, on April 16, 1953, at 256 P. 2d page 238 ..... Utah ..... The court held that the amendment was not an error and on page

241 said: "The amendment made was equivalent to an amendment to conform to the evidence. The trial court did that which was necessary and proper to effectuate justice." The same question being involved in this case, we see no reason to discuss it further.

## CONCLUSION

The respondents respectfully submit that the view held by the trial court is the proper one and that the appeal should be dismissed and the judgment of the District Court should be affirmed with cost to respondents.

Respectfully submitted,

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