1965

Apex Lumber Company v. Comanche Construction Company, Raymond Clark, Moroni Feed Company, D.A. Shand, Howard Willardsen, and Richard Jensen : Respondent's Brief

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AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

APEX LUMBER COMPANY,
Plaintiff-Appellant

-vs-

COMANCHE CONSTRUCTION COMPANY, RAYMOND CLARK, AND MORONI FEED COMPANY,
Defendants-Respondents

APEX LUMBER COMPANY,
Plaintiff-Appellant

-vs-

COMANCHE CONSTRUCTION COMPANY, RAYMOND CLARK and D. A. SHAND,
Defendants-Respondents

APEX LUMBER COMPANY,
Plaintiff-Appellant

-vs-

COMANCHE CONSTRUCTION COMPANY, RAYMOND CLARK and HOWARD WILLARDSEN,
Defendants-Respondents

APEX LUMBER COMPANY,
Plaintiff-Appellant

-vs-

COMANCHE CONSTRUCTION COMPANY, RAYMOND CLARK and RICHARD JENSEN,
Defendants-Respondents

Case No.

10414

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

The Respondent agrees with the Appellant's statement as to the kind of case. Defendants Moroni Feed Company, D A. Shand, Howard Willardson and Richard Jensen denied liability for the reason that the plaintiff-appellant so mixed up materials between the thirteen different pole barn construction jobs that it was not possible to determine which materials went into which pole barn. Each defendant claimed that he had paid for all the material that went into his building. Each Respondent claimed that the appellant was further estopped from its claims against the said Respondent because of a telephone conversation advising respondents to make payment to Comanche Construction Company.

DISPOSITION IN LOWER COURT

The Respondent's generally agree with the Appellant's statement as to the disposition in the lower court. The parties named as Comanche Construction Company and Raymond Clark were never served in any of the four cases and neither have ever entered an appearance.

The four cases were joined for purposes of trial and were tried together before a jury. The Court propounded six written questions in each case and the Jury answered the questions in each case generally the same. The answers were to the effect that the Appellant did furnish the materials that went into the buildings, that the materials had been paid for and that the plaintiff-appellant received a telephone call from respondents before they made final payment, asking if payment should be made to Comanche or held up. That the Appellant through a Mr. Rasmussen whom the jury held was authorized to act, advised the Respondents to go ahead and pay Comanche Construction Company for the buildings, which they did.

RELIEF SOUGHT ON APPEAL

Respondents' deny that appellant should have a reversal of the lower court's judgment which was based upon special verdicts submitted to the Jury. The entire course of conduct by appellant with Raymond Clark and Comanche Construction Company in the 13 constructed pole barns shows a confusion

of material and payments.

The appellant's specific conduct with the Respondents is an adequate basis for appellant's legal remedies to be estopped in equity. The Jury after hearing all the evidences so found by its answers to special verdict, as did the lower court in entering its decision of no cause of action in each of the cases.

STATEMENT OF FACTS

The Respondents agree generally with the statement of facts set forth in Appellant's brief.

Thirteen pole barn buildings were constructed starting and ending with the dates stated. The plaintiffs witness Guy Pittman, the Construction Supervisor, testified that men and materials were shifted from one job to another. (T-80)

MR. TIBBS RE-CROSS EXAMINATION OF GUY PITTMAN.

"Q. You had fourteen men working for you, didn't you?
"A. Approximately, Donald.
"Q. Your primary interest was keeping this labor moving?
"A. That is right.
"Q. You were moving these men and these trucks and this material to keep them busy. This is the primary purpose, wasn't it?
"A. That is right.
"Q. And you kept them busy whether you had to move some material over here or material over there or anywhere you needed it, didn't you?
"A. That is right.

Other witnesses testified that the materials were moved between the jobs — Charles DeVon Beck (P. 179 line 27), Mark Christensen testified he loaned Comanche Construction Company a truck which was used to haul materials between jobs (P. 186), Cliff Blackham saw materials moving on trucks (p. 191). The Respondents, Dick Jensen (p. 213-217), Howard Willardsen (p. 223-224), Arthur Shand (234, 235, 240), all saw materials moved to and from their premises.

