

1956

Lowell E. Parrish v. Theodore H. Tahtaras and Josephine Tahtaras : Brief of Appellants

Utah Supreme Court

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Bernard L. Rose; A. H. hougaard; Attorneys for Appellants;

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IN THE SUPREME COURT

UNIVERSITY UTAH

of the

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STATE OF UTAH

FILED

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LOWELL E. PARRISH,
Plaintiff and Respondent,

—vs.—

THEODORE H. TAHTARAS, and
JOSEPHINE TAHTARAS,
Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No. 8514

BRIEF OF APPELLANTS

BERNARD L. ROSE,
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IN THE SUPREME COURT

of the

STATE OF UTAH

LOWELL E. PARRISH,
Plaintiff and Respondent,

—vs.—

THEODORE H. TAHTARAS, and
JOSEPHINE TAHTARAS,
Defendants and Appellants.

Case No. 8514

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This action arose from respondent's claim for money due and owing him for services rendered in designing plans and specifications for the construction of a home for appellants on a lot owned by them at 1510 Ute Drive in Indian Hills Subdivision, Salt Lake City, Utah. Respondent's Complaint (R. 1) alleges that in April of 1954 appellants engaged his services as an architect and that coincidentally a written agreement was executed; that in pursuance of such employment he entered upon the preparation and the execution of such necessary plans, specifications, and drawings, requisite for the taking of bids by December, 1954; that the lowest bid was \$62,579.00; that defendants were obligated to pay a sum equal to 6% thereof, to-wit, \$3,754.74; that appellants have paid \$1300.00 and a balance remains due and owing in the sum of \$2,554.74, and pray judgment in that amount.

Appellants' Answer and Counterclaim (R. 3) admits engaging respondent; denies any written contract was entered into coincidental with such engagement but admits signing a standard form of agreement on the 27th day of July, 1954, and alleges that said agreement is incomplete and does not totally and completely incorporate the agreement of the parties.

By way of counterclaim appellants allege that plaintiff was engaged by oral agreement to design a home for

appellants for a cost of work including architectural services and the cost of the land not in excess of \$45,000.00; that on the 27th day of July, 1954, the appellant, Theodore Tahtaras, signed a printed form which is incomplete and does not fully state the agreement between the parties; that the lowest bonafide standing bid which was presented to appellants was in excess of \$80,000.00; that the respondent did thereafter modify the plans reducing the size of the proposed structure and did thereupon receive new bids, the lowest of which was \$73,280.00 not inclusive of the cost of the land or the fees of the architect; that respondent failed in the substantial performance of his contract of employment, has failed, refused and neglected to modify the plans to the extent contracted for by the parties and has altogether failed to perform according to the terms of said agreement; that respondent refused to return \$1300.00 which appellants had previously paid.

Respondent's Amended Reply (R. 8) alleges the contract in writing to be the entire agreement; that appellants orally authorized respondent to design for them a residence similar in size and style to respondent's house and they approved preliminary drawings as to size and style of residence; that all prior oral understandings were reduced to writing by the execution of the written contract on or about July 27, 1954; that there was no agreement orally or in writing that the total cost of the house, including architectural services and cost of land,

was to be a sum not in excess of \$45,000.00; that no fixed maximum was set by the appellants with the respondent in their negotiations; that respondent had fully performed; that the bid in the sum of \$73,280.00 was in excess of the fair and reasonable cost of construction and alleges that the sum of \$1300.00 was paid pursuant to Paragraph 5 of the contract, which requires 25% of the fee to be paid at completion of preliminary sketches.

Appellants denied these allegations.

During trial the Court directed respondent to file an additional cause in quantum meruit and admitted evidence of estimates of reasonable costs and the reasonable value of respondent's services, (R. 118, 120, and R. 175, Lns. 1-16).

Respondent's version, as extracted from his testimony, is substantially:

Appellants were friendly neighbors of the respondent for a period of ten years and are the owners of a small restaurant on West 3rd South Street in Salt Lake City, comprising 14 stools and 4 booths wherein appellant Theodore Tahtaras works one shift daily as cook and appellant Josephine Tahtaras works part time as a waitress (R. 152, Lns. 3-16). That respondent knew this and also that the restaurant was the principal source of appellants' income (R. 164, Lns. 24-26).

In April, 1954, he was called to advise appellants on choice of available lots and in the latter part of the month (R. 23, 24, Lns. 30-3) he was orally retained to draw plans and specifications for a dwelling to be built on the lot of his recommendation (R. 143, 144, Lns. 28-2), the home to be as beautiful, as good and as nice as the home of the respondent which appellants had visited a number of times and for which they had repeatedly expressed admiration (R. 25, 26, Lns. 11-11) and which cost respondent \$62,000.00, containing 1100 square feet of patio (R. 49, Lns. 5-10), 2240 square feet of house, and 500 square feet of garage (oral stipulation).

Pursuant to such authorization and employment the respondent on or about May 11, 1954, presented his topographical survey of the property (R. 27, Lns. 18-21) and received the instructions (R. 28, Lns. 1-12) from appellants that the house was to contain three bedrooms on the main floor, combined living room and dining room, breakfast room off the kitchen, utility room upstairs, a two-car garage and a completed recreation room downstairs (R. 28, Lns. 1-6) and two bathrooms (R. 30, Lns. 9-13).

In the latter part of May or first part of June he presented rough schematics, rough drawings to scale (R. 29, Lns. 9-17) to appellants (Exhibits 4 and 6) and received their acceptance and approval (R. 32, Lns. 2-18) and (R. 35, Lns. 1-18).

At a fourth meeting about a week later he presented these exhibits to appellants again together with a floor plan to scale (Exhibit 5) (R. 34, Lns. 1-17).

At this meeting the schematic sketches and floor plan, Exhibits 4, 6, and 5 were approved by appellants (R. 35, Lns. 7-27).

On July 27, 1954, at a fifth meeting respondent submitted preliminaries to appellants at their rented residence (R. 36, 37, Lns. 30-1) — preliminaries being drawings essentially identical with the approved schematics but in addition had elevation and extensions so that the appearance of the house could be visualized, Exhibit 7 (R. 37, Lns. 4-28); these were approved and respondent received from appellants a check for \$300.00. On that date appellant Theodore Tahtaras signed the written elements of the agreement, Exhibit 1, which is a printed form prepared by the American Institute of Architects, and submitted by the respondent, which provides:

1. The architect shall prepare plans and specifications and supervise.
2. Be paid 8% of the Cost of the Work, the said percentage being called the Basic Rate, and
3. Receive a sum equal to 25% of the Basic Rate computed upon a reasonable estimated cost upon completion of preliminary studies, and
4. Further payment from time to time so that the

architect shall have received 75% of the Basic Rate at the completion of the general working drawings and specifications.

