

1956

Richard Whipple v. Harold Fuller : Plaintiff and Brief of Respondent

Utah Supreme Court

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**IN THE SUPREME COURT
Of the
STATE OF UTAH**

RICHARD WHIPPLE,

Plaintiff and Respondent,

— vs —

HAROLD FULLER,

Defendant and Appellant,

— vs —

DON C. CHRISTENSEN,

Third Party Defendant and
Respondent.

FILED

MAY 5 - 1956

Clerk, Supreme Court, Utah

Plaintiff and Respondent's Brief

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Received two copies of the foregoing Brief this..... day of
May, 1956.

Defendant and Appellant

Third Party Defendant and Respondent

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IN THE SUPREME COURT of the STATE OF UTAH

RICHARD WHIPPLE,
Plaintiff and Respondent,
— vs. —
HAROLD FULLER,
Defendant and Appellant
— vs. —
DON C. CHRISTENSEN,
Third Party Defendant and
Respondent

Case
No. 8409

Plaintiff and Respondent's Brief

STATEMENT OF FACTS

The defendant Harold Fuller entered into a contract with the third party defendant Don C. Christensen, a licensed contractor, for the remodeling of the former's residence at 105 "B" Street, Salt Lake City, Utah, for \$5,770.00. The defendant did not require the contractor to furnish a bond pursuant to the mandate of Section 14-2-1, U. C. A., 1953. *By virtue of the general contract may* On June 3, 1951, the said Don C. Christensen entered into a contract with the plaintiff, a licensed plumber, *to furnish fixtures and materials and may* to do certain plumbing work for the sum of \$1,513.00. The contract provided that any additional materials or labor furnished upon request would be paid for at a price mutually agreed upon by the parties. The

Plaintiff fully performed said contract and furnished additional material at the agreed price of \$133.50. The defendant paid the third party defendant in full but the latter went bankrupt and did not pay the plaintiff. The plaintiff was awarded judgment for \$1,303.00, the amount of the wholesale price of the materials and extras furnished by the plaintiff. The defendant appeals and the plaintiff cross-appeals for judgment for the full amount.

STATEMENT OF POINTS

I

THE PLAINTIFF IS NOT SUING ON HIS CONTRACT OF JUNE 3, 1951, BUT ON HIS CAUSE OF ACTION UNDER SECTIONS 14-2-1 AND 14-2-2, U. C. A., 1953. HE IS ENTITLED TO RECOVER BY VIRTUE OF SAID STATUTE EVEN THOUGH HE MIGHT BE BARRED FROM ENFORCING HIS CONTRACT BECAUSE OF NOT BEING A LICENSED CONTRACTOR UNDER SECTION 58-6-10, U. C. A., 1953, ALTHOUGH HE WAS LICENSED AS A PLUMBER UNDER SECTION 58-18-2, U. C. A., 1953.

II

THE CONTRACT PRICE OF THE MERCHANDISE AND MATERIALS FURNISHED AND SERVICES RENDERED WAS THE REASONABLE VALUE OF THE SAME.

ARGUMENT

I

THE PLAINTIFF IS NOT SUING ON HIS CONTRACT OF JUNE 3, 1951, BUT ON HIS CAUSE OF ACTION UNDER SECTIONS 14-2-1 AND 14-2-2, U. C. A., 1953. HE IS EN-

TITLED TO RECOVER BY VIRTUE OF SAID STATUTE EVEN THOUGH HE MIGHT BE BARRED FROM ENFORCING HIS CONTRACT BECAUSE OF NOT BEING A LICENSED CONTRACTOR UNDER SECTION 58-6-10, U. C. A., 1953, ALTHOUGH HE WAS LICENSED AS A PLUMBER UNDER SECTION 58-18-2, U. C. A., 1953.

14-2-1, U. C. A., 1953, states:

“The owner of any interest in land entering a contract . . . for the construction, addition to, or alteration or repair of, any building . . . shall, before any such work is commenced, obtain from the contractor a bond . . . *conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract . . . ; and any person who has furnished materials or performed labor* for or upon any such building . . . payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the reasonable value of the materials furnished or labor performed, not exceeding . . . the price agreed upon . . . ” (Italics supplied by the respondent).

It will be noted from the wording of the statute that the clear intent is to assure payment to *any person* who furnishes materials and labor. No distinction is made as to whether that person is to be a sub-contractor, mechanic or materialman, licensed or unlicensed.