The three Respondents (Shand, Jensen and Willardsen) pole barns were the same size. The Respondent Moroni Feed Company's pole barn was substantially larger, yet the amount

appellant claimed from Moroni Feed Company was smaller than the amounts claimed from some of the other Respondent Defendants. In answer to questions concerning this problem the General Manager of Appellant stated: (T. 76)

CROSS EXAMINATION OF C. H. CHILD BY DON V. TIBBS:

"Q. (By Mr. Tibbs) Well, in any event Moroni Feed is fifty percent, or fifty feet longer in length, plus it also has the addition on; right?

"A. Right. It should cost more money.

"Q. And so if the claimant was saying that there was four thousand six hundred dollars, roughly, or let's make it exact, four thousand six hundred seventy-seven dollars eighty cents worth of materials in the Moroni Feed Company building, and was saying there was four thousand nine hundred forty dollars worth of materials in the Dick Jensen building there is something wrong. Isn't that true?

"A. It doesn't add up. The cost of your material in these buildings costs roughly between sixty and sixty-five cents a square foot.

"Q. Especially doesn't add up when you analyze the extra fifty feet, plus the extra thirty-two feet, does it? Well, it doesn't add up, does it?

"A. No."

The appellant's basis for holding the respondents liable for their materials was on the application of payments received from Raymond Clark, doing business as Comanche Construction Company. One of the last pole barns constructed was for Bruce Barton. He was never sued by Appellant. Seven other law suits were filed. Mr. Child, Appellant's General Manager applied an $8000.00 payment received from Comanche Construction Company on the Barton obligation, (a building constructed after the Respondents' buildings were completed), rather than on Respondent's alleged obligation. (T. 157). Mr. Bruce Barton testified (T. 188) that he paid for his pole barn just like the other farmers, and that he did not ask for lien waivers. (T. 189, Line 7).

Mr. Child, Appellant's General Manager, testified on cross examination that the payments were applied to the old-

est job except for Barton payment. (T. 133, 134). His testimony at time of trial was compared with his testimony given at the time of an earlier deposition on September 8, 1964. (P. 157.)

"Q. (By Mr. Tibbs) Now, Mr. Child, on your direct testimony you indicated that as to the application of this eight thousand dollars that Mr. Clark came in to your office in the Spring of 1961 when that eight thousand dollars was paid, and you had a conversation with him wherein at that time he told you that eight thousand was to be applied against the Barton obligation?

"A. That is correct.

"Q. Is that — and that Barton obligation was the last job. Isn't that right?

"A. No. The Barton - -

"Q. Other than these two northern jobs?

"A. Yes.

"Q. And in the event he hadn't been in the office and hadn't said to apply it that way, then it would have applied earlier on the chain and would have wiped out, according to your diagram and your exhibit that was introduced, for all practical purposes, the Shand and the Willardsen job. Isn't that right?

"A. It woul.d And it would have put Barton in their place.

"Q. That is right. Now in September 8, 1964, I took your deposition in this matter. Isn't that true?

"A. That is correct.

"Q. And I asked you about the application of payment in that deposition to your recollection. Isn't that true?

"A. That is correct.

"Q. And isn't it a fact that I asked you specifically concerning this, and all you would answer to me that it was just a possibility that this was the case and that you at no time told me that there was a direct conversation concerning this matter. Isn't that true?

"A. I don't recall telling you that there was no conversation about the matter.

"Q. All right. May I read the deposition to you. This is on, I am on page 22 of the deposition starting at the last sentence - - - **(down to page 159 line 7)**

" 'Q. I assume by that you said, then, that the reason the other, that this last group of jobs, this last six, which also includes Barton and Mark Christensen, as I recall, the reason that they weren't sued, was because at the time the money was sent a specific lien waiver was asked upon those jobs. Is that correct?

" 'A. Well, this is a possibility.

" 'Q. Either that or the jobs were ordered before these particular jobs were ordered?

" 'A. Right.

" 'Q. The others?

" 'A. Yes.

" 'Q. When these invoices or these cheks were received from Clark or Comanche Company or Comanche Lumber, did the checks themselves specify on whose account they were to apply?

" 'A. They were not.

" 'Q. None. Is that correct?

" 'A. Only the ones in which he requested lien waivers, and he would say this check includes payment for the particular job and please furnish me a lien waiver on it. I assume, that is the way you said, I assume.

" 'Q. So that that would have been a separate letter correspondence rather than by the check itself. Is that correct?

" 'A. That is correct.

" 'Q. So that once again the drafts or checks themselves individually would not specify any particular account which they were to be applied against?

