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John S. Davis dba Geneva Lumber Co. v. Payne and Day, Inc. : Brief of Appellant on Appeal

Utah Supreme Court

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George S. Ballif; George E. Ballif; Attorneys for Appellant;

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**In the Supreme Court of the
State of Utah**

FILED

APR 21 1961

JOHN S. DAVIS d/b/a
GENEVA LUMBER COMPANY,
Plaintiff and Respondent,

vs.

PAYNE AND DAY, INC.,
a corporation,
Defendant and Appellant.

Clerk, Supreme Court, Utah

**CASE
NO. 9386**

APPELLANT'S BRIEF ON APPEAL

GEORGE S. BALLIF
GEORGE E. BALLIF
For BALLIF & BALLIF
Attorneys for Appellant

NEW CENTURY PRINTING CO., PROVO, UTAH

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In the Supreme Court of the State of Utah

JOHN S. DAVIS d/b/a
GENEVA LUMBER COMPANY,
Plaintiff and Respondent,

vs.

PAYNE AND DAY, INC.,
a corporation,
Defendant and Appellant.

**CASE
NO. 9386**

APPELLANT'S BRIEF ON APPEAL

STATEMENT OF FACTS

Plaintiff brought this action to recover \$7,294.61 for materials claimed to have been furnished to defendant on the three count alternative theories of goods sold and delivered, quantum meruit, and open account. The first appeal was from an order granting defendant's motion to dismiss at the close of the first trial. This court reversed, and the case was tried a second time. This appeal is taken from a judgment in favor of plaintiff entered at the con-

clusion of the second trial and from an order overruling defendant's motion for a new trial. Defendant shall be hereinafter referred to as appellant and plaintiff as respondent.

The appellant, Payne and Day, Inc., a Utah corporation, during the year 1957 contracted for the construction of sixty-one homes in the Orem-Provo area for sale to interested buyers. The homes were built successively in five different groups beginning with a group of ten homes in Rose Garden Subdivision at Orem, and when that was completed, the remaining four groups of homes were constructed in Mount Aire Subdivision, Provo. Appellant employed C. E. Slavens as construction superintendent under separate contracts covering each group of homes in which his duties, authority, and compensation were specifically defined, (Exhibits 20, 21, 22). The construction superintendent procured bids from subcontractors on the labor and materials necessary for the construction of each home in each group, including respondent, and presented the same to appellant. Appellant then attached the bid to a written agreement with respondent, of which it was made a part, providing for the furnishing of two packages of building materials in connection with each home in each group of homes, (Exhibits 6 through 11). In these contracts, the parties fixed a single unit home price and appellant inserted in each the following provision:

"It is mutually agreed that any additions or deletions in the materials to be furnished are to be given in writing by party of second part (appellant) to the first party, and the value of the change, based upon prices quoted in the attached list, shall either be added or subtracted from the original contract."

The parties entered into five separate contracts on the five groups of homes in question; the first is dated February 21, 1957, and it covered ten homes in Rose Garden Subdivision, Orem, (Exhibit 6); the next is dated March 16, 1957, and it covered eleven homes in Mount Aire Subdivision, Provo, (Exhibit 10); the next was made June 3, 1957, and it covered sixteen homes in Mount Aire Subdivision, Provo, (Exhibit 8); the next is dated July 26, 1957, and it covered eleven homes in Mount Aire Subdivision, Provo, (Exhibit 7); and one dated September 3, 1957, covering twelve homes in the Mount Aire Subdivision, Provo, (Exhibit 9). There was also a contract dated September 23, 1957, covering one home in the Western Manor Subdivision, Orem, (Exhibit 11). These contracts all incorporated respondent's bids for furnishing all materials necessary for the construction of each home unit through second and final F. H. A. inspections. With the exception of the designation of the group of homes covered, these contracts contained substantially identical provisions, and for that reason we will refer to respondent's Exhibit 6 to illustrate the contract provisions.

