1965

Ruth W. Shupe v. Roy A. Menlove, D/B/A Menlove Construction Company : Defendant-Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

RUTH W. SHUPE,
Plaintiff-Respondent,

vs.

ROY A. MENLOVE, d/b/a MENLOVE CONSTRUCTION COMPANY,
Defendant-Appellant.

No. 10405

DEFENDANT-APPELLANT'S BRIEF

Appeal from the District Court of Salt Lake County, State of Utah
Aldon J. Anderson, District Judge

GEORGE M. McMILLAN and FRANKLIN D. JOHNSON
1020 Kearns Building
Salt Lake City, Utah
Attorneys for Defendant-Appellant

Bryce E. Roe
American Oil Building
Salt Lake City, Utah
Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

INDEX OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

RUTH W. SHUPE,
Plaintiff-Respondent,

vs.

ROY A. MENLOVE, d/b/a MENLOVE CONSTRUCTION COMPANY,
Defendant-Appellant.

No. 10405

DEFENDANT-APPELLANT'S BRIEF

NATURE OF THE CASE

This is a civil action involving a claim by a contractor against an owner under a cost plus contract and Title 38, Chapter 1 of the Utah Code.

DISPOSITION IN THE LOWER COURT

The trial court determined that the contractor, Roy A. Menlove, d/b/a Menlove Construction Com-

pany, and the owner of the land, Ruth W. Shupe, had entered into a written agreement whereby Menlove was to construct a house upon the owner's lot and would be compensated on the basis of cost plus 10%. The trial court rejected the owner's contentions (a) that there was an oral understanding with respect to a maximum cost, and (b) that the contractor should be compensated only on a quantum meruit basis. The trial court held that Menlove Construction Company had substantially performed the promises and obligations contained in the contract between the parties. However, the trial court refused to enter judgment for the total amount of the undisputed costs incurred by Menlove Construction Company plus 10% thereof, and refused to allow the contractor a new trial for the sole purpose of determining damages, and refused to allow the contractor an attorney's fee or costs pursuant to the provisions of Section 38-1-18, U.C.A.

RELIEF SOUGHT ON APPEAL

The contractor seeks a judgment and decree in this court awarding to him (a) judgment against the owner and a lien against the owner's property in the sum of $30,910.45 (which represents the actual costs of construction plus 10%, less the amounts paid by the owner); (b) judgment on the defendant's Second Cause of Action in Counterclaim; (c) a reasonable attorney's fee and defendant's costs and disbursements, and (d) adjudicating that the defendant is entitled to receive

a judgment in the amount of the defendant's actual costs of construction plus 10% thereof. Alternatively, the appeal seeks a new trial solely on the issue of damages.

STATEMENT OF FACTS

The Appellant is a licensed general contractor with 30 years' experience in the construction of residential property in the Wasatch front area (226). The Respondent is the owner of a lot in Salt Lake City located at 1208 Yale Avenue. Respondent's husband, who conducted the negotiations and acted for Respondent in all relevant negotiations and transactions incident to the construction of the house, is a civil engineer with 40 years' experience in the construction field (160, 161, 174). Mr. Menlove and the Shupes had known each other for many years in a social capacity prior to the transaction which is the subject of the instant litigation.

Following preliminary discussions concerning the location of the house and the general type of construction that was involved, the parties executed an agreement, received in evidence as Exhibit 1, under the terms of which Menlove Construction Company agreed to act as general contractor in the construction of a home on the basis of being compensated for its cost plus 10%.

The construction commenced almost immediately. Partially constructed foundations from one or more

houses which had been commenced on the lot were removed during November, 1962, and the construction proceeded through December and into the early months of 1963. Invoices were rendered during the first few months of construction as follows:

December 1, 1962 (Nov. costs)	$2,681.07	Ex. 5
January, 1963 (Dec. costs)	5,249.54	Ex. 5
February, 1963 (Jan. costs)	3,976.49	Ex. 6
March, 1963 (Feb. costs)	3,656.21	Ex. 7

The Shupes issued checks in payment of these invoices. While payment of the last invoice was approximately 20 or 30 days late (180, 182), no objection was made by the owners of the premises to any of the items contained in the invoices or to the manner of billing or to the amount of the bills, except that a slight adjustment was made in the hourly rate of Max Menlove after the first billing (Ex. 5, p. 2). Work continued through March and April, 1963, and in the early part of May, the contractor sent or delivered to the owner a statement, received in evidence as Exhibit 8, reflecting an amount due at that time of $10,308.64. It appeared from this invoice that the total costs of construction to the end of April were $25,869.75 (Ex. 8, p. 1). The record is uncontradicted that at this time Mr. Shupe requested that Mr. Menlove prepare an estimate with respect to the total estimated costs of construction. Max Menlove, superintendent of construction, at the direction of Appellant, prepared an analysis of the cost balance of the house, and on or about June 14,

1964, at a conference attended by the Appellant, Max Menlove and Mr. Shupe, the figures were reviewed in detail. A copy of this informal cost projection was received in evidence as Exhibit 64 and the following language appears at the end of the exhibit in Mr. Shupe's handwritnig: "Sat in conference with Roy and Max at office June 14, 1964." It was apparent at that time that the total cost of construction would be $49,630.00. The costs which were estimated but not incurred at that time appear on Exhibit 64.

The exhibit indicates that wiring, heating, plumbings, cabinets, linoleum, painting, roofing, windows and doors, tile and finishing had not been completed at that time. The cost of these items with the cost of the car port, fence and finishing the plaster work were estimated in detail. The total appearing in the exhibit for these items was $12,933.

