

1954

# Vern B. Millard v. Jesse H. Parry et al : Appellant's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Paul E. Reimann; Attorney for Appellant;

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# In the Supreme Court of the State of Utah

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VERN B. MILLARD,

*Plaintiff and Appellant,*

vs.

JESSE H. PARRY AND ELSIE H. PARRY, his wife,

*Defendants and Respondents.*

STRAND ELECTRIC SERVICE COMPANY, A Corporation, and OTTO DREWS,

*Defendants.*

No. 8026

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APPELLANT'S PETITION FOR REHEARING AND BRIEF  
IN SUPPORT THEREOF

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FILED

AUG 5 1954 PAUL E. REIMANN,

*Attorney for Appellant.*

Clerk, Supreme Court, Utah

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## TABLE OF CONTENTS

	Pages
PETITION FOR REHEARING .....	3- 4
BRIEF IN SUPPORT OF PETITION FOR RE- HEARING .....	5-19
<b>ARGUMENT:</b>	
Point 1: The opinion of the Court and the affirm- ance of the judgment, are predicated on substantial misstatements and omissions of material undisputed evidence .....	5-10
Point 2: The Court has in effect denied the plain- tiff his constitutional right of appeal by predicating its decision on a state of facts materially at variance with the record made in the district court. ....	10
Point 3: The opinion disregards one of the flagrant errors of the trial court by ignoring the distinction between recovery for changes on the basis of cost plus 10% as agreed upon, and the much lower basis of "reasonable value" adopted by the lower court. ..	10-11
Point 4: The decision is contrary to law. ....	12-15
Point 5: The decision misconstrues the stipulation of the parties, and exceeds the jurisdiction of this	

Court by reaching out to cover a portion of the judgment from which no appeal was taken. ....	16
Point 6: The denial of interest on sums due and owing to plaintiff is contrary to law, and amounts to making a contract for the parties without any meeting of minds. ....	16-17
CONCLUSION .....	18-19

## CITATION OF AUTHORITIES

9 Amer. Jur. p. 7 .....	13
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## APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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### PETITION FOR REHEARING

The appellant Vern B. Millard respectfully moves this Honorable Court to vacate its decision heretofore entered in this case, and appellant petitions this Court to grant him a rehearing upon the following grounds and for reasons set forth hereinafter:

1. The opinion of the Court and the affirmance of the judgment, are predicated on substantial misstatements and omissions of material undisputed evidence.

2. The Court has in effect denied the plaintiff his constitutional right of appeal by predicated its decision on a state of facts materially at variance with the record made in the district court.

3. The opinion disregards one of the flagrant errors of the trial court by ignoring the distinction between recovery for changes on the basis of cost plus 10% as agreed upon, and the much lower basis of "reasonable value" adopted by the lower court.

4. The decision is contrary to law.

5. The decision misconstrues the stipulation of the parties, and exceeds the jurisdiction of this Court by reaching out to cover a portion of the judgment from which no appeal was taken.

6. The denial of interest on sums due and owing to plaintiff is contrary to law, and amounts to making a contract for the parties without any meeting of minds.

WHEREOF, appellant respectfully requests that the decision be vacated and that the Court grant a rehearing both as to the facts and the law, for the reason that there is a serious miscarriage of justice by the decision.

Respectfully submitted,

PAUL E. REIMANN,  
*Attorney for the Appellant.*

# BRIEF IN SUPPORT OF PETITION FOR REHEARING

## ARGUMENT

### Point 1:

*The opinion of the Court and the affirmance of the judgment, are predicated on substantial misstatements and omissions of material undisputed evidence.*

Notwithstanding the high esteem in which counsel for appellant holds the writer of the decision, the opinion is erroneous both as to the facts and the law. Counsel for appellant respectfully requests this Honorable Court to re-read the Brief of Appellant, and also the Reply Brief of Appellant wherein appellant points out various assertions which respondents make in their brief which contradict the record. Counsel for appellant painstakingly pointed out by specific reference to the record on appeal wherein respondents misquote or otherwise misstate the facts. Nevertheless the opinion contradicts the record, and thereby creates disputed "issues of fact" in instances where there were no disputes. The injury to plaintiff amounts to more than \$18,000.00, which is sufficient to wipe out the appellant's working capital, when he was the innocent victim of the mistakes of the owner and his architect.