Exhibit 6 covers the Rose Garden group of homes at Orem. It provides that respondent shall furnish materials for plan No. 485, schemes 1, 2, and 3, as per "attached lists", which become a part of the agreement, "for the price of \$2,116.00". It required the specified grade and quality indicated by the list and delivery within 15 days after being ordered by the appellant. The attached lists are entitled "Building Material List for Three Bedroom House-Garage Plan with gabled front porch plan 485, Package No. 1—Schemes 1, 2, 3." This list then specifies

in detail the number of units and the kind and quality of materials necessary to complete the package and prices out each unit and shows a package number 1 total net price of \$1,610.00. Then follows a list similarly titled for "package No. 2, schedules 1, 2, and 3," likewise detailing the materials and showing the net price for package No. 2 of \$506.00. The contract then provides for the above quoted writing in case there are any "additions or deletions" in the list. It is further provided that materials shall be stacked on the job site in good order and in accordance with the superintendent's instructions; that the contract price shall hold for ninety days at which time adjustments shall be made in accordance with current market prices; that appellant will purchase the material at the named price as needed; that payment for materials delivered is to be made on the 10th of the month following delivery to the 27th of the preceding month; "that delivery will be made and billed by package number as per attached list"; and the agreement covers the ten houses in Rose Garden Subdivision. The houses described in this contract were built and the parties fully performed their agreement.

On March 28 1957, respondent, Geneva Lumber Company, billed appellant for materials furnished as called for in package No. 1 under the contract, Exhibit 6, which comprised the framing materials taking each house up to second F. H. A. inspection. A receipt dated April 10, 1957, for \$16,100 was thereupon given by respondent to appellant acknowledging payment for the materials in package No. 1, (Exhibit 12). Also, on April 10, 1957, respondent executed and delivered to appellant a receipt on each home unit described in Exhibit 6 for the sum of

\$1610.00 reciting that it was "In full payment for materials furnished" as required by package No. 1 of Exhibit 6. Likewise on April 27, 1957, respondent billed appellant for materials furnished in package No. 2 on each house unit described in Exhibit 6 and on May 10, 1957, gave a separate receipt and lien waiver acknowledging payment in full for each unit package No. 2 materials as required by the contract, Exhibit 6, (Ex. 12; Tr. 132). Identical contracts were made between these same parties on each of the other groups of homes (Exhibits 7, 8, 9, 10, and 11) pursuant to which respondent furnished the materials called for by package No. 1 and package No. 2 for each unit and gave receipts in full on each home unit for all materials furnished for same, as well as lien waivers thereon. (Exhibits 13 A and B, 14 A, B, and C, 15 A, B, and C, 16 A, B, C, and D).

Three months after the date of the last contract (respondent's Exhibit 11) and after all of the contracts had been fully performed, including those of C. E. Slavens, the general superintendent, appellant corporation received a communication from Slavens (Exhibit 31) dated January 27, 1958, enclosing a statement from respondent for "extras on the 73 homes" in the amount of \$8398.30, and which included documents in the nature of itemized statements, in which Slavens stated, "I need not say that the entire bill is utterly ridiculous." Although the respondent did not send this statement directly to the appellant, but rather, sent same to Slavens, who was no longer employed by appellant and was then in Blanding, Utah, and this was the first notice appellant had been given that respondent was making claim for extras under the contracts in question, (Tr. 487-488), respondent, John Davis, admitted that

he was well aware of the contract provision (Tr. 421-423) requiring a "writing if there were any additions or deletions", and that he tried to get appellant on the telephone for the purpose of procuring the writing but was unable to do so, (Tr. 410). He also admitted that no writing was procured from the appellant authorizing any of the additions of materials which he claims to have furnished. Slavens denied that he ever told respondent that the required writing would not be necessary, (Tr. 567-570, 578-580). Slavens did admit receiving, on or about July 1, 1957, a statement from respondent, (Exhibit 19) for \$623.36 for extras on "Cherry Lane Project," (Tr. 571-572), and that he talked to respondent, John Davis' wife, and she told him it was sent out by mistake.