The projection then credits the Shupes with $2,400.00 paid earlier to Barnes Electric and adds an estimated amount for a circular stairway for $500.00, for a balance of $11,033.00; $1,000.00 is added for the contractor's 10%, bringing the total to $47,130.00, including the previous billings and the amount previously paid to Barnes Electric.

Not only did Mr. and Mrs. Shupe instruct Mr. Menlove to proceed to complete the construction as soon as possible, but even after they received this projection, the record shows that they continued to order materials and give instructions to the men with respect

to various phases of construction and landscaping. (840, 845).

Nor did the Shupes make any effort to reduce costs. The door locks they selected, for example, cost $54.10, while the Weiser locks used in the ordinary house would cost $3.85 (842). All of the hardware was extremely expensive (ibid), and of course, the hardware is one of the last things to install in a house.

Prior to the execution of the contract with defendant, Mr. Shupe had considered acting as his own general contractor (162, 173). The testimony is undisputed that as various bids were obtained from subcontractors incident to the various phases of construction, conferences were held with Mr. Shupe with respect to such bids (292). Mr. Shupe visited the premises nearly every day during construction from beginning to end (292). He gave repeated and detailed suggestions to Max Menlove and the employees concerning the manner in which the work should be done (292). The record is clear that Mr. and Mrs. Shupe approved each subcontract for each phase of construction and actually selected all of the items of any consequence that went into the house. Mr. Shupe designed and supervised the installation of an extensive network of pipes constituting an underground drainage system under the basement wall and around the entire perimeter of the outer walls (Ex. 4). The Shupes selected Norman brick, knowing that it was substantially more expensive than that ordinarily used (371). They

selected a special mortar for the brick walls (191). Mr. Shupe was present when the concrete was being poured and was aware of the fact that a portion of the house on the lot required the use of a crane and a resultant fee for overtime for the operator of the cement truck (295, 296). The arrangement for compensating Ron Clark, the roofer, was based upon $15 a square. The arrangement with the roofer was explained to Mr. Shupe before roofing commenced (197, 293). Mr. Shupe was advised that the painter was to be compensated on a time basis (248, 249). The Shupes participated in the discussions with respect to the kinds of finish to be used on the exterior of the premises and the colors on the interior. The paint schedule was, in fact, prepared by Mr. Shupe after conferences between the architect, George Cannon Young, the Shupe's decorator, Marion Cornwall, and the painter (474-476). As a result of changes made by Mr. Shupe in the decorations of the front entry, mahogany strips were nailed and removed from the front entry three different times (297, 298). The Shupes ordered double laminated plasterboard, the most expensive available, for the interior walls (204). Through Barnes Electric, they personally selected three furnaces to be used in the premises (189, 198). They personally selected the cabinets from Amherst Cabinet and Mill in Murray (187, 188). They picked out the lighting fixtures, the type of windows and doors they desired, the tile, the linoleum and other floor covering (221), the plumbing fixtures (224). There was extra cost in the intricate

steel work in the foundation (368), steel mesh in the basement floor (371), the bearing walls were constructed from 2 x 6 lumber rather than 2 x 4. The floor joists were 2 x 12 rather than 2 x 10. There were double joists on both floor and ceiling (370). The Shupes admitted that they selected and approved all of the costs that went into the house. At his deposition Mr. Shupe stated that he was advised as to the cost as the work progressed. He testified: " . . . of course, there was discussion about everything that went into the place. No doubt there was discussion about it." (205).

Exhibit 4, pp. 355 and 356 reflect Mr. Shupe's detailed specifications furnished during the course of construction with respect to the reinforcing steel in the foundation. The expert witness called by the Shupes admitted that whereas approximately 100 pounds of steel are used in the foundation of an ordinary house, he estimated that between 7,500 and 8,000 pounds were used in the Shupe residence (364). Each piece of steel had to be hand tied before the foundation was poured (365). He suggested that the amount of steel in this structure would hold up "a pretty tall building." (366).

The record is replete with instances where the Shupes revised plans and made changes and additions to the structure as construction ensued. It is beyond the scope of this brief to attempt to itemize these changes and additions in detail. Max Menlove, the superintendent of construction, stated that there were

at least 100 changes and additions (885). The Shupes made no effort to controvert this testimony.

The record is undisputed that the men employed by Menlove Construction Company who worked upon the premises kept records with respect to their time and were compensated on the same basis as they were compensated in all other construction by the company. There is not a shred of evidence that any men charged any time to the job which was not actually spent working on the job. There is no evidence that as much as a stick of lumber went into the house that was not called for by the plans or the direct order of owners.

Some time during the end of the summer, after Mr. and Mrs. Shupe had moved into a basement apartment in the house, they instructed Mr. Menlove that they did not desire him to complete the work. Mr. Menlove requested a payment on the account, reminding them that it had been substantially six months since he had received any money (Ex. 9). When no payment was received, Mr. Menlove filed a mechanic's lien on November 5, 1963, pursuant to the provisions of Title 38, Chapter 1 of the Utah Code, in the amount of $30,910.40 (Ex. 62). Notice of the claim was published in the Salt Lake Times in accordance with the statute (Ex. 63).

When the Shupes learned that Mr. Menlove had filed a lien and intended to insist upon his rights under the contract and under the lien statute, they filed the complaint in this action alleging that Mrs. Shupe

owned the property in question, that they had entered into an agreement with the defendant, copy of which was attached, and that they realized that they owed Mr. Menlove some money but did not know how much it was. They asked the court that defendant be required to prove and show the amount which he claimed to be due and to determine the amount of the indebtedness. The defendant filed a counterclaim in his First Cause of Action that the plaintiff was indebted to him in the amount of $30,910.45; that he had complied with the requirements of 38-1-7 of the Utah Code, and that he was entitled to a lien and the other remedies provided under the statute. In a Second Cause of Action, he prayed for judgment in the amount of his costs plus 10%, pursuant to the provisions of the contract.