Liberty Coal and Lumber Co. vs. Snow, 53 U. 298. 178 Pac. 341, said that the purpose of this particular statute was to prevent owners of land from having their lands improved with materials and labor furnished and performed by third persons, and thus enhance the value of such lands, without becoming personally responsible for the reasonable value of materials and labor.

14-2-2, U. C. A., 1953, says:

“Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond . . . shall be personally liable to *all persons* who have furnished materials or performed labor under the contract for the reasonable value . . . ” (Italics supplied by respondent).

In this case, it is true that the defendant paid the prime contractor in full, but he failed to protect third parties as required by law and for his neglect or failure the law requires that he pay twice, if need be, to assure the third party of his just due and to compensate for failure to furnish adequate protection for interested persons. The law places this responsibility upon the owner as the one who gains the most by the improvements and the one who is in the best position to require security to protect third parties. Instead of penalizing the offender by fine as is the case in the statutes regulating plumbers and contractors, the state subjects the offender to double payment, a greater penalty ordinarily than the fines for failure to procure either a contractor's license or a plumber's license, clearly evidencing the legislature's concern that all who provide improvements be paid for the same.

The issue in this case, so far as the defendant's appeal is concerned, is whether the “any person” and “all persons” respectively of Sections 14-2-1 and 14-2-2, U. C. A., 1953, are to be construed as restricted to a special group as contended for the defendant (see Page 11 of defendant's Brief) or construed to mean as they say “any person” and all persons” respectively “who furnish materials or labor.”

The defendant cites no cases which create such judicial exceptions as he urges and in their absence the plaintiff urges this court to construe the language in the light of its plain meaning.

Even if Sections 14-2-1 and 14-2-2, are to be construed as benefiting only those who hold the requisite licenses for furnishing the materials and doing the work for which they sue under that statute, the plaintiff respectfully submits that he was licensed to do all that he did and for which he herein sues.

The evidence is uncontradicted and the defendant has stipulated to the fact that the plaintiff was, at all times in question, a licensed plumber and had complied with the requirements set forth in 58-18-2 (a) of U. C. A., 1953, which provides:

“Each applicant for a certificate to engage in the trade of plumbing as a journeyman plumber, must produce satisfactory evidence of good moral character and pass a satisfactory examination under the rules and regulations of the department of registration.”

A “journeyman plumber” is defined in 58-18-5 (a) as follows: “A person who has passed the examination herein provided and whose name is duly registered with the department of registration as a journeyman plumber.”

The “trade of plumbing” is defined in 58-18-5 (c), U. C. A., 1953, as follows: “The performing of any mechanical work pertaining to the installation, alteration, change, repair, removal, maintenance and use in buildings . . . of pipes, fixtures and fittings for bringing in the water supply and removing . . . water carried wastees . . .”

These statutes constitute a police regulation enacted to protect public interests as much or more than the "contracting" statutes relied on by the defendant.

In this instance the plaintiff installed two bathtubs, two toilets, two wash basins, four kitchen sinks and water and drain pipes necessary for installation of the mentioned items, all of which was work clearly within the purview of the statute regulating the "trade of plumbing" as herein set forth.

The legislature did not say or intend to say, as the defendant would have us believe, that before a licensel plumber can contract to do plumbing he has to be licensed also as a contractor. If that were so, then all plumbers working for themselves must also be licensed contractors, for then all work done by them would come within the classification of contractor or sub-contractor.

The defendant argues that the legislature intended the construction he is advancing by citing 58-18-14, U. C. A., 1953, (regulating plumbers) as follows: "The general provisions of Title 58 . . . including the prohibitions and penalties thereof, shall be applicable to the administration and enforcement of this act, in so far as they are not in conflict herewith." There is no ambiguity here in what was intended. Tittle 58 regulates both contractors and plumbers. 58-1-1 to and including 39 is entitled "General Provisions." These provisions apply to plumbers, but only if they are not in conflict with the chapter regulating plumbers. There is no indication that the legislature intended by any of said general provisions that licensed plumbers are also to be licensed as contractors, as the defendant contends. Had such been the legislative intent, it is difficult to understand why such requirement was not expressly stated.