Respondent offered, as evidence of his claimed extras allegedly furnished appellant in the construction of the homes in question, three paper back books (Exhibits 1, 2, and 3,) containing numerous undated entries of materials claimed to have been furnished as "additions" to the lists attached to the contracts, (Exhibits 6, 7, 8, 9, 10 and 11). The tabs attached to Exhibits 1, 2, and 3, the red penciling and the crosses appearing therein were added by the witnesses who identified same. Appellant made timely objections to Exhibits 1, 2, and 3, and all oral evidence going to the identification and explanation of same, and also to respondent's Exhibits 4 and 5 (Tr. 70-90), summarizing the reasoning process employed by the witnesses, making conclusions from the entries in the three books as to prices and materials. Appellant's objection to this evidence was made on the ground that its admission would be a violation of the parol evidence rule in view of the "additions and deletions" provision contained in the con-

tracts in question, and on the further ground that the evidence was self-serving and immaterial, (Tr. 47-53). The Court admitted this evidence despite appellant's objections.

Respondent used the date of the making of the contracts 6 through 11 respectively, to fix the time when the alleged extras were furnished, and thus ties Exhibit 1, 2, 3, 4, and 5 directly into the contracts mentioned, (Tr. 154-158). Thus, the respondent dates the alleged delivery of materials by reasoning that this nebulous mass must have been furnished at the very time appellant was furnishing materials under the above mentioned contracts, and in violation of the "additions" provision of the same.

Respondent claimed that Slavens authorized the respondent to furnish the claimed extras appearing in Exhibits 1, 2, and 3, (Tr. 42-45; 84-86), but there is no evidence in the record that Slavens had any such authority, either express or implied. Over our objection, the court allowed the respondent to prove Slavens' authority by the above-mentioned extra-judicial statements he was alleged to have made to respondent.

The authority of Slavens to bind appellant is shown by the contracts under which he was employed. In fact, appellant required a contract with each of the persons who had any part in the construction of the homes in question, including the furnishing of materials. In each such case, appellant protected itself as far as "additions and deletions" were concerned by the above quoted contractual provision appearing in each contract.

Appellant relies for a reversal of the trial court upon the following:

STATEMENT OF POINTS**POINT 1**

THE PAROL EVDENCE RULE IS APPLICABLE AND THE COURT ERRED IN ALLOWING ORAL EVIDENCE OF CLAIMED EXTRAS VIS-A-VIS THE CONTRACTUAL PROVISION REQUIRING A WRITING IN THE EVENT ADDITIONAL MATERIALS WERE NEEDED.

POINT II

THE COURT ERRED IN RECEIVING IN EVIDENCE THE ALLEGED ORAL EXTRA - JUDICIAL STATEMENTS CLAIMED TO HAVE BEEN MADE TO RESPONDENT BY SLAVENS, THE CONSTRUCTION SUPERINTENDENT OF APPELLANT, GOING TO THE EXISTENCE AND EXTENT OF HIS AUTHORITY AS AN AGENT.

POINT III

THE COURT ERRED IN ADMITTING EVIDENCE (1) THAT APPELLANT HAD IN CONNECTION WITH A CONTRACT NOT IN ISSUE OR BEFORE THE COURT IN THE INSTANT CASE PAID FOR ADDITIONAL MATERIALS FURNISHED, THOUGH NOT AUTHORIZED IN WRITING, AND (2) ALSO ORAL AND WRITTEN SELF-SERVING DECLARATIONS PERTAINING TO AN ACCOUNT THERETOFORE ACKNOWLEDGED TO HAVE BEEN PAID IN FULL.

POINT IV

THE COURT ERRED IN MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDG-

MENT, FINDING AND HOLDING THAT APPELLANT'S GENERAL SUPERINTENDENT HAD BOTH APPARENT AND ACTUAL AUTHORITY TO WAIVE THE PROVISIONS OF THE CONTRACT REQUIRING A WRITING SIGNED BY APPELLANT FOR EXTRA MATERIAL NOT CALLED FOR BY THE CONTRACT, THERE BEING NO EVIDENCE TO SUPPORT SAME.