At the request of Mr. and Mrs. Shupe, Mr. Menlove turned over to the Shupes' certified public accountant all of his invoices, records, checks and other data concerning the costs incurred on the Yale Avenue house (249, 250). These records were delivered sometime in the fall of 1963 (255, 256). More than a year later, on December 16, 1964, Mrs. Shupe answered a written interrogatory by the defendant as follows:

> "Q. Itemize in detail the expenses which plaintiff claims were unnecessarily incurred by defendant as alleged in paragraph number 7 of plaintiffs' complaint.
>
> "A. Plaintiff is unable at the present time to

itemize in detail the expenses which were unnecessarily incurred by the defendant . . . " (27).

At the trial, the plaintiff took two positions: (1) that there was an oral understanding to the effect that the total cost of construction would not exceed $35,200.00, and (2) that Menlove Construction Company did not substantially perform its agreement; therefore it was entitled to receive damages only on a quantum meruit basis. (See plaintiff's trial memorandum, 46, 50).

The court determined at the conclusion of plaintiff's evidence on defendant's motion, that there was no evidence to support plaintiff's first position. The trial judge determined that based upon the admissions of Mr. Shupe on cross-examination, the plaintiff had conceded that there was no oral agreement placing a limit upon the cost of construction (487, 488). Plaintiff has filed no protective motions with respect to such ruling and it must be conceded on this appeal that the trial judge's ruling on this point was correct. The case was submitted to the jury upon special interrogatories submitted by the plaintiff (126, 7). In its answer to the first interrogatory, the jury determined that Menlove Construction Company had substantially performed its obligations under the contract. The factual determination upon this question, therefore, is adverse to the plaintiff's position, and since Mrs. Shupe has made no effort to obtain a new trial, or to otherwise complain of the jury's verdict, it must be

conceded on this appeal that such finding is binding upon her.

The jury determined, notwithstanding the undisputed evidence with respect to the actual costs of Menlove Construction Company, that the costs incurred in the construction of the structure was $43,000.00 (133). It determined further than an offset should be allowed to plaintiff because of defective construction and delay in the sum of $1230 (ibid).

Defendant filed a motion for judgment notwithstanding the verdict to the effect that the defendant's cost plus 10% was in the sum of $49,461.56, or in the alternative, $49,061.56, on the ground that the verdict as returned by the jury was contrary to the evidence and the weight of the evidence, and that the jury failed to follow the court's instructions with respect to the applicable interrogatory, and that the evidence conclusively established said amount to be defendant's costs of construction and that there was no evidence to the contrary. The defendant further moved that the court fix a reasonable amount to be awarded to the defendant as attorney's fees pursuant to the provisions of 38-1-18 U.C.A., and that judgment be entered in favor of the defendant on both of his causes of action in the sum of $30,910.45 plus interest, costs and such reasonable attorney's fees (134). The trial judge denied the motions. Defendant then moved for a new trial solely on the question of damages, upon the grounds, among others, that the verdict of the jury

was against the weight of the evidence and that inadequate damages were given under the influence of passion or prejudice (140). The defendant's position on the motion for new trial was substantially that a great part of the evidence in the case was directed to the question of recovery on a quantum meruit basis and that such evidence was wholly inadmissible and irrelevant in determining defendant's cost plus 10%. The jury's finding with respect to damages necessarily reflected the fact that it had considered evidence in the case which was introduced by plaintiff in support of her claim on quantum meruit in determining the question as to defendant's actual costs of construction plus 10%. Defendant argued that in view of the fact that the jury had determined that the defendant substantially performed his contract and defendant was prepared to concede an offset in the amount represented by the jury's findings, to-wit: $1230., defendant should be awarded a new trial solely upon the question of damages.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO ENTER A JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO THE ANSWER TO WRITTEN INTERROGATORY 2-B IN THE SUM OF $49,461.56, OR IN THE ALTERNATIVE ,THE AMOUNT OF $49,061.56.

The law is clear that where an owner has agreed to compensate a contractor for construction on a cost plus basis, that the contractor is entitled to recover his actual costs plus the designated fee or percentage of costs, whichever formula is applicable. *Shafer et al. v. Lee,* (1917) 64 Okla. 106, 166 P. 94, and see 10 Am. Jur. 15, Building and Construction Contracts, Sec. 20, and 17A C.J.S. 367(2) for general discussion of cost plus contracts.

There is no dispute in the instant case at this juncture of the proceeding that Menlove Construction Company is entitled to be compensated for its costs plus 10% based upon the agreement of November 2, 1962 between the parties (Ex. 1). The crux of the problem is whether the trier of facts should be permitted to stubbornly ignore and refuse to be guided by competent, credible and uncontradicted evidence with respect to the Appellant's costs. This case must be distinguished from *Arnold Machinery Co. v. Intrusion Prepakt, Inc.,* (1960) 11 Ut.(2d) 246, 237 P. (2d) 496. In that case plaintiff had leased to defendant a compressor unit to be used on a construction job. The compressor burned out because of lack of lubrication and overheating. The burning out was due to an obstructed oil line caused by a brass cutting. There was evidence that the plaintiff had included in his statement "numerous and substantial charges for other expenses connected with the repair of the machinery, such as travel, telephone costs, freight and towing of equipment back and forth". This court held that if

the jury was bound to accept plaintiff's evidence at face value and render a verdict exactly in accordance with its claims, the defendant might, in some instances, be "quite at plaintiff's mercy". The court pointed out that the repairs made on the machine "lay solely within the plaintiff's knowledge".