" 'A. Correct.

" 'Q. And it was correspondence which came with the draft?

" 'A. Yes.

" 'Q. Do you have this correspondence?

" 'A. No. I do not.

" 'Q. Is that your testimony?

" 'A. It is.

"Q. (By Mr. Tibbs) Let me just read the next question and answer. After you said no, I do not, I said:

"'Q. Did you return it or did you keep it?

"'A. Well, this happened four years ago and I am not sure. Sometimes it would appear on just a hand-written note with check, please mail me a lien waiver for such and such a job, and I just didn't keep it at all, where it may have been in a letter relative to some other item, and I just didn't keep all that correspondence.

"'Q. The way you answer this indicates that maybe the check came in an envelope and there was a sheet of paper with the check which says please send me a waiver for Bruce Barton's job?

"'A. That is a possibility.

"Q. In any event now you say it didn't happen that way at all. Now he came specifically in to your office and he handed you the check for eight thousand dollars and he said apply this on Bruce Barton's account. That is correct? That is your testimony now?

"A. Regarding the eight thousand dollar check, Mr. Clark brought that in hand to my office.

"Q. That is in variance with your prior testimony, is it not?

"A. No. I think it is not.

Obviously this evidence shows a misapplication of the $8,000.00 payment. The manager Child was flock shooting whichever builder-farmer he thought he could get payment from. His first testimony was that he applied the $8,000.00 based upon correspondence, (which was never in existence), then at the time of trial he applied the payment on Barton Pole barn based on an oral conversation, which Barton has no knowledge of and which was never requested by Barton from Comanche Construction Company.

There was also evidence presented wherein the appellant by its General Manager C. H. Child received two Pro-

missory Notes. The Respondents contended these notes were taken in satisfaction and payment of the Apex account with Raymond Clark, doing business as Comanche Construction Company. The Court refused to submit this to the Jury over the objection of Respondents' counsel. See Instructions that were denied.

The Jury undoubtedly considered this in its Answer to Special Verdict question No. 3. However, even if they did and should not have, there was sufficient other evidence to substantiate the basis of their answers to the question. This was so found by the court.

Although the Respondents rely particularly upon the doctrine of estoppel it is noted that based upon the circumstances herein involved the question of payment because of the acceptance of the Promissory notes should have been submitted to the Jury. Originally appellant was dealing with Raymond Clark doing business as Comanche Construction. After the transaction occurred a corporation was formed known as Comanche Construction Company, Inc. The account between Clark and Apex Lumber was in dispute as shown by the Exhibits 47 and 48. Two Promissory Notes were delivered by the third party, Comanche Construction Company, a corporation, for a sum certain. See Exhibit 35 and 36. These notes provided for interest different from the open account and were given as security. The fact that they were not subsequently paid should not say they were not accepted as payment, and it should have been a question for the Jury to determine, if, in fact, they had been taken as payment. This the Jury apparently did in its answer to question No. 3. The fact that they did should not now be determined to have affected all other payment and evidence presented in the case.

There was also evidence to the effect that some of the appellant's billings were not correct as to the materials that went into the particular buildings. Appellant's testimony as to the nails is a good example. (T. 138)

CROSS EXAMINATION OF APPELLANT GENERAL MANAGER CHILD.

"Q. So that on this particular job there is roughly four hundred pounds of particular nails which on the other job there is about one hundred pounds. Is

that right? Is that right?

"A. That is correct.

"Q. And then there is another four hundred pounds of nails just below that, where on the other jobs there is what, three hundred pounds?

"A. That is correct.

"Q. So there is quite a substantial variance of nails between Richard Jensen's job and Art Shand's job, for example, isn't there?

"A. Yes. And these nails would be twenty-five dollars per keg, so there is seventy-five dollars difference worth of nails on the two.

"Q. But the point is, and you understand this point, that if the nails didn't go into Mr. Jensen's job then he shouldn't have to pay for the nails, should he?

"A. No.

"Q. Not under this theory that you are proceeding under. Actually in this theory, he should only pay for the materials that went in that have not been paid for. Isn't that true?

"A. That is correct.