POINT V

THE DOCTRINE OF THE "LAW OF THE CASE" DOES NOT PRECLUDE THE COURT FROM CONSIDERING APPELLANT'S POINTS MADE HEREIN DESPITE THE ADVERSE HOLDING ON THE FIRST APPEAL.

THE BASIC ISSUE

Appellant, Payne and Day Inc., is a Utah corporation wholly owned by Afton M. Payne and Henry Day, who supplied capital for the construction business, but who did not participate actively in its building program. The 61 homes in question were constructed under contracts with several individuals, including respondent, who contracted to furnish the necessary materials (Exhibits 6 through 11). There was also a separate contract with Slavens to supervise the construction work and act as construction superintendent. Thus appellant, having contractually established its costs for the construction of each of the homes in question, proceeded with its business venture. Appellant covenanted with respondent, in order to stabilize and control its costs so established, that written authority for "additions" should be procured from its owners. Hence the above quoted provision. In this regard, Slavens' contract

was significantly silent and respondent's was explicit. Appellant complains bitterly that this protective provision was held for naught on the admission in evidence over objection of the extra-judicial statements of Slavens that he had authority to waive the said provision. We believe appellant had a legal right to the protection of the provision in question and that the trial court erred in admitting this evidence. Although respondent claimed a bill of more than \$7,000.00 in extras, allegedly incurred over the period of the entire construction of the 61 homes in question, no demand was made to appellant for written authority to furnish such extras, despite the aforesaid contract provision. And as each of the contracts were performed (Exhibit 6-11), respondent billed appellant as required thereby, and was paid for all materials furnished, and gave receipts and lien waivers on each of the houses in question. But no mention was made to appellant that any extras were claimed by respondent until three months after the performance of the last contract. Appellant complains that respondent and Slavens, in effect, were allowed by the trial court to bypass, by a secret conspiracy, the crucial contract provision appellant's owners had placed in the contracts for its protection. Certainly, appellant had a right to rely on the contractual provisions, and it complains that the Court bypassed and ignored the same in awarding judgment to respondent.

THE ARGUMENT

POINT I

THE PAROL EVIDENCE RULE IS APPLICABLE AND THE COURT ERRED IN ALLOWING ORAL EVIDENCE OF CLAIMED EXTRAS VIS-A-VIS THE CONTRACTUAL PROVISION REQUIRING A WRITING IN THE EVENT ADDITIONAL MATERIALS WERE NEEDED.

It is obvious that the provision with respect to additional material being required to be in writing is a contractual provision of the written contracts in question. There is no evidence that there was ever any written authority given by the appellant to respondent to furnish any extras as claimed by respondent. Under these circumstances the respondent is barred from offering parol testimony that he furnished additional materials under the contract without producing a writing signed by appellant which complies with the terms of the said provision of the contract. The trial court refused to apply the parol evidence rule although it is firmly established in Utah law. Of the parol evidence rule, this Court in *Garrett v. Ellison* (1937) 98 Utah 184, 72 P 2d 449, 129 A. L. R. 669, has the following to say:

“ The rule, so called, may be stated thus. Parol evidence is inadmissible to vary, alter, control, or contradict the terms of a written instrument, in an action founded upon such writing, between the parties or privies thereto and the rule only applies to those elements or parts of the writing which are contractual between the parties and not merely recitals of fact . . . a rule has been established that

an agreement by parol which is collateral to the written contract and on a distinct subject may be proved. To lay down, in advance, a distinct formula that will determine by "rule of thumb" what cases come within it, is difficult . . . the rule is founded upon the principle that when the parties have discussed and agreed upon their obligations to each other, and reduced those terms to writing, that such terms, if clear and unambiguous, furnish better and more definite evidence of what was undertaken by each party than the too often fickle memory of man, or why else reduce it to writing. The rule applies to exclude extrinsic utterances, when it is sought to use those utterances for the purpose for which the writing was made and have superseded them as the legal act."