5. To be computed upon a reasonable cost estimated on such completed drawings and specifications or if bids had been received then computed upon the lowest bona fide bid or bids.

6. If any work designed is abandoned or suspended in whole or in part, the architect should be paid for the service rendered on account of it.

7. Cost of the work is defined as the cost to the owner, but such cost shall not include any architect's or special consultant's fees or reimbursements or the cost of the clerk of the work.

At this point respondent could have "guesstimated" work at something in excess of \$60,000.00 but did not see fit to do so because of the stipulation of designed work—something as beautiful and as attractive as his home (R. 150, 151, Lns. 1-1).

Nothing in the printed form would indicate its intent to provide for the limitation of a proposed cost of the work and the respondent contends that to this point there was no conversation between the parties which determined for him such a limitation.

About September 10th he submitted Exhibit 8, (which are sketches of the interior details, (R. 41, 42,

Lns. 7-12) and at which time he considered himself approved on all items of interior or exterior details (R. 42, Lns. 23-28) of a house with a square footage of 4500 square feet (R. 71, Lns. 16-22).

Appellant Josephine Tahtaras volunteered the question that this house would cost at least \$60,000.00 and respondent replied , "Yes, at least that and more." (R. 44, 45, Lns. 30-13) and appellant Theodore Tahtaras said in order to give his wife exactly what she wanted, he would go as high as \$65,000.00 (R. 45, Lns. 1-13).

After this alleged conversation respondent proceeded to draw final plans and specifications, a procedure which involved the next two months and further conferences with appellants (R. 47, Lns. 2-7) and work involving Exhibit 17 — working studies and preliminary engineering, and most of the necessary work prior to executing the completed documents (R. 72, Lns. 6-18).

Respondent testified there was no conversation about limiting the cost of the work other than the one respondent recited above as having taken place on or about September 10th (R. 28, Ln. 28, R. 32, Lns. 2-6, R. 35, Lns. 28-30, R. 36, Ln. 1, and R. 39, Lns. 24-27).

After completed plans and specifications for a house of 4500 square feet had been approved by appellants, bids were invited.

Those received were: (Exhibit 14)

Earl Belknap	\$62,589.00
Stewart L. Carlson	80,562.00
Hamer Culp Jr.	82,500.00
Alvin E. Fors	92,500.00

but the bid by Mr. Belknap was immediately withdrawn; that appellants had no knowledge of Belknap's bid prior to its withdrawal (R. 67, Lns. 25-29).

Appellants protested the bid prices including the figure of \$62,589.00 (Belknap's bid, R. 73, 74, Lns. 30-7) and after some discussion respondent offered to revise plans, knowing that appellants wanted a figure below \$62,589.00, by cutting them to see where they would come out (R. 72-78, R. 56, Lns. 6-10, R. 153, 154, Lns. 21-2). That the reasonable estimate of cost is \$12 to \$14 per square foot, (R. 174, Lns. 21-23).

With the consent of the appellants to cut plans (R. 72-78, Lns. 25-28) respondent proceeded to cut 700 feet from the structure (R. 71, 72, Lns. 16-5) and sent out invitations for bids without first obtaining acceptance or approval by appellants to the modifications (R. 56, Lns. 11-15 and R. 69, Lns. 17-24) and thereafter submitted bids of \$73,280.00 and \$75,987.00 on the 3800 foot structure to the appellants. At this point respondent was not asked nor did he offer to rebuild or design new plans for a house (R. 158, Lns. 1-12).

Appellants thereupon abandoned the contract and returned plans to respondent because they said they were faced with two law suits at the time and could not con-

tinue with construction (R. 169, Lns. 15-29).

Appellants had paid a total of \$1300.00 in two payments (admitted by pleadings).

Appellants' version, as extracted from their testimony is substantially:

On August 29, 1953, appellants entered into an agreement, Exhibit 21, (R. 238, 239, Lns. 28-8) to purchase a lot in Indian Hills, which previously at their request had been selected for them by respondent, (R. 79, Lns. 17-30 and R. 23, 24, Lns. 11-3). That about the 10th of June, 1954, after entering into negotiations to sell their residence, (Exhibit 22) appellants orally contracted with respondent to design a house on the Ute Drive lot.

That appellants and respondent went to the Ute Drive lot in Indian Hills (R. 243, Lns. 1-4) and after appellant Josephine Tahtaras told him the rooms she wanted in the house, and their respective locations relating to view, the respondent asked appellant Theodore Tahtaras how much he wanted to spend (R. 270, Lns. 15-21 and R. 243, Lns. 26-30). Appellant Theodore Tahtaras answered, "\$40,000 because by the time I get through, the cost of the lot and your fee will run around \$45,000 to \$47,500."

In the course of a series of meetings appellants were shown and approved various stages of the work, paid two installments totalling \$1300.00, signed the written elements of the contract on July 27, 1954, and ultimately

the parties convened in respondent's office on or about the 14th of December, 1954, at which time appellants observed all the bids and were notified of the withdrawal of the Belknap bid of \$62,589.00. Appellants declared their disapproval of the size of the bids, and their desire to forget the whole thing (R. 281, 282 Lns. 25-8 and R. 258, Lns. 17-22).

Respondent offered to cut about 500 square feet (Exhibit 13) to bring amount to appellants' figure (R. 282, Lns. 9-26).

The appellants, at the persuasion of respondent, consented to cutting the size of house about 500 square feet; the elimination of a substantial amount of detail on the lower floor, the cutting of the size of recreation room, by partitioning off a sewing room and the addition of one-half bathroom fixtures to a roughed-in lower floor bathroom, Exhibit 11-3R, 4R, 13R (R. 282, 283, Lns. 27-30).

The appellant Theodore Tahtaras called Earl Belknap, the \$62,589.00 bidder, and tried to persuade him to rebid the plans (R. 294, 295, Lns. 22-12) telling him there might be some revisions (R. 304, 305, Lns. 10-10).