The Respondents testified, Arthur Shand (T. 236-238), Howard Willardsen, (T. 224, 225, 230, 232), Richard Jensen (T. 214, T. 219), and Moroni Feed by Clifford Blackham (T. 193, 195, 198, 204, 205, 207, 208, 209, 210, 212.) that they became concerned about Comanche Construction Company not paying their suppliers and labors, consequently, before making their final payment the Respondents (Moroni Feed, Howard Willardsen and Art Shand for himself and Richard Jensen) in Clifford Blackham's office phoned Appellants and were advised by H. J. Rasmussen, of Appellant Company, who had issued a prior lien waiver on Clifford Blackham's personal pole barn job, to make their payments to Comanche Construction Company. In the event Appellant hadn't advised them to so pay, they wouldn't have made the payments.

The appellant's General Manager, C. H. Child testified that appellant employed H. J. Rasmussen as a bookkeeper, but that he did not have any authority to issue lien waivers. (T. 149, line 11)

TIBBS CROSS EXAMINATION C. H. CHILD:

"Q. Mr. Child, did Apex Lumber and Hardware Company have a man by the name of H. R. Rasmussen employed for it in 1960 and '61?

"A. Mr. Rasmussen was a bookkeeper at Apex Lumber.

"Q. And so he was an employee working in the office. Is that right?

"A. That is correct.

"Q. Did he have authority to issue lien waivers?

"A. He did not.

(Thereupon, Defendants Exhibit No. 43 was marked for identification.)

"Q. (By Mr. Tibbs.) I hand you what has been marked as Defendants. Exhibit No. 43, and ask you what that is?

"A. Receipt and waiver for one dollar for, doesn't say to whom. Doesn't say. Oh, Comanche Construction Company. It is on there.

"Q. And it has for Comanche Construction for Clifford Blackham job. Isn't that what it says on it?

"A. That is correct.

"Q. So at least in this case he had authority to issue a lien waiver for this particular job. Isn't that true?

"A. Yes it is.

There were two Exhibits No. 43 and No. 53, both lien waivers which were signed by Appellant (H. J. Rasmussen), one was issued to Clifford Blackham (Exhibit No. 43) for his personal job and the other was issued to Ray Olsen (Exhibit No. 53), for his pole barn construction.

Mr. Child, Appellant's General Manager, reluctantly admitted that it might have been done at his direction. (T. 270)

"Q. Yes. Now you also stated on rebuttal, as I understand it, that Mr. Rasmussen had no authority to sign these lien waivers?

"A. I also stated on direct testimony he had no authority.

"Q. But be that as it may, we have two jobs here, at least as to Cliff Blackham's and as to Mr. Olsen's, that he did execute a lien waiver. Is that true?

"A. Signed on the same day and obviously at my direction.
"Q. So that at least for these two jobs he had authority to execute lien waivers. Is that right?
"A. Authority delegated by me.
"Q. But that doesn't show on the lien waivers, does it?
"A. It is not.
"Q. Is it your position that these lien waivers are no good then as to these two jobs?
"A. It is not.
"Q. So you are holding them out as having authority to do it, and did at that time, aren't you?
"A. If I directed it.
"Q. In November, at this time these two liens waivers were signed, you held him out to these individuals as that he had authority to execute lien waivers, did you not?
"A. This is December, Mr. Tibbs.
"Q. All right. In December of 1960, when these two lien waivers were issued, you held them out and Apex Lumber held them out as having authority to issue lien waivers?
"A. In these two cases.
"Q. Well, you held him out, didn't you?
"A. In these two cases.

The Lien Waivers for two of the 13 pole barns constructed were issued by H. J. Rasmussen for Appellant. Clifford Blackham testified that before any of the four Respondents herein named paid for the materials on these jobs that he phoned Apex Lumber Company, talked to H. J. Rasmussen, the man who signed his lien waiver, about the Respondents paying the balance due to Comanche Lumber (T. 204-212) and the Respondents' concern. Each of the respondents testified they paid the final payment due under their contracts in reliance on the telephone call made to appellant. The only reason they phoned appellant was to hold up payment in the event the appellant claimed funds for materials. (T. 212, T. 214, T. 230, 232, T. 244.)

ARGUMENT

APPELLANT'S POINT I. The undisputed evidence proves

that plaintiff not only supplied the materials used by the contractor in constructing the building on defendants' land, but received only partial payment for the value of said materials.