See also *Pacific States Cast Iron Pipe Co. et al v. Harsh Utah Corporation* (1956) 5 Utah 2d 244; *Fullmer et al v. Morrill et eux.* (1954) 2 Utah 2d 347; 3 Jones Commentaries on Evidence, Sec. 1484.

Again we point out that appellant corporation was in a large building enterprise and the corporate officers did not have direct supervision of the work. For that reason it employed a construction superintendent and gave him supervisory authority only. Appellant also made separate contract with all the other subcontractors who participated in any way in the construction, among which respondent had the written contracts for furnishing materials under the package method of contracting. Appellant had a right to protect itself from claims for extras and did so by inserting in each contract the provision with respect to furnishing additional materials. Commenting upon this phase of the application of the parol evidence rule, the Utah Supreme Court stated in *Jenkins Used Cars*

vs. James G. Rice (1958) 7 Utah 2d, 276, 277, 323 P. 2d 259:

“But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so, business one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law, to supply enforceable rules of conduct for the maintenance and improvement of an orderly society’s welfare and progress, would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances we should not be required to embosom any request that we ignore that very language. This is as it should be. The rule excluding matters outside the four corners of a clear, understandable document, is a fair one, and one’s contentions concerning his intent should extend no further than his own clear expressions.”

We do not think respondent can arrange with anyone to circumvent such written provision requiring written authority for the furnishing of any extras, rely upon the contracts, receive payment and receipt in full for materials furnished under same, and then, after complete performance, for the first time, make these surprise claims of extras that had been furnished. We believe that it was prejudicial error for the trial court to permit oral evidence which varied the terms of the written contractual provision inserted in the contract for the protection of the officers and owners of appellant corporation.

POINT II

THE COURT ERRED IN RECEIVING IN EVIDENCE THE ALLEGED ORAL EXTRA - JUDICIAL STATEMENTS CLAIMED TO HAVE BEEN MADE TO RESPONDENT BY SLAVENS, THE CONSTRUCTION SUPERINTENDENT OF APPELLANT, GOING TO THE EXISTENCE AND EXTENT OF HIS AUTHORITY AS AN AGENT.

The trial court permitted respondent's evidence of alleged oral extra-judicial statements of Slavens that he had authority to waive the aforesaid "additions and deletions" provisions of the contracts in question. Such evidence is the sole basis for holding that appellant waived the contractual provisions in question. Respondent claimed that these oral statements were made by Slavens at Geneva's office in July of 1957; and that they were to the effect that respondent could keep a separate record of the claimed extras and that same would be kept secret from appellant. It was claimed that this amounted to respondent and appellant entering into an oral agreement to waive the writing requirement provision for extras contained in the said contracts. This is the evidence allowed by the Court. We submit that the construction superintendent's contract with appellant must be viewed in the light of the contractual provision in respondent's contracts requiring the writing in the event additional materials are required. Clearly this limits the construction superintendent's authority to supervision of the construction work, and any oral statement which he might make to respondent, who was a party to the contracts in question, could not possibly be construed to be binding upon

appellant. An agent's authority cannot be shown by reliance on oral declarations the alleged agent is supposed to have made. The applicable rule of law in this regard is stated in A. L. I. Restatement: Agency 2d, Section 285, beginning page 5, as follows:

"Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent."

The following comments are made beginning page 5 under the above quoted rule as follows:

"a. The rule stated in this section does not deal with testimony by an agent . . ."

"d. . . . On the other hand, unless it is proved that the speaker was an agent and that the statement was within his power as such agent, evidence of the statement is inadmissible . . ."

See also 2 American Jurisprudence, Section 445; and 3 A.L.R. 2d 602, where it is said:

"In cases too numerous to be exhaustively collected, the proposition has been announced that, as against the principal, evidence of extra-judicial statements of an alleged agent is not admissible to show the facts of agency or the extent or scope thereof."