When the second bids came back respondent talked to appellant Josephine Tahtaras by phone and on learning the bids were over \$73,000.00 she told him they couldn't afford it and would be better off going out to buy one.

The architect answered, "I think you'd better." (R. 260, Lns. 15-25).

Appellants deny specifically that they participated in a conversation at any time where Mrs. Tahtaras had estimated building costs at \$60,000 or that Mr. Tahtaras had declared a willingness to spend \$65,000 (R. 279, Lns. 3-19).

That about the middle of January, 1955, appellant Theodore Tahtaras, in the office of respondent, discussed the second set of bids which were \$73,280.00 and \$75,-987.00 (R. 286, 287, Lns. 30-15) and appellant told him to forget the work. Respondent answered, "I can't build you a home for less than \$60,000.00," and demanded the balance of his fee.

Appellant refused to pay (R. 288, Lns. 1-4) and on January 26, 1955, bought a home already constructed.

The Court in line with its reasoning expressed at the trial (R. 320, Lns. 3-8) made its decision (Minute Entry — R. 324); holding defendant employed plaintiff to design plans for a figure of \$65,000 less architect's fees or \$60,185.18; "plaintiff could have cut plans to get bids of this figure, but defendant abandoned project. Defendants not entitled to return of any fees paid; plaintiff entitled to judgment calculated on quantum meruit" and computed the same as follows:

"Fee if work had been completed 8% of
62,579.00 is 5207.12 reduced to maxi-

mum of 8% on 60,185.18 or.....	4814.82
Less $\frac{1}{4}$ allocated to building supervi- sion	1203.70
Less $\frac{1}{8}$ allocated to reducing plans to secure bids at 60,185.18.....	601.85
Less amount paid	1300.00
	1709.27
	(R. 324)."

Findings (R. 13 and 14) were made that appellants engaged respondent to draw plans and specifications for a home the cost of the work to be \$65,000 including architect's fees or \$60,185.18; that the written contract did not fully encompass all of the understandings and contracts made by the parties; that bids were taken by plaintiff for the convenience of the defendants, the said bids ranging from \$73,500 to \$90,000, but plaintiff was ready, willing and able to reduce the dimensions and design so as to procure bids of \$60,185.18; that notwithstanding the willingness and ability of plaintiff to further modify the drawings and specifications, defendants on January 14, 1955, notified plaintiff of their intention to abandon, and they did in fact abandon their projected construction and did not erect the residence designed by plaintiff or any residence on said lot; that the reasonable value of plaintiff's services is \$3009.27 and plaintiff is entitled to that sum less \$1300.00 paid or a balance of \$1709.27 which sum was payable on or before February 1, 1955.

Appellants moved for a new trial (R. 328) and the

said motion was denied (R. 329).

STATEMENT OF POINTS

POINT I.

DURING TRIAL THE COURT ERRED IN (a) INTRODUCING THE ISSUE OF QUANTUM MERUIT; (b) PERMITTING EVIDENCE TO BE ADMITTED IN SUPPORT THEREOF; (c) ALLOWING AMENDMENT OF THE COMPLAINT; (d) MAKING FINDING NO. 7 THAT REASONABLE VALUE OF RESPONDENT'S SERVICES IS \$3009.27; (e) ENTERING JUDGMENT THEREON; (f) DENYING APPELLANTS RECOVERY OF THE SUM OF \$1300.00.

POINT II.

THE COURT, HAVING FOUND THAT THE COST OF THE WORK HAD BEEN STIPULATED AT THE INCEPTION OF THE ORAL CONTRACT, ERRED IN FINDING THE FIGURE WAS \$60,185.18 AS SET FORTH IN FINDINGS OF FACT NUMBERED 4 AND 6 RATHER THAN THE SUM OF \$40,000.00 AS TESTIFIED TO BY APPELLANTS.

POINT III.

THE COURT ERRED IN FINDING (a) THAT THE BIDS TAKEN BY THE PLAINTIFF RANGED FROM \$73,500 TO \$90,000 AND (b) THAT THE RESPONDENT WAS READY WILLING AND ABLE TO CUT THE PLANS TO \$60,185.18.

POINT IV.

AN ARCHITECT OWES TO HIS CLIENT A FIDUCIARY DUTY OF LOYALTY AND GOOD FAITH.

POINT V.

THE FINDINGS OF THE COURT ARE INSUFFICIENT TO SUPPORT THE CONCLUSIONS AND JUDGMENT OF

THE COURT; TO THE CONTRARY, THE SAID FINDINGS REQUIRED AS A MATTER OF LAW, JUDGMENT IN FAVOR OF THE APPELLANTS ON THEIR ANSWER AND COUNTERCLAIM. WE SUBMIT THE JUDGMENT OF THE COURT SHOULD BE REVERSED AND JUDGMENT OF NO CAUSE OF ACTION SHOULD BE ENTERED ON PLAINTIFF'S COMPLAINT AND FOR APPELLANTS ON THEIR COUNTERCLAIM.

ARGUMENT

POINT I.

DURING TRIAL THE COURT ERRED IN (a) INTRODUCING THE ISSUE OF QUANTUM MERUIT; (b) PERMITTING EVIDENCE TO BE ADMITTED IN SUPPORT THEREOF; (c) ALLOWING AMENDMENT OF THE COMPLAINT; (d) MAKING FINDING NO. 7 THAT REASONABLE VALUE OF RESPONDENT'S SERVICES IS \$3009.27; (e) ENTERING JUDGMENT THEREON; (f) DENYING APPELLANTS RECOVERY OF THE SUM OF \$1300.00.

(a) and (c) violate Rule 15 (b) of Utah Rules of Civil Procedure.

(b) Admission of testimony in support of a cause in quantum meruit is immaterial and irrelevant where it is in defeasance of the terms of an express contract.

(d) The measure of respondent's damages in quantum meruit is set forth in the court's decision (R. 324).

The court first multiplied \$60,185.00 which it had determined to be the pre-stated limitation on the cost of the work by the contractual Basic Rate, namely 8%.

It then reduced this result by $\frac{1}{4}$ because of build-

ing suspension, and an additional $\frac{1}{8}$ which was allocated as the reasonable value of the work necessary in reducing the plans further to secure bids consistent with the pre-stated limitation.