In the instant case, the actual construction costs were controlled by the Shupes. It is undisputed that the Shupes waited until the house was nearly completed and until the contractor obligated himself to his own laborers, materialmen, suppliers and subcontractors before they even notified him that they had any complaints. After requiring Mr. Menlove to extend himself in giving his own credit to subcontractors and actually paying most of them, the finder of fact should not be in the position of putting him at the Shupes' mercy. Mr. Shupe admitted that "there was discussion about everything that went into the place". The costs were incurred under his active direction. The entire conduct of the Shupes is inconsistent with any good faith claim that they seriously contested any of the costs which Menlove Construction Company actually incurred in the construction of this house.

In fact, until the present time, the Appellant has never been advised as to what specific items of cost are being disallowed. The Shupes and their certified public accountant had access to all of the defendant's records between the fall of 1963 and at least the middle of November, 1964. The trial was held in early March,

1965. In the year and a half that the Shupes and their counsel and accountant had access to these records, they were unable to suggest even one item which should not properly be charged as a cost of construction.

The first four billings were paid. Certainly the Shupes cannot be heard to object that the hourly rate of the employees of Menlove Construction Company was objectionable because these rates were itemized in the statements, and the amounts represented by costs based on such rates were approved and paid.

Shupes cannot suggest that any amounts paid for subcontractors were excessive or did not represent actual costs of construction. The record shows that the Shupes actually approved each subcontract, either as to the actual amount of the bid or the method of billing or the precise portion of the construction involved. No particular purpose is served by reference to the evidence with respect to each of these subcontracts. The Appellant has never been advised and does not now know what subcontracts, if any, are objectionable insofar as the Shupes were concerned or insofar as the findings of the jury of the lower court reflect any possible dissatisfaction with any particular item. In this respect, the Appellant is fighting a shadow. His actual costs of construction, as clearly reflected by his records and the proof of payment to his employees and to suppliers and subcontractors, is nearly $6,500 more than he was awarded by the jury. The defendant has no way of knowing what subcontractors should

not be paid. Should Mr. Menlove refuse to pay Amherst Cabinet & Mill, who is now threatening a lawsuit against him for the total amount of the cabinets which were actually selected by Shupes and installed at their request? Should he withhold payment from the painter who worked under the direct supervision of Mr. and Mrs. Shupe and their decorator? Should he attempt to recoup payment by the brickmasons who were selected by the Shupes and who approved the brick and the amount of brick bid? The evidence shows that the Shupes actually consulted with Barnes Electrical personnel and accepted their suggestions with respect to the type of furnaces to be installed in the house and the fixtures that were to be used. Can this court say that Mr. Menlove is obligated to pay Barnes Electric for these items and that the Shupes are not liable to him for them?

The inequity of the lower court's determinations is reflected by paragraph 9 of the judgment (139). Judge Anderson determined that Mr. Menlove was obligated to pay all of the laborers, materialmen and subcontractors in the amounts reflected in the invoices, Exhibits 5 through 12. This amount, without allowance of a single dime to Mr. Menlove for his overhead or profit, would be approximately $45,000. Yet the amount awarded to Mr. Menlove before any deduction reflected by the offset, would be only $43,000. (Compare paragraph 9 of the decree, 139, with the jury's answer to Interrogatory No. 1, 133).

It appeared at the trial that the Appellant was a co-owner of Apex Lumber Company. Apex was organized as a cooperative. Its billing arrangements with Mr. Menlove was on the basis of its cost plus 10%. Five percent of said 10% was represented by the actual expense of doing business of Apex Lumber, and the other 5% was represented by a contribution to capital. The plaintiff's own expert testified that the cost of materials in the house was reasonable and competitive and was not excessive (357, 361). Obviously, therefore, since Apex Lumber supplied the materials of the total invoice value of $7,489.89, the cost of such materials cannot be said to be unreasonable or excessive. Leaning over backwards, however, the Appellant stated in open court at the trial that if the 5% charged by Apex as contribution to capital was not deemed to be a cost within the contemplation of the parties, he would consent to a reduction of his claim in the amount of 5% of the total Apex bill. Thus on his motion for judgment notwithstanding the verdict, he suggested alternatively that the total cost of construction be reduced $400 from the $49,461.56 represented by the billings.

Appellant suggests that the result achieved in this case, if the determinations of the trial court stand, is that Mr. and Mrs. Shupe enjoyed the benefits of a house which was actually paid for by Mr. Menlove in the sum of more than $6,000.

It is submitted that *Arnold Machinery Co., supra,*

does not support this result. The case of *American Scale Mfg. v. Zee* (1951) 120 Ut. 402, 235 P (2d) 361, is more applicable to the present case than *Arnold Machinery Co., supra.* In *American Scale Mfg.* case, the court quoted with approval the following:

> "Where the testimony of a witness is uncontradicted and not inherently improbable, and there are no circumstances tending to raise a doubt of its truth, the facts so proven should be taken as conclusively established and verdict on decision entered accordingly."

It is certainly conceivable that there are situations where a contractor claims reimbursement for costs that were not actually incurred. It is certainly conceivable that an owner may have offsets against a contractor as a result of negligence or construction delays or things of that kind. In the instant case, the jury found that an offset existed against Mr. Menlove in the sum of $1230.00, and while the Appellant does not believe that this amount is justified in view of the failure of the Shupes' evidence to distinguish between purported negligence in construction and the items which were unfinished because Shupes prevented the completion of the project, the Appellant does not quarrel with the $1230 figure.