In this case the appellant started with a construction project which was to cost \$82,000.00, which ultimately cost appellant as contractor more than \$111,000.00, by reason of mistakes of respondent's architect and in consequence of numerous changes demanded by the owners. There was no dispute as to the fact that the building as actually built, was reasonably worth \$116,000.00. The opinion of the Court makes the contractor the victim, although he was the innocent party.

On page 2, last paragraph, it is stated contrary to the record:

" . . . It must also be noted that in the matters referred to, plaintiff relies chiefly upon alleged promises and representations of the architect, and upon the contention that the architect was the agent for the defendants. An architect is not ordinarily a general agent of his employer (3 Am. Jur. 1000) and in this instance it was expressly so provided in the contract documents. Clearly he did not have authority to bind Parry on a promise of construction of another structure."

The statement is not only an unfair statement of the contention of appellant, but it contradicts the findings submitted by respondents and adopted by the trial court to the effect that the architect was the agent of defendants Parry when he asked the plaintiff to submit a bid. Finding of Fact No. 5 so recites:

"That the plaintiff on or about the 10th day of January 1951, was requested by the defendants Parry agent and architect, Leroy W. Johnson to enter into a written contract with the said defendant Jesse H. Parry . . ."

The writer of the opinion says that the architect was *not* the agent of the owners under the terms of the contract documents. *That is not the contention of appellant.* Even if the architect was a supervisor under the contract documents, that fact does not alter the admitted and undisputed fact that *prior* to the signing of the contract documents *the architect was the agent of the owners*, and Jesse H. Parry so admitted and the court found that to be the fact. The opinion contradicts paragraph 5 of the findings which clearly recite that prior to the signing of the contract documents, the architect was the agent of the owners. That particular portion of the finding was not before this Court for review.

*While the architect was the agent of the owners, his representations and instructions to Mr. Millard as to what should be*



*included in the bid and what was to be excluded, were the representations and instructions of the owners.*

Defendant Parry testified that he hired the architect about December 1st. He admitted that he left various matters to the architect, as that is "what I hired him for." Even the architect called as a witness for defendants testified that the architect controls the bidding and the contractor is supposed to follow the directions of the architect. (R. 853-855). The architect procured a bid on plumbing and told Mr. Millard to base his bid on that figure. He also told Mr. Millard to exclude sewer as that was to be covered by another construction project. It is undisputed that the *contract documents reserve to the owner the right to let other contracts*, (Exhibit P-3).

The opinion on page 3 further misstates the record:

"Plaintiff's sixth point is that even if the contract were not voidable it could not be construed to require plaintiff to furnish items in excess of those on which the architect, as agent of the owners, instructed plaintiff to base his bid. We find no merit to this point. The items complained of were described and included within the written specifications and we find no reason to reject the trial court's finding that they were not intended to be eliminated. It would constitute a strange departure from the rule relating to the effect of a written contract to sustain the contention of plaintiff on this point. Also, the architect, testifying as plaintiff's witness, stated that the estimates on plumbing furnished by him to plaintiff at the time of plaintiff's bid included cost of water and sewer connections which is one of the chief items objected to by plaintiff under this head."

Appellant respectfully submit that the Court has misstated the record to the prejudice of the rights of plaintiff. The Court has adopted a misstatement of the respondents and has disre-

garded the plain facts of the record. The exhibit in question which was submitted by the architect to plaintiff (Exhibit P-4) expressly states: "This does not include sewer or water meter service." The Court must have overlooked said instrument. Contrary to the statement in the opinion, the architect did *not* state that the bid included water and sewer connections. The opinion likewise does not mention the fact that defendant Parry had in his possession Exhibit D-27 dated December 14, 1950, which stated as the cost of the plumbing the exact amount of Exhibit P-4 which specifically declared that sewer and water were not included. Said Exhibit also stated the heating allowance. When the heating was decided upon *after* the contract documents were signed, the heating costs were in excess of the allowance which the architect instructed Mr. Millard to provide in his bid.

The Court in the opinion has overlooked the facts which show that the contractor was the victim of the instructions given by the owners' agent in the submission of his bid, and the further fact that the contractor's bid was originally \$90,000.00, then reduced to \$85,212 on the direction to exclude sewer and water lines and rely on the Barnes bid, and to limit the heating allowance. Finally the architect induced the contractor to reduce his bid still more by \$3,212 by the assurance that he would be awarded construction of the second project.