This conclusion is not merely not borne out by the evidence in that the $\frac{1}{8}$ reduction is absolutely arbitrary — without a scintilla of evidence to support it — but is in direct conflict with respondent's contention that he "exceeded in service value more than the contract amount" (R. 176, Lns. 10-26).

Counsel most seriously questions the prerogative of the court summarily to evaluate the failure of respondent's performance to $\frac{1}{8}$ of his fee.

Even if this $\frac{1}{8}$ was amenable to measurement, the crux of the issue here is whether the performance of respondent is to be measured by his work at the drawing board, or by the substantive result of his cutting an additional 1000 feet (\$12.00-\$14.00 per foot, see Statement of Facts) from the size of the house regardless of the desires of the appellants.

(e) Judgment in quantum meruit in this case is contrary to law. Both parties insisted an express contract existed between them, and the court so found.

By the court's statement — (R. 118, 119, 120):

COURT: "It is my idea right now in the case you have to recover on the quantum meruit. —

It looks like now I would think quantum meruit would be your basis, in other words reasonable value to date, not exceeding probably a certain sum —”

MR. ROSE: I take it Your Honor feels there is a basis for recovery in this action on quantum meruit?

COURT: I think if there is any it would be on that basis. If the contract had been performed it probably would not be the basis for recovery. — We have the plaintiff’s story — That they were stopped in the middle of their work, and when that occurs quantum meruit is usually the basis for damages, not the amount of the contract —”

Counsel for appellants disagrees. If respondent can recover at all, he must do so on the express contract made by the parties. He cannot, where he has failed to perform, or been guilty of breach, avail himself of the device of quantum meruit to recover for his unused and unuseable efforts. One who breaches an express contract should not be permitted to circumvent his responsibilities thereunder or avoid the onus of his breach, but retain its benefits through the medium of implied contract.

Where there is an express contract nothing is to be implied, except as may be construed from the agreements expressed.

(f) It follows that if respondent is not entitled to recover on quantum meruit, he cannot retain the \$1300.00 paid him by the appellants.

In *Maack v. Schneider* 57 Mo. App. 431 where \$200.00 had been paid on account to the architect, the court declared at Page 433:

“If this be true it is difficult to see — the plaintiff had any cause of action against the defendant. Taking plaintiff’s evidence to be true, it left plaintiff in receipt of \$200.00 to which he had no legal claim.”

If respondent’s version of the transaction between him and appellants is to be believed, and if under the circumstances he was entitled to a recovery in quantum meruit, then he could conceivably recover for work only to the date of September 10th when, according to him, appellants committed themselves to an expenditure up to \$65,000. He could not recover for work thereafter which was (respondent’s testimony) — “The procedure which involved additional conferences with appellants (R. 47, Lns. 2-7) and work involving Exhibit 17 which is working studies and preliminary engineering and most of the necessary work prior to executing the completed documents” (R. 72, Lns. 6-18) and also the completed documents.

This work led to bids in excess of \$80,000. There is no evidence of the value of respondent’s work to that date and therefore he must fail of recovery.

The following cases clearly support appellants’ position: In *Pack v. Wines* (Utah 1914) 141 Pac. 105 Justice Straup in his concurring opinion on page 107

declares:

“But since he made a bid which was not satisfactory and not acceptable to the defendants, therefore he asserts he now is entitled to be paid. But that is not his contract. No such condition is specified or embraced within it. When the parties, as here, made a contract specifying conditions under which the plaintiff was to receive no compensations, and conditions under which he was to be paid, to now permit him to recover on other conditions not specified is to make another contract for them, or to permit a recovery on an implied contract. I think we may do neither.

In *Graham v. Bell Irving* (1907 Wash.) 91 Pac. 8, Plaintiff architect was to receive a fee equal to 2½ percent of the lowest or accepted bid, as the case might be, for services similar to those of respondent in the instant case. A cost of construction limit was stipulated at \$25,000 but the lowest bid was \$35,000. Defendant counterclaimed for \$300 paid prior to the receipt of the bid. The court declared:

“Under such facts there was a plain failure to prepare plans that would come within the limitations of the construction cost fixed by respondent, a straight breach of the contract. Appellant is therefore not entitled to recover upon the contract, and he is no more entitled to recover upon a quantum meruit. Respondent has neither accepted nor received any benefits from appellant's work, and he offered to fully return the plans. It is argued that the respondent's payment of \$300.00 on account of the plans amounted to an

IN THE SUPREME COURT OF THE STATE OF UTAH

LOWELL E. PARRISH,	:	
Plaintiff and Respondent,	:	INSERTION OF
-vs-	:	ADDITIONAL UN-
THEODORE H. TAHTARAS, and	:	COVERED CASES
JOSEPHINE TAHTARAS,	:	ON BEHALF OF
Defendants and Appellants.	:	APPELLANTS.
	:	Case No. 8514

The following two cases are to be inserted on Page 19 of Appellants' Brief immediately following quotation from Pack v. Wines (Utah 1914) in support of appellants' proposition as set forth in Point I of the said Brief.

In Morris v. Russell, et ux 120 Utah 546; 236 Pacific (2nd) 451, Mr. Crockett declares as dictum:

"It may be true that where parties allege the same express contract, it is improper to submit the case to the jury on quantum meruit."

Taylor v. Royle 1 Utah (2nd) 175

Deals primarily with the matter of quantum meruit proof where the complaint alleged an express contract employment, and the Court decided that it was improper to have awarded a quantum meruit judgment.

acceptance. The payment was made before it had been demonstrated by the bids that the plans would not meet the requirements of the contract in the matter of cost of construction. It was a payment made upon account, somewhat hastily perhaps, but under the circumstances it was not an act which bound respondent to an acceptance of the plans."

The court further held that since appellee did not appeal for return of the \$300.00 it would not rule on the matter.

In *Kurfiss v. Martin* 110 S. W. 33 Missouri 1908 in the syllabus note 2 on page 32, the court declared:

"22. Same — Quantum Meruit.

"An architect agreeing to furnish plans for a building, the cost not to exceed a specified amount, who fails to comply with his contract, in that the building would cost in excess of that amount, is not entitled to recover on a quantum meruit."

And further at the bottom of the second column on page 33, declares:

"Judging by defendant's contention, he is laboring under the supposition that the court tried the case upon the theory that, although plaintiff had failed to comply with his contract in the first instance, he would be entitled to recover on quantum meruit for the services rendered under the contract. If this supposition is true, the court was in error. A party cannot recover for the reasonable value of his services rendered in

cases of contracts of this kind unless he had himself complied with its terms.”