Appellant suggests, however, that the law does not and should not sanction the conduct of the Shupes in the instant case. The Shupes determined the contractor's costs; they selected the plan of construction;

they were responsible for certain increased expenses by reason of the inadequacies of the original plan and changes in the plans made during construction; they selected the materials and all the materials they selected were the most expensive that were available. They knew the actual costs of construction as the various phases were decided upon and completed. Then when the job was done, after they had moved into the house, and after they knew that the defendant had obligated himself to pay contractors and laborers and materialmen for the building which they had chosen, they decided to attempt to impale defendant upon his own laxness in failing to insist upon payment as work progressed during construction.

Appellant suggests that the jury's determination is totally arbitrary. Appellant does not suggest that the jury was "obliged to follow abjectively the [defendant's] evidence". (cf. *Arnold Machinery* at 497 Pacific Reporter). But the jury is required to follow *some* evidence. If there were specific individual items of cost which the defendant should not be awarded, or which were not incurred, or as to which there was a dispute in the evidence, the jury might well have reduced from the contractor's claim such items which were the subject of such evidence or dispute. But the Shupes presented no such specific evidence. There were no specific items ever placed in dispute. If such items were placed in dispute it is impossible to come to a rational conclusion that the jury resolved the dispute in favor of Shupes. The jury could not find from the

evidence that Mr. Menlove's costs just happened to be the round figure of $43,000. Appellant suggests that the finders of fact in the instant case simply imposed an unreasoning imposition of their will upon the defendant and that such conduct "is the essence of tyranny and the antithesis of justice". (*Arnold, supra,* at 479 Pac.).

The case was presented to the jury on the theory that if the defendant substantially performed the obligations described under the contract, he was entitled to recover his costs plus 10%, less any offsets or credits which the jury determined were to be allowed the plaintiff. There was no actual issue with respect to plaintiff's costs plus 10%. The posture of the parties and the position of the court was made clear from the conduct reflected in the record in connection with the ruling on defendant's motions and the instructions given to the jury.

At the conclusion of plaintiff's evidence, for instance, defendant asked the court to determine that as a matter of law there was no competent evidence from which the jury could find that the defendant had not substantially performed his contract and that the defendant therefore should be awarded judgment in the amount represented by his invoices, or in the alternative, the amount of the invoices less 5% of the Apex Lumber billing. The court indicated in ruling on the motion that he was submitting the question of substantial performance to the jury. The court stated

explicitly, however, "If the jury should determine that there was substantial performance, why then there would be only the question of offset." (489). In the court's Instruction No. 10 the jury was advised that Menlove Construction Company had the burden to show by a preponderance of the evidence that it substantially complied with the terms of the contract. If that burden was satisfied, then the plaintiff had the burden of showing by a preponderance of the evidence that the plaintiff is entitled to some offsets or credits against the cost of construction plus 10% thereof which Menlove Construction Company is entitled to receive under the terms of its agreement (103). Substantial performance was described in Instruction No. 19:

> "A building contractor is entitled to recover under the terms of his contract only if he has substantially performed his part of the bargain. In this case the defendant's performance has been put in issue, and the burden of proof is upon the defendant to establish that he did perform substantially as agreed, or that he was prevented from doing so by plaintiff. To establish substantial performance, the defendant must prove, by a preponderance of the evidence that he (1) exercised reasonable skill and judgment in letting subcontracts, in performing his own work, and in supervising his workmen and subcontractors; (2) performed the construction in a reasonable time; (3) rendered statements reasonably; and (4) exerted his best efforts toward constructing the Shupe residence at the most reasonable cost possible." (112).

Again in Instruction No. 20, the jury was advised that if it determined that defendant construction company had substantially performed the written contract, that it was entitled to receive its costs of labor and materials plus 10%.

> "On the other hand, if the defendant fails to establish by a preponderance of the evidence that he substantially performed the written contract between the parties, then the defendant contractor is not entitled to recover the cost of labor and material plus 10% agreed to but may recover only the reasonable cost of the materials and labor which have been incorporated into the home, and without allowance for the 10 fee% of the contractor." (113).

It is, of course, true that the defendant had the burden of proving the amount of his costs. But in the instant case, the defendant's invoices were actually introduced by the plaintiff (172). Plaintiff actually proved defendant's costs herself. She proved defendant's method of recording invoices and time costs and she proved that the same kind of records, including time records, were kept on the Shupe job as on other construction projects of the defendant (289). It is hornbook law that a party is bound by its own evidence. 32 CJS p. 1104, Evidence, Section 1040. The same rule applies where the evidence is adduced from an adverse witness, particularly unless such testimony is contradicted by *credible* evidence (ibid, p. 1107, et seq. Sec. 1040 (b). Thus plaintiff effectively has conceded the amount of the cost plus 10%.

The parties and the court all proceeded on the assumption that if the contractor substantially performed, as the jury found he did, his damages were liquidated. No evidence was introduced to show or to tend to show that the costs reflected by these invoices were not actually incurred. On the contrary, the evidence adduced by Mrs. Shupe was all directed toward the point that defendant had not reasonably performed the contract and that he was entitled to recover only on a quantum meruit theory. The trial court conceded on the defendant's motion for a directed verdict that "If the jury should determine that there was substantial performance, why then there would be only the question of offset" (489).

Inasmuch as the jury found without equivocation that Menlove Construction Company substantially performed the obligations described under the contract, the trial court should have granted defendant's motion for a judgment notwithstanding the verdict in the total amount of defendant's costs plus his 10%. Appellant admits, for the purpose of argument on this appeal, that the jury's finding of allowing plaintiff an offset in the amount of $1230 is supportable from the evidence and that such amount should be deducted from the net judgment awarded against the plaintiff.

POINT II.