RESPONDENTS' ANSWER: THE EVIDENCE SHOWS THAT APPELLANT FURNISHED SOME MATERIALS FOR 13 DIFFERENT POLE BARN CONSTRUCTION JOBS, THAT MATERIALS WERE MOVED FROM JOB TO JOB AND THAT CONSTRUCTION ON THE JOBS WAS TAKING PLACE SIMULTANEOUSLY. THAT IN THE EVENT THE PAYMENTS HAD BEEN PROPERLY APPLIED ALL MATERIALS THAT COULD HAVE BEEN USED FOR RESPONDENTS' POLE BARNS WOULD HAVE BEEN PAID.

The Comanche Construction Company contracted to build 13 pole barns for different owners. Not one of the owners obtained a Contractor's Bond and each paid in full to Comanche Construction Company the contracted amount. Approximately a year after they had all been completed and paid for, the appellant filed suit against these Respondents and three others. Two suits were compromised, one was dismissed. The third from the last of the thirteen pole barns was constructed for Bruce Barton. He was not sued because Appellant's General Manager, C. H. Child stated he was orally advised by Raymond Clark to apply a certain $8,000.00 payment on this Barton account. Barton testified he never even asked for any lien waiver. Mr. Child on his deposition stated the request came from Clark in writing (which he couldn't find) then at the time of trial (more than a year after deposition) he testified Clark told him personally. The conflict is shown in the statement of facts.

There was a confusion of material between the 13 different jobs as there was a confusion of funds received for payment on the account.

Guy L. Pittman, the General Supervisor for Comanche Construction Company in Utah testified: (T. 78, line 29)

"Q. In regards to the material that was hauled back and forth between jobs, how substantial was this haulage back and forth?

"A. You mean how much of it was hauled?

"Q. Yes.

"A. Back and forth. Well, sometimes we would probably get a whole semi load of just three by threes in, and this was distributed to different jobs by our truck because most of these big semis would make one stop.

"Q. In this case would you leave enough to complete the job at the initial site of unloading and then distribute the rest?

"A. That is what we usually tried to do. The same thing happened on poles.

"Q. And was this uncommon or common?

"A. This was a common procedure.

APPELLANT'S POINT II. The undisputed evidence proves that under the provisions of 14-2-1 and 14-2-2 of Utah Code Annotated 1953, as amended, plaintiff has a cause of action against defendants for the unpaid value of materials supplied by plaintiff and used in the construction of buildings on defendants' land.

RESPONDENTS' ANSWER: THERE WAS SUCH A CONFUSION IN THE USE OF MATERIALS FOR THE 13 POLE BARNS CONSTRUCTED AND THE ACCEPTANCE OF PAYMENTS THAT THE APPELLANT HAS NO CAUSE OF ACTION AGAINST THE RESPONDENTS.

The Respondents admit they did not obtain the bond required under 14-2-1 Utah Code Annotated. However, the cause of action only arises in favor of the materialman when "payment for which has not been made". (14-2-1, Utah Code Annotated, 1953). In this case the Jury in answer to a special Question by the Court stated that payment had been made in full.

Guy L. Pittman, General Supervisor of Comanche Construction Company (T. 40) testified that each of the Respondents paid for the materials by checks made payable to Comanche.

Cliff Blackham testified that before the checks were delivered the Respondents were concerned over whether the material and labor had been paid for, so that he acting for

them phoned appellant to determine if payment should be paid to Comanche. On (T. 192) Blackham testified:

"A. Mr. Shand and Mr. Willardsen came to my office because they were concerned about paying for, making the final payments on the buildings.

"Q. Do you recall when this date was?

"A. I think it is the 23rd of January, based on my telephone bill.

"Q. When you say they were concerned about making the payments on the barn, what do you mean by that?

"A. They wanted to be sure that the materials and labor were paid for and that when they paid their money the thing would be properly closed.

. . . . then on Page 195, Line 12, Mr. Blackham stated:

"A. Well, I placed a call to Scherer Brothers Lumber Company in Minneapolis, Minnesota, and Apex Lumber Company in Salt Lake City to Mr. Rasmussen, because Mr. Rasmussen had signed my lien waiver from Apex on my own personal building. At the time I gave my deposition I didn't remember who I spoke to, when I checked it out with the telephone company and got their information I had talked to Mr. Rasmussen. And Mr. Rasmussen told us, told me that the accounts were clear and it was clear to go ahead and make the final payment to Apex Lumber Company. (Later corrected to mean Comanche Construction Company — Page 197, line 4 through line 9). And on this basis of this information these men went out and paid for the buildings and we paid for our Feed Company building, the final payment.