In *Cooper v. City of Derby* 75 Atl. 140 (Conn. 1910) the Court stated on Page 141, column 1:

“He therefore could not complain that they were not accepted. Nor can he recover upon a quantum meruit. No plans were wanted, or would have been of service, which called for more money than the committee could contract to pay. His did. The limit of cost was brought to his attention first by the board of education, and then by the committee. His estimates, submitted to them in response, proved to be incorrect. An architect employed to plan a building to cost \$20,000, does not fulfill the terms of his engagement by planning one that costs \$30,000. His employer may be ready to incur the additional expense, and to make use of the plans. He may also decline to make any use of them. This the city did in the case at bar.”

Zannoth v. Booth Radio Stations 52 N. W. (2d) 678 (Mich. 1952) states on Page 682:

“(2, 3) It is the rule in Michigan that an architect must stay within the cost set by the owner, even though such cost was not set out in the written contract between the parties.”

This case is more fully discussed later in this brief. In *Hellmuth v. Benoist* 129 S. W. 257 (Missouri 1910) in a similar type of case the court in denying the architect recovery on a quantum meruit in the second column of page 258 stated:

“Contention is made by plaintiff that this is an action upon quantum meruit for services rendered. While this is true as far as the amount of his recovery is concerned, yet his pleading asserts a contract of employment which was complete except as to the price to be paid; his contention being that the payment for the services to be rendered was to be their reasonable value, and was not dependent upon any condition. The contention of defendant is that the contract of employment was conditioned that he should furnish plans for a house not to cost more than \$10,000, and that this being the contract, and plaintiff having failed to furnish plans for such a house, he cannot recover. It seems clear to us that this testimony as to what the terms of the contract were was admissible under a general denial. It does not assert a different employment or a different contract from that pleaded by plaintiff, but it was offered for the purpose of showing that the contract pleaded by plaintiff was never, in fact made, and hence goes to defeat plaintiff’s cause of action entirely.”

POINT II.

THE COURT, HAVING FOUND THAT THE COST OF THE WORK HAD BEEN STIPULATED AT THE INCEPTION OF THE ORAL CONTRACT, ERRED IN FINDING THE FIGURE WAS \$60,185.18 AS SET FORTH IN FINDINGS OF FACT NUMBERED 4 AND 6 RATHER THAN THE SUM OF \$40,000.00 AS TESTIFIED TO BY APPELLANTS.

Appellants contend that at the time of engaging the services of respondent he asked and they told him they were willing to spend \$40,000 for construction; that

they figured to spend \$45,000 to \$47,000, including architect's fee and cost of the land.

Respondent contends he was engaged under a stipulation of the designed work-something as beautiful and as attractive as his home (R. 150, Lns. 18-25) — and not until 4½ months after he was engaged under that stipulation and had received approval and acceptance of his work in both interior and exterior detail did one appellant volunteer a guess on the cost of the construction, and the other volunteer a commitment on what he would spend, namely \$65,000; that this commitment was made six weeks after appellants had signed the written portion of the contract.

The Court at close of trial declared: (R. 320, Lns. 3-8):

“It is very apparent that a person listening to the evidence would find it hard to imagine that the plaintiff would do all of the work he did, without being told as to what price range he was to do it in. It is also hard for a person to imagine that the defendant would hire an architect to do such work without giving him a price range.”

The Decision (R. 324) and Findings (R. 13 and 14) strike a compromise to the effect that a limitation specifying the inclusion of the architect's fee was set before the work was begun (but not the cost of the land) and determine the figure to be the one recited by the architect as having been stipulated 4½ months later.

The finding seems obviously inconsistent in that it seeks to reconcile the irreconcilable.

If it was the opinion of the court that a limitation was made at the very outset, then it can only be the figure contended for by appellants, for appellants' is the only figure testified to at this time.

A contract must be construed from the perspective of the parties at the time of entering into the contract and if one contends for one unusual in the common experience of man, then he must prove such a contract clearly and convincingly.

Coombs v. Beede, 1896, 89 Me. 187, 36 A. 104 56 Am. St. Rep. 406 declares:

“Of course, it would be too much to say that parties could not make such a shadowy contract as the defense contends for, but it would be so strange and unusual a thing to do, that clear and convincing evidence should be required to prove it.”

A denial of appellant's testimony, and the propounding of respondent's story, which in and of itself is unusual, is hardly such clear and convincing proof. It seems hardly reasonable that at the time of entering into the written portion of the agreement, at which time the floor plan and perspectives had been completed by the respondent and approved by the appellants (the point where the minds of the parties met on the size and the appearance of the house) the appellants would not have

expressed some curiosity about the cost of the house. It is much more likely that they would not have bound themselves to the written terms unless they knew a pre-stipulated cost limitation was impressed upon it.

At the point where respondent presented the written form for signature, it was incumbent upon him to have informed the appellants of his "guesstimate." It is probable that he did not do so because he was aware of the cost limitation imposed upon him, and intended to abide it.

POINT III.

THE COURT ERRED IN FINDING (a) THAT THE BIDS TAKEN BY THE PLAINTIFF RANGED FROM \$73,500 TO \$90,000 AND (b) THAT THE RESPONDENT WAS READY WILLING AND ABLE TO CUT THE PLANS TO \$60,185.18.

The best argument supporting Point III is respondent's own testimony:

(a) and (b) The bids received after first invitation to bid were: \$62,589.00; \$80,562.00; \$82,500.00; \$92,500.00 (Exhibit 14) and the \$62,589.00 bid was withdrawn before appellants were informed of it. (R. 67, Lns. 25-29).

Plans were cut 700feet in size, a substantial amount of detail was eliminated and bids returned at \$73,280.00 and \$75,987.00. By a consistent course of conduct established by respondent's repeated submission to appellants of the plans during their various formative stages and

the approval and acceptance by them of the same, the parties determined respondent's performance to be a set of plans specific in size and detail at a stipulated price. Valid bids for the construction of this house ranged from \$80,562.00 to \$92,500.00.

Respondent knowing appellants' desire to spend a figure less than \$62,500.00 offered to cut plans to see where they would come out. He cut, but plans didn't come out even close to appellants' known desires in price (R. 72-78):

“Q. And you assumed the responsibility then of shrinking this house to get a substantial cut on the figure of \$62,500 did you not?