THE COURT ERRED IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NUMBER 3 AND 4.

Defendant requested that the court give instructions number 3 and 4 as follows:

"Instruction No. 3

The defendant in this action, Roy A. Menlove, entered into a written contract with the plaintiff, Ruth W. Shupe, on the 2nd day of November, 1962, which has been received in evidence in this case as Exhibit 1. This agreement was in the nature of a cost plus contract. The parties agreed that the defendant was to receive for his services as a general contractor in building the house in question in this litigation all of his costs plus a fee of 10% of the cost of construction. Your sole duty and prerogative as jurors in this lawsuit is to determine the total cost of construction of the house and to add 10% of such cost, such total being the amount which the defendant is entitled to recover on each of his causes of action."

"Instruction No. 4

You are instructed that there is nothing illegal or improper about a cost plus contract. If the owners of the premises agree to pay a contractor his entire costs of constructing a house plus a percentage of such costs for the contractor's services, the contractor is entitled to recover all of such costs plus the percent agreed upon. In the case before you, the evidence is uncontradicted that the defendant's costs are in the sum of $..... The agreement between the parties provided that the defendant was entitled to recover these costs plus an additional 10% thereof for his services."

(Defendant offered to fill the blank in Instruction No. 4, but since the court indicated that he would refuse

the instruction, the blank was not completed at the time.)

The jury determined that the defendant substantially performed the contract. Appellant submits, therefore, that Instruction No. 3 is a correct statement of the law with respect to the subject matter involved, and that the instruction should have been given. Certainly with respect to interrogatory 3 the jury should have been instructed directly and succinctly that their sole prerogative was to determine the total cost of construction and to add 10% to such costs. The jury should have been instructed in substance and effect that they should not be permitted to speculate as to what the cost might have been by some other person in building the house. In view of the fact that evidence was received in the case on a quantum meruit theory, the giving of this instruction in the instant case was of particular significance.

Appellant submits that Instruction No. 4 correctly and succinctly states the law applicable to the posture of the parties in the instant case. Appellant suggests that the Respondent will not even argue upon appeal that the contractor is not entitled to recover costs plus 10% in the instant litigation. The defendant was entitled to a precautionary instruction that there is nothing illegal or improper about a cost plus contract and the jurors should have been aware of the legal proposition that when an owner agrees to pay a contractor for the costs plus a designated percentage

that the owner is bound to make such payment. The contractor certainly cannot be led down a primrose path into believing that he will be compensated for the items actually selected by the owner and then be required to pay for them himself. The advantages in cost plus contracts are to be weighed against the disadvantages at the time the contract is made, not after a house is constructed. In view of the fact that there has been some popular discredit of cost plus contracts, particularly in government projects in this area, the failure of the court to give the instruction in the instant case constituted prejudicial error.

POINT III.

THE COURT ERRED IN FAILING TO ADMIT INTO EVIDENCE DEFENDANT'S PROPOSED EXHIBIT NUMBER 67.

The plaintiff introduced evidence on her theory of the case with respect to the quantum meruit theory of recovery. Her expert witness was substantially impeached upon cross examination but the testimony he gave could easily have the effect of diverting the jury's attention from the real issue in the case, namely, the cost of construction incurred by Mr. Menlove.

To assist the jury in understanding the actual costs of construction as they related to the different phases of the building operation, defendant offered Exhibit 67. It is filed with this brief as Appendix A

(866, 867). This exhibit is an analysis of all of Mr. Menlove's costs applied to all of the various phases of construction. It was prepared by Max Menlove, the superintendent on the job, in conjunction with his study of the invoices and time records in existence and his knowledge of what phases of construction were completed during the times reflected in the original records. This exhibit makes more understandable the actual invoices because it relates the labor and material costs in the invoices to the particular phases of construction described in the exihbit.

Plaintiff's counsel objected to the exhibit on the ground that it was hearsay and that it would give undue emphasis to the testimony of the witness on the question of damages (867). Appellant submits that the objection is invalid under the circumstances of this case. Section 78-25-12(5) U.C.A. provides that an exception exists to the parole evidence rule:

> " . . . when the original costs of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

Exhibit 67 arranges the information contained in Exhibits 5 through 12 in an orderly fashion so that it could have been understood by the jury. It is submitted that the trial court's error in refusing to receive the exhibit was particularly prejudicial in the instant case, inasmuch as the jury determined that Mr. Menlove substantially performed his obligations. The sole and

critical remaining question was simply the cost of construction. The jury should have been afforded an opportunity to have a compilation of the numerous invoices, time sheets and other data contained in Exhibits 5 through 12 for use in its deliberations. Prejudice is particularly apparent from the result in the instant case, since it is clear that the jury did not and could not have arrived at its figure of damages from rational considerations or objective examination of the evidence itself.

POINT IV.

THE COURT ERRED IN FAILING TO AWARD DEFENDANT REASONABLE ATTORNEY'S FEES.

Section 38-1-18 Utah Code Annotated provides that in any action brought to enforce a lien under Chapter 1 of Title 38, the Mechanics' Lien chapter, "the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in this action." In the instant case defendant's counterclaim was brought under the statute. The counterclaim was anticipated by the complaint; in fact, the complaint was only a procedural device to be first in court. Plaintiff knew full well she was indebted to defendant; she didn't know, so she said, how much she owed. Plaintiff had never offered to pay more than $35,200 prior to the bringing of the action. She had not, in fact, actually tendered any sum

into court and she steadfastly maintained during the trial that she was not bound by the written agreement she signed with the defendant.