The point which the writer of the opinion has inadvertently overlooked is that a party who requests another person to omit items from his bid (whether he does so by agent or personally) cannot later be heard to say that those items were contracted for, since there has been no meeting of the minds for their inclusion. Furthermore, contrary to the statement in the opinion, the contract documents did *not* require inclusion of those items in the performance by the general contractor. Exhibit P-3, page 34 actually provides:

"Provide all necessary materials and labor for the installation of 4" diameter soil pipe sewer from the building and connecting to the city sewer as shown on the plot plan."

It is undisputed that there was no plot plan in existence when the contract document was signed. Exhibit 16, a plot plan which shows sewer, clearly shows that the sewer was intended to be part of another construction project. The defendant Parry identified a letter dated July 1951 from the architect which states that the sewer was not included in the original construction project.

No plot plan of a sewer ever came into existence as a part of construction project No. 1. When defendant Parry constructed the sewer, he did not use soil pipe, which is the least expensive type of construction, but he used cast iron which cost several times more, and instead of laying the line directly to the street as shown on the master plan, he ran it diagonally and much deeper which made the line considerably longer and more costly. (R. 762-763). Yet, the trial court gave credit for the entire cost of the sewer with expensive cast iron pipe, which amounted to "adding insult to injury."

"Plaintiff's final point is that the court erred in failing to allow, even as extras, costs incurred by plaintiff through the conduct of defendants and their architect and also in its findings as to costs of extras which were to be paid for on a cost-plus basis. It appears from the detailed findings that the trial court went into the matter of extras very meticulously and we have not found anything to justify us in disturbing such findings . . ."

The reason the Court did not find anything to disturb the findings is possibly because the Court overlooked the fact that

the trial court based its allowance *not* on cost-plus 10% but on a theory of "reasonable value," which amounted to only a small fraction of actual costs incurred by plaintiff. *The real issue is not even discussed in the opinion.* The trial court did *not* allow plaintiff recovery on the basis of actual costs plus 10% for the changes.

There are other matters in the opinion which are not accurately stated, but the facts misstated or omitted as hereinabove referred to affect the plaintiff to the extent of more than \$18,000.00.

#### Point 2:

*The Court has in effect denied the plaintiff his constitutional right of appeal by predicated its decision on a state of facts materially at variance with the record made in the district court.*

Article VIII, Section 9, of the Constitution of Utah not only provides for a right of appeal, but specifies: "The appeal shall be upon the record made in the court below." It seems to counsel for appellant that where the Court on appeal is in substantial error in its statement of the facts by material variance from the facts established in the district court, there ought to be a rehearing, for an opinion of the Court predicated upon alleged facts which are not the actual facts of the case, for all practical purposes is a denial of the right of appeal since it is not a review of the record made in the district court.

#### Point 3:

*The opinion disregards one of the flagrant errors of the trial court by ignoring the distinction between*

*recovery for changes on the basis of cost plus 10% as agreed upon, and the much lower basis of "reasonable value" adopted by the lower court.*

The opinion side-steps Point 8 in the Brief of Appellant by the highly inaccurate comment that "the trial court went into the matter of extras very meticulously and we have not found anything to justify us in disturbing such findings." The Court should have observed the error, for the simple reason that notwithstanding the defendants testified that for extras and changes the contractor was to be paid "cost plus 10%," and notwithstanding the trial court found numerous items were changes and extras, the trial court scaled down recovery therefor to a small fraction of the actual cost in most instances on the theory that plaintiff was only entitled to "reasonable allowance." As pointed out in the Brief of Appellant that scaling down process by trial court injured plaintiff to the extent of thousands of dollars.

The Brief of Appellant cites the cases which clearly point out the distinction between agreements to recover on a cost-plus basis and those which merely allow "reasonable value." Those citations merit re-examination.

In effect, the trial court said Mr. Millard was entitled to his actual costs plus 10% as even the defendants testified that such was the agreement, but in contradiction of such decision, the court deprived Mr. Millard of thousands of dollars of his actual costs by allowing him only a small fraction thereof. The opinion of this Honorable Court seems to miss that point altogether, and it is respectfully requested that the Court re-read the Brief of Appellant and the Reply Brief, as counsel for appellant meticulously presented both the facts and the law which have been overlooked in the decision.

#### Point 4:

*The decision is contrary to law.*

First, the decision is wrong and grievously unjust because it is predicated upon false premises. Secondly, the decision applies the wrong rules because it has the wrong facts.