In A. L. I. Restatement: Agency, 2d, Section 8, apparent authority is defined as follows:

“Apparent authority is the power to affect the legal relations of another person by transactions with third person, professedly as agent for the other, arising from and in accordance with the others manifestations to such a third person.”

The following comment on the foregoing rule as to apparent authority is made beginning, *Ibid.*, on page 30 as follows:

“a. Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person, and not, as when authority is created, to the agent. It is entirely distinct from authority, either express or implied . . .”

“c. Belief by a third person. Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. Further, the third person must believe the agent to be authorized. In this respect apparent authority differs from authority, since an agent who is authorized can bind the principal to the transaction with a third person who does not believe the agent to be authorized.”

This Court stated in its opinion on the first appeal, *Davis v. Payne and Day, Inc.*, 10 Ut. 2d 53, 56, that “It is a well established rule of law that parties to a written contract may modify, waive, or make new terms notwithstanding terms in the contract designed to hamper such freedom.” We recognize this rule of law but contend that under the evidence in the instant case, in both the first and second trials, it has no application. In support of this rule, the opinion cites the case of *Salzner v. Jos. J. Snell*

Estate Corp., 81 Utah 111, 16 P. 2d 923, and comments on it *ibid* 57 as follows:

“The facts are similar to those in Salzner v. Jos. J. Snell Estate Corp., wherein this court held that requirement in a written agreement that no alteration should be made in the written order of the architect containing the amount to be paid for such alteration did not preclude a recovery for alterations made on new plans and specifications not contemplated in the original agreement although the alterations were on the same building which was the subject of the written agreement, because the parties actually entered into a new agreement and the defendant was therefore liable for the work and materials it received from the plaintiff in that action.”

We do not agree that the facts of the instant case are similar to those of the Snell case; in fact, we would like to point out that they are entirely different.

In the Snell case there was an agreement between plaintiff and defendant whereby the plaintiff contractor agreed to remodel a building in Salt Lake City. The work was to be done under the direction of the defendant's architect, whose decision was to be final as to the meaning of the plans and specifications. The contract provided that additional drawings and specifications, if necessary, to illustrate the work were to be furnished by the architect. There was a provision in the contract that “no alterations shall be made in the work except upon written order of the architect; . . .” Plaintiff contractor recovered a judgment for “alterations” from the original plans and defendant claimed the architect's writing had not been procured.

The Court states in the Pacific Report, page 925, as follows:

“The work was done under the direction of the defendant’s architect; the manager of the defendant company visited the building frequently as the work progressed and was familiar with the alterations that were being made and made no objection whatever to the work as it was done. The architect testified that he issued a final certificate to the plaintiff that there was due him for extra work the sum of \$1757.80 in which was included the amount of \$1111.00 for the extra work at the front of the building; that the alterations were made under his supervision; and that he made a new sketch for the front in which were embodied the suggestions of the building inspector, and as he recollected it, he received the instructions to proceed from Mr. Snell, the manager of the defendant, and the certificate which he issued covered this extra work on the front as well as other extras.”

Obviously, the defendant corporate owner had agreed with the plaintiff contractor in the written contract that the order for the extras must be upon its architect’s writing and this is what was done. The situation in the instant case is wholly different in that the appellant, Payne and Day, Inc., agreed in writing with respondent, not that its superintendent could waive the provision requiring a writing in the event additional materials were furnished, but that the writing was to be furnished by the appellant, and no request was ever made of and no such writing was ever given by the appellant. In the Snell case, the defendant’s architect changed the plans and specifications to meet the requirements of the building inspector of Salt

Lake City. The extras that had to be done were not, therefore, included in the original contract, and the court so held. The extra work was in effect a new contract between plaintiff and defendant to which the defendant agreed and in fact, his architect drew the plans for the extra work. In the Snell case the corporate owner contracted that this whole business should be handled by its manager and the crucial provision was the extras should only be paid for upon written order of its architect. Whereas, in the instant case the appellant, to protect itself, limited the authority of its construction superintendent to supervision of the work, and contracted with respondent that in the event additional materials were required that it should be only upon the written authority of appellant. Such a provision was crucial to the protection of the corporation with respect to "additions" or extras, and a great injustice to the owners and officers of appellant will result if the trial court's ruling that the contractual provision in question is to be circumvented and ignored, is allowed to stand.