The trial judge refused to award attorney's fees on the theory that the contractor was not totally successful in that the jury's answer to Interrogatory 2-B was approximately $6500 less than the amounts received by his invoices and costs. It is submitted that even if this court should determine that the jury's verdict can stand, Mr. Menlove was the successful party to the extent of substantially $8,000.00.

The ruling of the trial court would mean that in any case where a contractor attempted to enforce a lien under the statute, if he should be awarded less than the amount he claimed, he would not recover an attorney's fee. Appellant suggests that such result is not in accordance with the spirit or intention of the statute. The result does not conform with the risks undertaken by the parties when the agreement was executed. The interpretation of the act by the trial court substantially thwarts the intention of the Legislature in that it denies a contractor a reasonable attorney's fee where he is required to litigate the lien. Such an interpretation places a premium upon refusing to pay the amounts owed to contractors, materialmen, laborers and others for whose benefit the Mechanic's Lien statute was designed. In the instant case, the very ambivolence and uncertainty of the nature of plaintiff's claim required far greater effort in the preparation of the trial than

would have been necessary if the plaintiff had even as much as indicated what particular costs she objected to. The reasons for the allowance of a fee are particularly cogent.

POINT V.

THE COURT ABUSED ITS DISCRETION AND THEREFORE ERRED IN FAILING TO GRANT TO DEFENDANT A NEW TRIAL SOLELY ON THE QUESTION OF DAMAGES.

Appellant has established in Points I, II and III of this brief that the trial court committed error. Appellant was, therefore, entitled on the grounds argued in prior portions of the brief, to a new trial pursuant to the provisions of Rule 59. The new trial should be granted only to the issue of damages since Mrs. Shupe is foreclosed on the two substantial points involved in her presentation of evidence in the instant case, to-wit, her contention that there was an agreed limit on the amount of costs plus the applicable percentage, and that Mr. Menlove did not substantially perform the obligations under the contract.

Aside, however, from the errors suggested in the first three points of the brief, Mr. Menlove should be awarded a new trial upon the ground that the amount of the jury's verdict was inadequate. In *United Press Associations v. National Newspapers Association* (CCA 8, 1918) 254 F. 284, the Eighth Circuit reviewed a situation where the substantive rights had been deter-

mined in prior proceedings. The jury had returned a verdict which ignored the instructions of the court and awarded damages in a nominal amount; whereas the evidence showed that the plaintiff was entitled to receive substantial damages. The trial court had failed to grant a motion for a new trial. The Circuit held that the failure to grant a new trial was reversible error.

> "It is our opinion that the trial judge, being an integral part of the court, charged with the duty and responsibility of seeing that justice was administered between the parties, should have granted a new trial, and that his failure to do so was an abuse of his discretion."

In the *United Press Associations* case the court referred to the fact that there was certain evidence from which the jury may have been confused with respect to the amount of damages due. In that case the vice president of plaintiff had sent a telegram before the suit was instituted expressing his view that damages would be only in the sum of $500. The court held that such telegram was not binding upon the plaintiff and could not be used to reduce the sum of damages actually proved to said amount.

In the instant case there was evidence from which the jury could have been substantially confused with respect to the damages recoverable under the cost plus agreement. Counsel for Mrs. Shupe elicited information from one of the witnesses from which it appeared that certain materialmen and subcontractors had not

been paid by Mr. Menlove. The amount due to these subcontractors was approximately $6,500.00. (257). Perhaps it is no accident that the jury's verdict was approximately $6500 less than the total amount reflected by the invoices (Ex. 5-12 inclusive). Appellant submits, moreover, that the testimony of Carl Ohran could have led the jury into error in the matter of determining the contractor's cost plus 10%. Mr. Ohran was called as an expert witness by Mrs. Shupe for the purpose of making an estimate of the reasonable cost of construction of the house. Such evidence was totally irrelevant to the question of the costs of Menlove Construction Company. It did not take into account the numerous and repeated changes made by the Shupes during the course of construction, nor was the witness able to state what portion of the figure he allocated for labor upon the various labor costs that went into the building. However, his testimony was before the jury at the time they were considering damages. As in the *United Press Associations* case, this kind of evidence might easily have confused the jury on the precise issue they were called upon to determine.

In *Boden v. Suhrmann* (1958) 8 Ut. (2d) 42, 327 P.(2d) 826, the majority of this court held that where "the verdict is outside the limits of what appears justificable under the evidence, to the extent that it should not be permitted to stand . . . the remedy is a modification of the verdict to bring it within the evidence; and the adverse party is given the choice of accepting it or taking a new trial." The majority's opinion in

example number 2 described a situation where a defendant was liable and there was no dispute as to the amount of the damages. The court indicated that in such event, the court should order the verdict increased to the correct amount or permit a new trial.

Appellant recognizes that there was a vigorous dissenting opinion in the *Boden* case, but Appellant suggests that the relief which the Appellant seeks in the instant action is within the rationale of both the majority, the concurring opinion, and the dissenting opinions.

In the case at bar, the liability of the owner of the home under the cost plus contract was positively established by the jury's answer to Interrogatory No. 1. As stated in Point I of the brief, the case was tried upon the theory that if the contractor's performance substantially satisfied the contract he was entitled to the full amount of his claim less any offsets which the owner established. Such offset was found by the jury and is not disputed here. Appellant suggests that the inconsistency between the amount awarded to the Appellant as his costs plus 10% and the jury's response to Interrogatory No. 1 indicates that the jury was confused or misled upon the question of damages or that its verdict indicates passion or prejudice, and that the trial court should have granted a new trial pursuant to the provisions of Rule 59 of the Utah Rules of Civil Procedure. cf. 39 *Am. Jur.* p. 155, New Trial Section 148 and authorities cited.