At the time the architect requested appellant to bid on construction and when he gave the specific instructions as to what items were to be excluded from the bid and what allowances to make for specific items, the architect was the agent for the owners. He was hired for doing that type of work as well as to draw plans and to prepare specifications. The appellant had a duty to follow those directions. It cannot be said with any semblance of candor that he did not rely on what the architect told him. The contractor was not injured by miscalculations of his own employees. The contractor was injured to the extent of more than \$20,000.00 by reason of the instructions and representations of the agent of the owners.

It makes no difference whether the agent was specifically directed by the owners to make the particular statements he made. The fact is that he was engaged to line up materials (which is one of the functions of the general contractor). He got a plumbing bid for the owners, which specifically excluded water and sewer connections. Said agent got the original bid of plaintiff reduced from \$90,000.00 to \$82,000.00 upon his instructions to limit allowances for specific items and to exclude other items. As agent for the owners, in the pressure to meet deadlines he made numerous mistakes and contradictions. The owners bargained for construction worth \$82,000.00 and they wound up with construction worth \$116,000.00 which cost the contractor more than \$111,000.00 without even any allowance for his services.

Under elementary rules of agency, the owners were responsible for all of the representations and statements of the architect. They obtained the benefits. The contractor was the innocent party, and he is entitled as a matter of equity to rescission, and to indemnification.

Equity even relieves a contractor of a mistake in a bid. (9 Am. Jur. p. 7). However, in this case the contractor made the type of bid he was instructed to make, and he reduced his bid on the representations of the agent of owner. To permit the innocent contractor to get "*stuck*" is shocking and unconscionable, as it amounts to a device whereby an owner gets "*something for nothing*."

Even if there were any substance to the contention that the owners did not authorize their agent to give the instructions to Mr. Millard which induced him to scale his bid down successively by a total of \$8,000.00, since the architect admittedly performs the function of giving directions on how to bid, all such an argument could establish is that *there was no meeting of the minds and hence no valid contract*.

There has been a serious miscarriage of justice in this case: (a) The owners obtained a lower bid by reason of instructions and representations of their agent. (b) The mistakes and incompleteness in the plans prepared by the owners' agent necessitated numerous changes, and the trial court allowed only a fraction of the costs. (c) The owners themselves demanded numerous changes and additions which greatly increased the cost, and the trial court disregarded the owners' admission that they were to pay cost plus 10%, and allowed only a fraction of the actual costs on a theory of "reasonable allowance," contrary to the adjudicated cases.

The plaintiff is injured to the extent of approximately \$20,000.00 by making him the victim of the owners' agent's instructions, and by denying him full recovery on the basis of actual cost plus 10% and by substitution of the "reasonable allowance" theory which gives the owners a free ride to the extent of thousands of dollars. Equity does not countenance unjust enrichment. Even if the owners had been entitled to complain about their own agent's act, as between innocent parties, the plaintiff as the victim was entitled to be made whole, particularly when those acts and instructions and representations of the agent enured to the benefit of owners by thousands of dollars.

This is not a case where the contractor bungled. He did a good job. It cost a lot of money to correct the mistakes in the architect's plans. He did not engage in any controversy with the owners. This Court leaves the contractor holding the bag by simply contradicting the finding of the court that the architect was the agent of the owners. Certainly, the briefs submitted by appellant deserve re-reading, as they were prepared painstakingly.

There is no justice in referring to an uncontradicted situation as a disputed question of fact. Regardless of what a witness may say on direct examination, when on cross-examination he admits that a party was his agent and that he was hired for that purpose any possible conflict is resolved, for the *"testimony of a witness is no stronger than where it is left on cross-examination."* But when the court finds that the architect was the agent of the owner, and neither party has made an issue of it and the owners have submitted such a finding, why should this Court contradict it when it cannot possibly be an issue on any phase of the appeal taken from only a portion of the judgment?



The opinion contradicts the express terms of written instruments, as illustrated by the comment on Exhibit P-3, and Exhibit P-4. One exhibit consisted of the court file, LeRoy W. Johnson v. J. H. Parry, Case No. 94041, shows a counterclaim filed February 13, 1952, which recites (and which was admitted by reply):

“That on or about December 14, 1950, plaintiff and defendant entered into an oral contract for architectural and supervisory service covering the erection of an 11 unit apartment at the rear of 160 South 13th East Street, Salt Lake City, Utah.”