A. The \$62,500 figure was out of the total. It wasn't on any figures. It was a resubmittal on the basis of reduced size of drawings.

Q. And you suggested that you revise it to cut down under the \$62,500 figure?

A. I did not suggest I do that at all. I suggested I cut the drawings — cut out the amount of building and see where it would come in at.

Q. You knew, however, they wanted the figure of \$62,500 cut, did you not?

A. Yes, they said that, but you cannot always take a client at his word. He always wants to save money.

THE COURT: Mr. Parrish, you knew they wanted something less than \$62,500?

A. I didn't promise they could have it.

THE COURT: In view of what they said about the size of the bid?

A. I knew they would want it for as little as they could get it.

THE COURT: You knew they wanted it for less than \$62,500.

A. I don't know, you would have to ask them."
(R. 72-78)

At a conference between all of the parties after the bids of \$73,280 and \$75,987 had been received: (R. 158, Lns. 5-12)

"Q. In any case you refused to redesign the house that would bring them (the costs) down?

A. I did not refuse, I was not asked, but I did not refuse.

Q. I am asking you did you offer to rebuild or redesign the new plans for a house.

A. I did not offer."

Despite this testimony the court found respondent ready, willing and able to cut plans.

POINT IV.

AN ARCHITECT OWES TO HIS CLIENT A FIDUCIARY DUTY OF LOYALTY AND GOOD FAITH.

This statement in *Palmer vs. Brown et al.* 273 Pac. (2d) 306 (Cal. 1954) states succinctly a principle of law irresponsibly violated by respondent. Respondent undertook to design a house for a husband and a wife who

(respondent knew) owned a 14-stool 4-booth restaurant in which husband worked one shift daily as a cook, the wife worked part time as a waitress and which was the principal source of income for them.

Respondent claims no greater stipulated limitation upon him than "as beautiful and as attractive as his home." In performing his function the respondent created neither similar size, cost, quality, nor similar design. His testimony denies any effort to reproduce similar size, cost, or design. (R. 92-96) Similar quality is refuted by the fact that his own house cost \$17 — \$20 per square foot whereas he testified to \$12 - \$14 per square foot as the estimated cost of the home designed for the appellants.

There can be no doubt that respondent knew of his failure of performance in terms of cost limitation, because upon receiving the first bids he undertook to cut the size of the plans at least one week prior to informing appellants of them (R. 152, Lns. 23-28). With the consent of the appellants to cut plans, knowing their dissatisfaction with the figure of \$62,500, respondent with a total disregard of their expressed dissatisfaction "cut the plans to see where they would come out" because "you cannot always take a client at his words; he always wants to save money." (R. 61., Lns. 11-14).

Respondent further ignored the responsibility of his fiduciary relationship when after cutting 700 feet from

the size of the first-agreed -upon dwelling, eliminating substantial detail and making modifications on the basement layout, he did not see fit to submit these to appellants for their approval. Yet in every formulative stage of his work prior to this he considered it a part of his responsibility to seek their approval and acceptance. He excuses himself because of the pressure of time yet he did not feel pressed to notify appellants of the receipt of bids for a period of at least a week after their receipt.

Respondent further disregarded the responsibility of his trust when he did not see fit to caution appellants of the probable cost at the time he sought to bind them to a written contract and at which time he could have "guesstimated" its cost to be in excess of \$60,000.

In response to questioning why he did not caution them he answered (R. 150, Lns. 22-25)

"A. Caution was not the word required. I did not caution them and I did not feel it was incumbent upon me to caution them, because the stipulations of designed work, something as attractive and as beautiful as my home—"

POINT V.

THE FINDINGS OF THE COURT ARE INSUFFICIENT TO SUPPORT THE CONCLUSIONS AND JUDGMENT OF THE COURT; TO THE CONTRARY, THE SAID FINDINGS REQUIRED AS A MATTER OF LAW, JUDGMENT IN FAVOR OF THE APPELLANTS ON THEIR ANSWER AND COUNTERCLAIM. WE SUBMIT THE JUDGMENT OF THE COURT

SHOULD BE REVERSED AND JUDGMENT OF NO CAUSE OF ACTION SHOULD BE ENTERED ON PLAINTIFF'S COMPLAINT AND FOR APPELLANTS ON THEIR COUNTERCLAIM.

The general proposition of law relating to the payment of architect's fees where the bid exceeded the architect's estimate or the owner's limitation is stated with approbation in *Williar v. Nagle, et al*, (Md. 1908 71 Atl. 427. An excerpt, as it applies fully in point to the instant case, declares :

"6 Cyc. 30, 'that a person employed as an architect to furnish a plan is entitled to remuneration therefor, if made in accordance with the directions of the owner; but he cannot recover where the owner stipulates that the plan should be for a building not to cost over a specified amount, if the plans made are for a building exceeding that sum. If the cost of erecting a building is "reasonably near" or "reasonably approximates" (as some of the authorities express it) that stated in the estimate or understanding of the parties, the owner might very properly be held liable, certainly in many cases, for he knows or as a man of ordinary intelligence may be presumed to know, that there may be some slight variance between the estimate and the actual cost of the building. *Feltham v. Sharp*, 99 G. 260, 25 S. E. 619; *Nelson v. Spooner*, 2 Foster & Finlason, 613; *Walt on Eng. and Arch. Juris.*, *Supra*. Ordinarily that question should be submitted to the jury, unless there be a written contract which has to be entirely construed by the court and has no provision in it which should be submitted to

the jury; but in a case like this, where it was contended that the building to be erected was not to exceed \$90,000, while the lowest bid was \$125,000, the court could declare as a matter of law that the estimate did not reasonably approximate the cost, which the lower court in effect did in granting the defendant's first and third prayers. In addition to the authorities above referred to, see 2 Am. & Eng. Ency. of Law, 818, *Maack v. Schneider*, 57 Mo. App. 431, *Wees v. Warren*, 72 Mo. App. 644, *Ada St. M. E. Church v. Garnsey*, 66 Ill. 132, *Hall v. Los Angeles Co.*, 74 Cal. 502, 16 Pac. 313, *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049, and 1 Hudson on Bldg. 70, although some of them do not discuss the question fully."