On Page 197 Mr. Blackham also testified:

"Q. Mr. Blackham, at my request did you also contact the telephone company in Moroni to ask them if they had any records concerning this telephone call on January 23, 1961?

"A. That is correct.

Exhibit No. 50 is the telephone company record of the call. Exhibit 51 is the telephone bill of Moroni Feed Company of the call. Exhibit 52 is Clifford Blackham's notes.

Exhibit 43 and 53 are lien waivers on two jobs (Blackham and Olsen) which show that Mr. Rasmussen issued lien waivers on two of the 13 pole barns constructed and that appellant held him out as being authorized to issue waivers. Obviously this appellant is estopped from complaining now after having advised these respondents to make payment as they did.

APPELLANT'S POINT III. The court erred in accepting the Jury's answer to question three of the special verdict, wherein the jury found that acceptance by plaintiff of contractor's unsecured promissory notes constituted payment in full.

RESPONDENTS' ANSWER: THE COURT'S DECISION OF NO CAUSE OF ACTION WAS BASED UPON THE JURY'S ANSWERS TO ALL WRITTEN QUESTIONS, AND NOT JUST AS TO QUESTION NO. 3. EVIDENCE ABOUNDS THROUGHOUT THE RECORD UPON WHICH THE JURY FOUND THAT PAYMENT IN FULL HAD BEEN RECEIVED BY APPELLANT.

Respondents contend that the Jury's answer to this question does not indicate that the jury relied solely upon the promissory notes as being payment. The manner of the payments from Raymond Clark and Comanche Construction Company would be reason enough for the jury to hold that appellants had been paid. The matter of the Barton check and its application to the last job rather than to prior jobs is another reason the jury found payment. The jury could also have found payment by reason of the telephone call from Respondents to appellant which has been discussed.

In regards to the Promissory Note theory of payment which respondents argued without success to the court throughout the trial in the absence of the jury. Respondent contends it is not now material because the jury found payment without reliance upon it, instead relying upon the appellant's being estopped because of the telephone call.

However, Respondents did seriously contend that even without the telephone call the acceptance of the two Promissory Notes from the third party Comanche Construction Company, a corporation, by appellant under these circumstances where the notes were given by a third party, for an

increased interest rate and for security for payment on a disputed claim the question of whether or not they were payment should have been a question for the Jury and not the Court.

See Tangaro vs. Manero, 13 Ut. 2nd 290, 40 Am. Jur. 2 p. 715. See also 40 American Jurisprudence Section 92 p 781 where it states that "the question whether a note is given and accepted as payment ordinarly is a question for the jury and the burden of proving this fact is upon the one having the affirmative of this issue.

So also payment to an authorized agent will discharge the indebtedness, although the agent misappropriates the payment — 40 Am. Jur. Section 154, 94 ALR 779, 8 ALR 198.

It is also well settled that a Note of the debtor, although unsecured, which is accepted by creditor in satisfaction of an unliquidated or disputed claim, operated in accord and satisfaction barring an action on the original claim or debt. See Smoot vs. Checketts, 41 Ut. 211, 125 Pac. 412, 62 ALR 752. Where a third person makes the note as the corporation did in this case where before it was only the debt of an individual Restatement of Contracts, Section 421, and in 62 ALR 758 cites cases holding payment regardless whether the note was paid.

But regardless of this Note theory the payment question is no longer important because of the jury's answers to question which gave the court reason to hold appellants estopped by reason of its conduct.

APPELLANT'S POINT IV. The court erred in accepting the Jury's answer to Question Three of the Special Verdict, wherein the Court found that plaintiff's recovery from the defendant was barred by estoppel.

RESPONDENTS' ANSWER: THE JURY'S ANSWERS TO THE COURT'S QUESTIONS 3, 4 AND 5 WERE BASED ON SUBSTANTIAL EVIDENCE PRODUCED AT THE TRIAL AND CONSTITUTED A SUFFICIENT BASIS FOR THE COURT TO HOLD THAT THE APPELLANT WAS BARRED FROM RECOVERY BY REASON OF ESTOPPEL.

As above stated in answer to appellant's Point II Guy Pittman, Supervisor for Comanche Construction Company, collected by check the sums due for materials from respond-

ents. These respondents only made payment based upon the telephone conversation by Clifford Blackham with Mr. Rasmussen of appellant company. These respondents phoned to appellant because they were concerned that all materials be paid for. Appellant instructed them to pay as they did and appellant should be estopped from now denying payment.