The defendant places great stress on the following sections within the contractors statute, U. C. A., 1953: 58-6-1, License to Do Business; 58-6-3, "Contractor" Defined; and 58-6-10, Violation of Act — Penalty.

Dow vs. United States, a 1946 case originating in Utah, involved an unlicensed sub-contractor who had fully performed his sub-contract, which was the excavation of footings for certain buildings. The prime contractor had been paid for the work completed, including the work of said sub-contractor but sought to avoid payment to the sub-contractor on the ground that the latter was unlicensed. After citing the statutory provisions relied upon^{by} the defendant herein the court held: "Neither these statutory provisions nor any others called to our attention provide in express language that a contract employing an unlicensed contractor to perform services falling within the field of his trade shall be unenforceable." Dow vs. United States, 154 F. 2nd 707, 710.

In short, this case holds that on unlicensed sub-contractor acting within his field or profession can recover from the prime contractor when the work has been fully performed and the prime contractor has been paid for the complete job, including the work performed by the sub-contractor.

What appears, from defendant's Brief, Page 5, to be defendant's best case in support of his contention, is Kirman vs. Borzage, 65 C. A. 2nd 165, 150 Pac. 2nd 3. Quoting defendant, "The Second District Court of Appeals in applying similar licensing statutes ruled that a licensed plumber could not maintain any action in the courts resulting from undertaking to do plumbing work on a contract basis without showing that the plumber had a contractor's license."

In that case, the following fact situation is involved. A partnership performed extensive plumbing work for the owner of property. No intermediate party was involved. One of the partners was a licensed master plumber but the partnership itself was not licensed either as a plumber or as a contractor. The California statute provides that it was unlawful for a partnership or joint venture to contract without first being separately licensed even if all partners were licensed to operate individually. Here, then, the partnership is treated as a separate entity, and it was held that the master plumber's license was not sufficient to remove the case from the operation of the statute. The court said in effect that a licensed plumber is licensed to contract individually but not as a partnership unless the partnership is also licensed.

The general rule that a sub-contractor is within coverage of the contractor's bond for not only labor and materials, but also profit when the contract has been performed is stated in 119 A. L. R. 1282, as follows:

" . . . where the sub-contractor has fully performed his contract, so that nothing remains but to pay the contract price, or balance due thereon, the recovery of profit is not to be denied merely because it is profit rather than the value of labor and materials furnished; and the amount of recovery being liquidated under the contract, the recovery of profit is not to be denied on the ground that the damages are not ascertained, as would be the case where the contract is only partly performed."

II

THE CONTRACT PRICE OF THE MATERIALS FURNISHED AND SERVICES RENDERED WAS THE REASONABLE VALUE OF THE SAME.

In lower court, the plaintiff testified that he was able to get the fixtures and materials, which were used on the job, at wholesale, and that the wholesale price came to approximately \$1,150.00. When asked how he arrived at the contract price as a basis for his charge, he replied that he had figured a one-third mark-up on the wholesale price which was the custom of the trade when furnishing materials and fixtures for a job, and that such mark-up was fair and reasonable. When the sum of the \$383.00 markup and the wholesale price were subtracted from the total claim leaving a balance of \$113.50, the plaintiff was asked if this latter figure was the amount to be attributed to the labor for the job. The plaintiff said that it was. The plaintiff further testified that such a figure would not adequately compensate for the amount of labor performed but in order to submit as low a bid as possible he had to cut the price somewhere. The price was fixed by bid and the plaintiff was the lowest bidder in competitive bidding. Defendant offered no testimony which would justify a conclusion that the contract price was greater than a fair and reasonable value of materials furnished and labor performed, and no question was raised as to the quality of plaintiff's performance.

Even assuming the defendant's contentions are correct and the plaintiff should be required to take out a contractor's license as well as a plumber's license in order to recover for his services, that would not prevent the plaintiff from recovering for the materials he furnished. As a materialman he is not required to furnish a contractor's license because he does not come within the purview of the contractors' statute 58-6-3 (Contractor Defined) U. C. A., 1953.

CONCLUSION

By virtue of 14-2-1 and 14-2-2, U. C. A., 1953, the plaintiff is entitled to recover from the defendant for the reasonable value of the fixtures and materials furnished and the labor performed. The Plaintiff's claim is the reasonable value and the lower court erred in granting judgment for a lesser amount.

Respectfully submitted,

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