SUMMARY AND CONCLUSION

This is a case where the jury fairly and properly determined the substantive rights of the parties but became confused and misled upon the appropriate measure of recovery. Since the case was tried upon the basic theory that if the jury found that the defendant contractor substantially performed his obligations he would be entitled to the amount of costs which he claimed, plus a percentage thereon, and inasmuch as there was no objection to any single item of cost, the trial court should have corrected the jury's verdict and awarded an amount in accordance with the contractor's claim on the defendant's motion for a judgment notwithstanding the verdict. Failing this, the court should have granted a new trial on the sole issue of damages so that the issues could have been tried in an atmosphere free from the obfuscating evidence involved in a determination of the substantive questions.

In any event, the defendant is entitled to an award of attorney's fees under Section 38-1-18 of the Utah Code. Appellant submits that even if this court should decide that it is unable to determine from the record the defendant's actual costs of construction, defendant should be awarded a new trial where the attention of the jury could be focused solely upon what would then be the only relevant issue.

RESPECTFULLY SUBMITTED this 29th day of November, 1965.

GEORGE M. McMILLAN and
FRANKLIN D. JOHNSON

1020 Kearns Building
Salt Lake City, Utah

Attorneys for Defendant-Appellant

APPENDIX A

CONSTRUCTION COST BREAKDOWN

		Cash cost
A. Clearing and Excavation of Lot:		
1. Menlove Constr. (Cat., clearing lot, loading soil, breaking & loading old foundation & grading)	951.63	
2. Trucks (hauling trees, soil, found.)	954.60	
3. Rulon Denney (breaking found. & ftg.)	236.00	
4. Menlove Const. (labor & supervision 2500 yards moved)	295.11	
		2,437.34
B. Drain Around and Under House:		
1. Menlove Constr. (labor & suprvn)	855.00	
2. Int. Pipe & Ceramics (drain pipe)	133.76	
3. Utah Sand & Gravel (drain gravel)	166.63	
4. Menlove Constr. (hauling gravel & excavated soil)	228.00	
5. Menlove Constr. (hauling gravel)	52.00	
		1,435.39

C. Subcontractors and Material Suppliers On Job:

1. Heatrite Eng. (hood kit fan)	61.40
2. Terrazo Rods (front entry)	12.95
3. Flowers Plumbing (sewer & water line installation)	337.00
4. Salt Lake Mill (oak treads for stairway)	186.85
5. Oscar Chytraus Co. (garage door)	131.02
6. Formatop (kit. cabinet tops)	268.00
7. Otto Buehner (fireplace hearth)	97.75
8. Const. Spec. Co. (skylight)	26.06
9. Morrison Merrill Co. (carport beam)	125.44
10. Heatrite Eng. Co. (GI flashings & sill covers)	45.54
11. Builders Mill (mill & farbicate redwood beams, labor only)	216.30
12. Rulon Denney (break out old ftgs.)	10.50
13. Frontier Oil & Sanzo Coal (hay & oil to protect concrete & thaw ground)	5.43
14. S & R Found. Spraying (waterproofing)	65.00
15. Menlove Const. Co. (final exc. of found., backfill & grading Cat. costs)	339.00
16. Menlove Const. (dump truck, hauling soil, lumber & trash)	293.75

17.	Gibbons & Reed & Red-E-Mix (total concreet mtls, ftg., found., flatwork)	2,169.23
18.	D. B. Mitchell (plumber)	2,275.00
19.	Barnes Heating	1,918.00
20.	Barnes Electric (no lighting fixtures included)	1,123.00
21.	Fuller Trimview (glass, windows & sliding doors)	1,158.91
22.	Durafloor (floor coverings)	784.22
23.	Menlove Constr. (labor to lay floor tile basmt. apt.)	125.20
24.	Elias-Morris Co. (ceramic tile)	588.00
25.	Amherst Cabinet Co. (2 kitchens & linen closet)	1,225.70
26.	Fred Bleazard (sheetrock, double laminated)	2,066.54
27.	Western Steel (angle irons)	51.32
28.	Western Steel (ftg. & found. reinforcing steel)	738.61
29.	Clark Roofing	480.00
30.	Martin Thompson & 2 employees (painting, labor only)	1,695.00
31.	Menlove Constr. (labor flat concrete)	1,292.51
32.	Menlove Const. (labor circular stairway)	89.00
33.	Menlove Constr. (labor to place, cut, handle & tie reinforcing steel in found.)	669.56
34.	Menlove Const. (labor to build, pour, & strip, ftgs & found.)	936.00

35. Menlove Constr. (labor to do brg. partitions, floor system, roof system, interior & exterior partitions)		3,506.18
36. Menlove Constr. (labor for carport, cornice, window frames, balcony, work bench & concrete window wells)		1,505.00
37. Menlove Const. (labor for front entry, window trim, railing, interior finish, paneling & hardware)		1,558.63
38. Apex Lumber (all lumber, finish mtl., trim, doors, hardware & paint)		7,489.89
39. Menlove Const. (Cat. cost to hoist concrete into found. & help move concrete trucks)		184.09
40. Jos. Curtis & Sons (brickwork)		3,660.00
D. Retaining Wall, Hand Esc. and Hauling to Rear of House:		
1. Menlove Const. (labor & supervision)	950.00	
2. United Rent-All (post hole digger)	4.80	
3. Pole Line Supply Co. (wall anchors)	89.12	
4. Apex Lbr. (redwood wall mtl.)	408.82	
5. Menlove Const. (Cat. exc. & hauling)	98.00	
6. Menlove Const. (truck hauling soil)	30.00	
		1,580.74
TOTAL CASH COST		44,965.06
10% overhead & profit		4,496.50
TOTAL DUE		49,461.56