Blackham on (T 207) was asked by Attorney for Appellant:

"Q. What you desired from Mr. Rasmussen of Apex was not whether materials were paid for but whether Comanche Construction Company was in default or behind with Apex Lumber?

"The Court: Now do you have the question clearly in mind? If not, we will have the report read it.

"The Witness: I have it in mind.

"The Court: All right, You may answer.

"My answer is that I simply wanted assurance that the final payments could be made without any complications of legal action such as we are having today. I received that assurance from Mr. Rasmussen and on that basis we went ahead and made final payments on these buildings.

Then on Line 13 he answered Mr. Griffith's further question:

"Mr. Griffiths: Did you understand that the Shand job or the Willardsen job were completed?

"A. I remember this much that I understand that these men were faced with the final payment right away and they wanted information as to whether or not they should make this payment and still be safe. And that is why we made the calls. I made no survey as to the status of these buildings.

The Respondent Moroni Feed Company paid based upon the telephone call to Appellant. See Mr. Blackham Testimony on Page 210, line 8.

"Q. So I rephrase my question to you, Mr. Blackham. Did you expect the materials to have been paid for on January 23, for your job?

"A. When I talked to him on January 23, the assurance I received at that time that it was, that we could pay our bills, must have carried forth with me

until this time when I made final payment because we made these payments on the basis of what we learned from Apex Lumber Company's Mr. Rasmussen."

On Page 212 Mr. Blackham answered further:

MR. TIBBS:

"Q. Do you have any other reason that you would call Apex Lumber Company?

"A. No reason. No other reason.

The Respondent Richard Jensen paid his account based on this telephone call. (T. 214).

"Q. Mr. Jensen, prior to your paying Comanche Construction Company did you have occasion to talk to anyone else concerning whether or not to pay Comanche Construction Company?

"A. Oh, yes. I was much concerned and I talked to Art Shand. Art Shand said they had made an investigation and as far as he could see it was all right. He paid his. When he said that Cliff Blackham had made the calls to Apex and different companies that had furnished the material.

"Q. Did you prior to your making this payment know about this telephone call of Cliff Blackham's?

"A. Oh, yes, I remember I talked to Cliff Blackham in his office when I was after feed before I made the payment besides talking to Arthur Shand.

"Q. Was it based upon this information that you inquired about that you made the final payment?

"A. Yes.

The Respondent Howard Willardsen paid his account based upon the telephone call. (T. 224)

"A. There was a local man by the name of Neff DeLeeuw employed by Comanche Construction Company and he informed me during the construction of my building that they were defaulting on their payments, getting behind on their payments on their labor. For this reason, and two others, I was very concerned about the solvency of Comanche Construction Company.

"Q. So what did you do?

"A. Well, before I made final payment, together with Art Shand, we went to the office of Clifford Black-

ham asking advice. We have a lot of respect for Cliff. And he said he thought he should call the suppliers of material and see if Comanche was solvent so to speak.

"Q. Do you recall when this was, when it was you went to Cliff Blackham?

"A. In my deposition I couldn't, but of course since we have traced this phone call. It is January 23.

"Q. I see, now do you - - what happened on that time to the best of your recollection.

"A. The call was placed to the company in Minnesota and Apex Lumber Company.

"Q. Were you present when this call was placed?

"A. I was present when the call was placed.

"Q. Where were you at?

"A. In the office of Clifford Blackham at Moroni.

"Q. Who else was present?

"A. Art Shand.

"Q. So the three of you were sitting there. Is that correct?

"A. That is correct.

"Q. And what happened?

"A. Well, of course I don't know, I didn't speak myself, but we received assurance from Cliff that it was all right with Comanche Construction, with Apex Lumber if we paid Comanche because apparently they were solvent and they had no concern about Comanche paying their bills. Certainly I wouldn't have paid it if I hadn't of had this assurance.

"Q. And was it based upon this assurance that you heard during this conversation that you made this payment?

"A. That is correct.

"Q. Now that was on November, or correction, that phone call was on January 23 and you made the payment on January 28. Is that correct?

"A. Correct. Correct.

"Q. (By Mr. Tibbs) When you were sitting in this office did you hear Mr. Blackham talking on the phone?

"A. I did.