The trial court erroneously excluded said exhibit as being “immaterial” although it should that the agency of the architect for owners arose December 14, 1950, or a date prior to the date when he gave the instructions to Mr. Millard as to how to prepare his bids. Notwithstanding the trial judge excluded said exhibit, he was forced to the conclusion that the architect was the agent of the Parrys during a period of a month or more prior to the execution of the so-called contract documents. After reaching that conclusion, however, he made the victim responsible for his loss by saying in substance that he should not have paid any attention to those directions although the owners testified that the contractor was supposed to follow directions and instructions of the architect and their own architect hired as an expert witness admitted that the architect controls the bidding and that the contractor is supposed to follow the directions of the architect on how to bid. By disregarding those irrefutable facts, this Court in its opinion has overlooked entirely the law applicable thereto, and it has condoned the injustice to the contractor as the innocent victim.

Point 5:

*The decision misconstrues the stipulation of the parties, and exceeds the jurisdiction of this Court by reaching out to cover a portion of the judgment from which no appeal was taken.*

The second paragraph of the opinion is an incorrect statement of the stipulation which was entered into after trial to enable the owners to stop the running of interest. There was no appeal from the judgment dismissing the counterclaim of defendants. The opinion infers that the appellant stipulated to entry of judgment against plaintiff for \$435.30, as the amount paid, when such was not the case. The stipulation has been misconstrued. The Parrys willfully delayed payment for two years and caused the running up of interest and costs, and the Court unjustly makes the plaintiff liable for the defaults of the Parrys.

Point 6:

*The denial of interest on sums due and owing to plaintiff is contrary to law, and amounts to making a contract for the parties without any meeting of minds.*

The fourth paragraph of the opinion denies plaintiff recovery of interest, but such denial is predicated upon an incorrect statement of the record. The opinion states that the plaintiff billed defendants on the wrong basis, and that therefore interest did not accrue. It was admitted by the parties that plaintiff was entitled to recover for changes and extras on a basis of cost plus 10%. The worst objection which could be made to the billing, is that it was excessive since it covered total costs. Billing for an excessive amount does not stop the

running of interest. No case can be found to that effect. The contract document required payment in full within 30 days after completion of construction. Completion was bound to cover extras and changes. Defendants ordered most of the changes and knew about them. The billing rendered was accompanied by a letter inviting the defendants to confer on the matter with counsel for plaintiff. They voiced no objection. They made no contention until the time of trial that the billing was incorrect. On the contrary, they made specific payments in accordance with the provisions of the letter which accompanied that bill. The statement which the Court quotes for "removal of liens" is not in point at all, for the liens which were filed were due to the willful failure of the defendants to pay promptly or at all. Said quoted provision, although not applicable does not provide that interest shall be suspended.

There is nothing in the contract document which states that if the billing is incorrect or excessive, that the obligors shall be exempted from payment of interest. In several days of research, counsel has been unable to find a case to support the novel theory in the opinion.

Counsel for appellant has cited the applicable interest statutes. The Court by implication amends those statutes, which is not the function of this Court but within the sole province of the legislature. Under the statute the plaintiff was entitled to interest.

The effect of the opinion is to make a contract between the parties to which plaintiff never assented.

The balance of the decision is just as bad, but the amounts involved are relative minor, nevertheless a careful re-reading of the briefs is requested.

## CONCLUSION

The facts are incorrectly stated in the opinion, which indicates that the Court has a misapprehension of the record on appeal. The recitals in the opinion contradicts the undisputed facts in the record. The results of such substantial departures from the record, is the application of incorrect rules of law, and the denial of plaintiff of the judicial relief to which he is justly entitled.

Counsel for appellant realizes that under the pressure of a large volume of work the Court can and does make mistakes, and counsel has the duty to apprise the Court of such errors which result in a miscarriage of justice. The loss of \$18,000.00 might be insignificant in some quarters, but to a contractor who has that much tied up in a job as part of the costs of construction, is a serious matter. He has not asked for relief from blunders made by his employees. He has asked for relief from the circumstances in which he has been placed in good faith on his part by following the instructions and adhering to the representations of the agent of the owners and by making numerous costly changes requested by the owners themselves. He is the victim of application of the wrong measure of indemnification. The owners obtained a completed construction worth \$34,000.00 more than they originally bargained. There is no equitable basis for making the contractor responsible financially for the instructions given by the agent

of the owner which lopped \$8,000.00 off his bid nor to make him bear the major cost of changes ordered by the owners.

WHEREFORE, appellant respectfully prays that the decision heretofore entered be vacated, and that a rehearing be granted in this cause, and that this Honorable Court re-examine the record on appeal and the briefs of appellant upon rehearing.

Respectfully submitted,

PAUL E. REIMANN,  
*Attorney for Appellant.*