Zannoth v. Booth Radio Stations, 52 N. W. (2d) 678, (Mich. 1952) previously referred to with relation to quantum meruit, is particularly pertinent in that the contract is identical to the one in the instant case. The circumstances are equally identical in that the written elements of the contract were signed after the architect had begun his work. In this case the court denied recovery on the contract, declaring: On pg. 683, Notes 5 and 6

"Plaintiff having breached the contract as hereafter will be shown, and defendant receiving no benefit whatsoever from Plaintiff's performance thereof after September 1st by reason of such breach, quantum meruit is not proper. Recovery cannot be had on a quantum meruit by a person who breached the contract against one

receiving no benefit from the performance of the services for which recovery is sought. The trial court did not err.

The trial court also ruled that Plaintiff had breached the contract and could recover nothing thereon by reason of his exceeding the cost limitation on the building."

Wetzel v. Roberts 295 N. W. 580 (Mich. 1941) dealing with the same type of contract and circumstances resulting from a bid in excess of the oral limitation, calls attention to the fact that no contract for the construction of the building was ever executed and denied recovery to the architect, declaring:

"In spite of obscurity and contradiction, it appears that the architect's fees are based upon a percentage, to be computed upon the cost of the work and the cost of the work is to be based on the amount specified in the executed construction contract.

In this case no contract for the construction work was ever executed. When Roberts received the bid on the plans prepared by plaintiff, it amounted to \$28,000. This was so much greater than the amount that he had planned upon, and so in excess of the limitation of expense which was communicated by Heartt to Wetzel, that Roberts refused to go ahead with the proposition. He later remodeled the building according to another plan. Plaintiff sued for 6 per cent of a fee based upon 10 per cent of the bid of \$28,000 claiming that such sum was due him under the contract.

(1) There is nothing in the terms of the contract which provides that the total fee of the architect would be 10 per cent of the amount of a bid. The fee depends upon the letting of a contract. The architectural fees were based upon the total amount that it would cost to do the work, according to the terms of the construction contract. Apparently the form of contract here used was drafted to cover a case where the owner actually let a building contract; but it did not cover the case before us, where no building contract was ever executed. To sustain the claim of plaintiff it would be necessary to hold that no matter how large the bid for doing the work, Roberts would have been obligated to pay an architectural fee based upon the amount of such a bid. The contract does not so provide, and Roberts did not so agree.

(2) Furthermore, it appears that there was an oral condition precedent to the execution of the contract. Plaintiff had been advised before he commenced to prepare the plans and specifications that the cost of the improvements was not to exceed \$15,000. In this regard it is of no consequence whether Heartt, who informed Wetzel of this limitation, was the agent of plaintiff or of Roberts. The evidence shows that, after being advised of the limitation, plaintiff drafted the plans and that there was no subsequent modification of this condition precedent.

We cite additionally *Wicks v. Murphy*, 54 N. W. (2d) 850, and *The Royal Order of Moose v. Faulhaber*, 41 N. W. (2d) 535, both recent Michigan cases and we

earnestly request their reading by the court in that the entire opinion deals probatively with the law subject, but are too long to repeat here.

The citation of 127 ALR, 410 covers comprehensively the entire subject citing many more cases dealing with the subject and revealing overwhelmingly the foregoing to be the general tenor of opinion.

In the case at bar the court, however, interjected the concept that the architect had avoided the onus of his failure to perform the contract by being ready, willing and able to cut plans to the agreed figure. The only support appellant can find for this doctrine is the last sentence in Section 15 of Architects at 3 Am. Jur. 1009:

“A similar rule applies where the architect is able and willing to make such alterations, but the employer refuses to allow him to do so.”

The citation given in support of it is the hereinbefore cited *Coombs v. Beede*, 89 Me. 187; 36 A. 104; 56 Am. St. Rep. 406:

“Plaintiff, architect employed by defendant to build a house for \$1500.00. The wife wanted a second story and \$2500.00 was set as limit, based on architect’s actual estimates. He then drew plans and then said he thought house would cost over \$2500.00 and wife said cut it down. It was so done.

“Bids were sent out and ranged from \$3300.00 to \$4400.00 and then to \$3100.00. Defendant re-

fused to accept and refused to permit plaintiff to cut down plans. Plaintiff advised wait until spring and she accepted the advice, for building costs to come down.

“Defendant did not wait, he bought his own material and hired labor by the day, from memory and experience drew sketch for carpenter and with him erected house and stable, substantially as plans. The house alone for a little less than \$2700.00.

“So that plaintiff’s calculations tested by actual cost instead of contractor’s bids were less than \$200.00 of variance from the standard which the defendant and wife pretend was prescribed for by them. Even if A’s version be true, then the undertaking of plaintiff was to make plans for a house to cost \$2500.00 and no more; and if acting in good faith, he exercised his skill and ability in an endeavor to bring about that result, that is all that could be expected or required of him; and no defense is established against his claim even if he failed in his attempt. But if the house designed by him could be built for less than \$2,700.00 it could hardly be called a failure, especially in view of the interferences on the part of defendant’s wife; nor a failure if the plaintiff could have so altered his plans as to reduce the house in price, and it seems preposterous to say that he could not; and he was willing to make alterations, and the defendant or his wife would not consent thereto.”

It is interesting to note that American Jurisprudence is the only encyclopedic legal authority dignifying

Coombs v. Beede in its text.

References to the case have been made in notes and footnotes as follows:

“42 LRA N.S. 127 Note: ‘While the decision in *Coombs v. Beede*, 89 Me. 187, 36 Atl. 104, is correct upon the evidence in the case, the opinion leaves something of clearness to be desired.’ ”

“5 CJ 262 Footnote re this case says: ‘But the decision in this case may perhaps be supported on the ground that some use was made of the architect’s plans or suggestions.’ ”

American Law Reports (companion piece to Am. Jur.) at 127 ALR 412 Col. 2 states:

“Attention is called to *Coombs v. Beede* which appears out of harmony with the general rule.—It is submitted that the opinion in the above case leaves something of a clearness to be desired.”

The syllabus to the Am. Sts. Rep. citation of the case declares in effect that the reason for the decision is the house was actually built for less than \$200.00 in excess of the stipulated figure.

Appellant cannot argue that *Coombs v. Beede* is not good law as related to its particular facts, but feels a significance in the fact that despite the numerous adjudications relative to architects’ fees since *Coombs v. Beede* was reported in 1898, its doctrine has never to the knowledge of appellants’ counsel been followed or even argued in support of its doctrine of tender of per-

formance.