The Respondent Arthur Shand paid his account based upon the Telephone Call. (T. 238)

"Q. Was it based upon this conversation with Apex Lumber Company that you paid this bill?

"A. Absolutely.

"Q. Did you have occasion to talk to Mr. Jensen sometime during this period?

"A. I talked with Mr. Jensen several times. In fact he kind of relied on me to get this information because he was out there on the farm. And he asked me if I, to give him any information that I could gather. And I did. I both went out to see him and I called him on the phone, and he called me on the phone.

"Q. You told him about your going up and your phoning to make out, make sure it was all right to pay then?

"A. Yes. I also called him and told him not to pay it prior to this, a week or so.

Then again on Re-direct examination of Mr. Arthur Shand:

BY MR. TIBBS:

"Q. Would you have paid it if Apex Lumber hadn't, had told you not to?

"A. No Sir, I would not.

"Q. You paid it in reliance upon the conversation of that telephone call in Cliff Blackham's office. Is that correct?

"A. Absolutely.

The doctrine of equitable Estoppel must always be so applied as to promote the ends of justice and accomplish that which ought to be done between man and man. Each case of Estopple must in the nature of things stand on its own bottom. 19 Am Jur Section 33, 106 ALR 1169.

The cases themselves must be looked to and applied by way of analogy rather than rule. Equitable Estoppel is the principle by which a party who knows or should know the truth is absolutely precluded both by law and in equity, from denying, or asserting the contrary of any material fact which, by his words or conduct, has induced another, who

had right to rely on it, to believe and act upon them thereby changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed — Public Utilities Commission vs. Jones, 54 Utah 111, 179 p 745.

In our case these Respondents because of what they had heard became concerned that their payment on their respective contracts would not go to pay the laborman and the materialman. They were Farmers, they didn't know anything about Contractors Bonds, but they wanted in all fairness to protect the labors and materialmen. They did what was reasonable by telephoning to this particular materialmen Appellant to find out if they should pay the contract or should hold up to give appellant some protection. Appellant told them to go ahead and pay. He should be precluded now from saying: Well I made a mistake I shouldn't be bound. Let them pay again. Don't make me suffer because I led them to pay this person Raymond Clark with whom I was dealing.

As the testimony indicated the only purpose of the call was to determine what the Respondents should do in regards to making the payment. Appellant told them to pay Comanche Construction Company. If appellant had not told them to pay respondents would not have paid. The Respondents' payment was clearly based upon Appellant's answer on the telephone call.

The court after receiving the Jury's answer to the question concerning the telephone call had the obligation to decide whether or not the facts gave rise to an estoppel. This the Court did in rendering its decision of no cause of action.

Appellant would have this high court on appeal believe that there was no estoppel because there was no false representation by appellant and allegedly that the respondents knew at the time of final payment that the materials had not been paid. This is not so.

An actual intent to mislead or defraud is not essential to the creation of an equitable estoppel. (19 Am Jur, Section 46.) An intention to influence the action of the particular person claiming the estoppel is not necessary in all cases. It is enough if there was a holding out to all who might have occasion to act on the existence of a certain state of facts which they might assume to be true and upon which they

might act. The result of the particular conduct rather then the intent is the criterion.

In our case payment would not have been made but for appellant's action on the telephone. To allow appellant to now say Respondents should not be harmed by its telling them to pay would not be fair. The respondents had a right to pay based upon this telephone conversation and the appellants, as the court found, were estopped.

APPELLANT'S POINT V. The Jury's Answers to the Interrogatories of the Special Verdict are not supported by the evidence, and the court erred in failing to direct a verdict for the plaintiff notwithstanding the special verdict.

RESPONDENTS' ANSWER: THE JURY'S ANSWERS TO COURTS QUESTIONS ARE SUPPORTED BY THE EVIDENCE.

Respondents deny the conclusion that the verdict was not supported by evidence. As heretofore set forth in this brief evidence is in abundance as to confusion of materials between jobs.

The jury found there was no unpaid materials. The evidence would warrant this finding based on either the jury treating the payments made by Clark should have been applied against these respondents job, Barton check is good example, or that the payments made were based on the telephone conversation.

CONCLUSION

There is nothing in the record to indicate the Jury failed to answer the court's questions properly. The answers must all be read together with all the evidence as shown by the record.

The trial court properly held that the Appellant has no cause of action against the Respondents. To have held otherwise would have been a miscarriage of Justice.

Respectfully submitted,

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