Indeed, to apply it to the instant case would be violative of the cardinal principles employed in construing contracts, for it would be permitting the unilateral discretion of the architect limited only by a cost figure to determine the appearance, the size and the structure of the house regardless of the desires of the proposed owner. So arbitrary is such a concept that it destroys the element of mutuality in contracts.

To construe the contract of the parties here to mean that respondent as an architect could approach a set of plans on a hit or miss basis until he met an agreed figure, with the unrestricted option to cut where he will in size and quality, and that appellants contemplated and agreed to such a contract with such a meaning is to violate an uncontrovertible principle of the law in that it introduces an optional performance on the part of the respondent.

The law frowns on construing a contract to be an option where there is no clear intent of the parties to do so and particularly where such a construction would entail no responsibility, but only benefit to one of the parties.

Yet this is apparently the theory of the trial judge for in his summation (R. 320, Ln. 23 and following):

“MR. ROSE: May I ask a question, your Honor?

“How about the element of his performance of contract—even if you were to find \$62,500 was

the limit, isn't there a question as to whether or not he had substantially performed, even if that was the limit?

"THE COURT: I do not think so. Under Mr. Parrish's testimony, he figured that he would get the plans close enough to it, so a revision would bring it within that range, and he was stopped in his efforts.

"His theory is supported by his testimony that he was stopped in his efforts at getting a home in the range of \$60,000, because they decided that they did not want to go through with it."

In *American Locomotive Co. v. Chemical Research Corp.*, 171 F. (2d) 115, (1954) the Court declares at Page 128:

"This Court said in *Midland Linseed Products Co. v. Charles R. Sargent Co.*, 6 Cir., 281 F. 704, at page 708 — 'It is a canon of construction that courts will not destroy the mutual and reciprocal obligations of the contracting parties, and substitute therefor an optional contract, unless the language used imperatively requires such construction.'"

In *Wilson & English Const. Co. v. New York C. R. Co.*, 269 N.Y.S. 877 (1935), the Court declares as rules of construction:

"(3) Words intended to exempt a party from liability because of its own fault are to be construed strictly against it.

"(4) A contract will not be so construed as to put one party at the mercy of the other.

Gillet v. Bank of America, 160 N.Y. 549, 55 N.E. 292.”

Udy v. Jensen, 63 Utah 94; 222 Pac. 598 (1924 Utah) cites with approval Frick, J., in *Burt v. Stringfellow*, 45 Utah 207, 143 Pac. 234 as follows:

“In case parties have entered into a contract and differ with regard to its meaning, and the terms of the contract are doubtful or ambiguous, the first duty of the court is to ascertain the actual intention of the parties at the time the contract was entered into. This intention must be determined from the language used by the parties when applied to the subject-matter of the contract and the circumstances and conditions surrounding the parties. In arriving at a conclusion all the words and expressions used by the parties in the contract must be given full force and effect, unless to do leads to an absurdity or is contrary to the manifest purpose and intention of the parties.”

And again:

“The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention.” *Schuykill, etc., Co. v. Moore*, 2 Whart. (Pa.) 490.

It would be establishing an absurdity to construe the contract between the parties in the instant case

so as to compel appellants to accept the end result of respondent's unilateral, successive efforts to cut plans to an agreed figure. Certainly the fact that appellants had consented to one effort cannot mean that they had committed themselves to a course of continuous consents to continuing cutting.

While the facts are not precisely in point, the law as stated in *Vinal v. Inhabitants, Etc.* (Mass. 1919) 122 N.E. 294 seems pertinent and applicable:

"It could not have been ruled as a matter of law that the plaintiff was entitled to an opportunity to modify his plans to the end that the cost of the building might be brought within the specified amount. It was an express term of his contract—that the test of his right to receive compensation should be bids received after advertisement."

And we quote 6 C.J.S. 310 on the question of opportunity to perform:

"Where Plaintiff was to prepare plans for a building for which the construction bids were not to exceed a fixed amount, and where bids received exceeded that amount, Plaintiff was not entitled later to modify his plans and bring the cost within the limit."

CONCLUSION

The rules of construction are applied to contracts only when there are obvious ambiguities and never when the contract is clear in all its terms. However, if we were

to concede simply for the purpose of argument that there were any ambiguities in the contract, then there is nothing which could conceivably be construed as requiring appellants to accept the result of respondent's repeated efforts to change the plans and specifications.

The primary motivation in seeking an architect to design a home is that one may have a home to fit his own ideas of comfortable and contented living. It is essentially the desires and the wants of the owner that are to be incorporated in a home, and it is the responsibility of the architect to fulfill those desires and wants.

Here it is clear that the architect did so at the point where he sent the plans and specifications out for the first bids. It is also clear that he was aware of a cost limitation because it is beyond the credibility of a reasonable man to believe that an architect could be turned loose to design a home with no more restriction than the respondent here claims and without a cost limitation.

The authorities clearly establish the fact that the respondent, under the circumstances, owed to the appellants high duty of trust and responsibility; that the relationship between the parties was such as to impose upon the respondent a duty to keep the appellants fully informed concerning his honest judgment as to cost, and the amount of bids received pursuant to the plans and specifications prepared by the respondent. When bids were received for the work, and were greatly in

excess of the amount which respondent knew appellants were willing and able to pay for the construction of the home in question, it became his obligation to inform the appellants of the amount of such bid or bids.

When at the trial it became apparent that the respondent could not recover under the agreement which had been entered into by respondent and appellants it was clearly error for the court to permit respondent to amend his pleadings in order to recover on the basis of quantum meruit for any work performed in the preparation of the plans and specifications. But assuming that the court was clothed with the authority to permit the case to proceed on the basis of a recovery on the theory of a quantum meruit, we submit that there is no evidence in this record showing or purporting to show the value of respondent's services in the preparation of the plans and specifications to the point where he acknowledges a cost limitation.

The value of respondent's services was attempted to be fixed by the court on the basis of a percentage of the prestipulated limitation cost of the work.

We submit that the appellants are entitled to a judgment of this court reversing the decision of the lower

court with instruction to the lower court to enter judgment against the respondent for the sum of \$1300.00 paid by appellants to respondent together with the legal rate of interest from the date of entry of such judgment.

Respectfully submitted,

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