Under these authorities, the alleged statements of Slavens were inadmissible as they did not constitute a representation by the appellant to the respondent that the claimed authority existed, and the Court erred in allowing such evidence to come in.

Rather than there being a representation from appellant that Slavens had authority to waive the contractual provisions in question by reason of the alleged oral statements, the respondent should have been estopped to assert that such statements were made. Respondent at all times during the performance of the contracts in question relied upon them, billed appellant at the conclusion

of each, and was paid according to the billing and receipted appellant for full payment of all of the materials furnished under all of the contracts. Respondent seems to have conspired with Slavens to keep secret what was going on between respondent and Slavens concerning the claimed extras all during the period of February, 1957, until November, 1957, when all of these contracts were being performed, then some three months later claimed that he had furnished extras despite the "additions and deletions" provisions of the said contracts.

POINT III

THE COURT ERRED IN ADMITTING EVIDENCE (1) THAT APPELLANT HAD IN CONNECTION WITH A CONTRACT NOT IN ISSUE OR BEFORE THE COURT IN THE INSTANT CASE PAID FOR ADDITIONAL MATERIALS FURNISHED, THOUGH NOT AUTHORIZED IN WRITING, AND (2) ALSO ORAL AND WRITTEN SELF-SERVING DECLARATIONS PERTAINING TO AN ACCOUNT THERETOFORE ACKNOWLEDGED TO HAVE BEEN PAID IN FULL.

(1) The Court admitted evidence over appellant's objection to the effect that respondent had been paid for additional materials furnished under roofing contracts on some of the same houses contemplated by the instant suit, although appellant did not authorize these extra roofing materials in writing, as required by the roofing contract. These roofing contracts were not the subject of the instant suit, and no claim was made by respondent for extras with respect thereto in the case at bar. There was no showing that the circumstances were the same or what

the circumstances were, under which the claimed payments on the roofing contracts were made. The argument seems to be that if appellant waived the provision in question in some other contract not before the Court, that he did so in connection with the same provision in the contracts in question. We do not believe that there is any rule of evidence which permits or allows such speculative proof.

(2) Also, over the objection of appellant the Court admitted in evidence an alleged open account for materials claimed to have been delivered to appellant by respondent, during the period of the construction of the houses in question (Exhibits 1, 2, 3, and 19). These exhibits did not constitute any part of the system of accounts regularly kept by respondent in his business. They are paper back books, including entries of items which are supposed to be extras delivered to appellant in connection with the performance of the contracts, (Exhibits 6 through 11), and for the most part they were undated and in different handwriting. They were kept as a result of the above-mentioned secret oral conversations respondent claims to have had with Slavens, and appellant was never notified of their existence until three months after the last of the 61 houses was constructed and respondent began to assert his claims for extras involved in the instant suit. Our position is that these are self-serving declarations which were erroneously admitted in evidence by the trial court.

The law with respect to self-serving declarations is stated in 20 American Jurisprudence Section 558, beginning at page 470:

“There is a general rule that self-serving declarations, defined as statements favorable to the interest of the declarant, are not admissible in evidence as proof of the facts asserted, whether they arose by implication from acts and conduct or were made orally or reduced to writing. The vital objection to the admission of this kind of evidence is its hearsay character. Furthermore, such declarations are untrustworthy; to permit their introduction in evidence would open the door to frauds and perjuries . . .”

See also *Engemann v. Colonial Trust Company, etc.* (1954) 378 Pa. 92, 105 A. 2d 347, 48 A.L.R. 2d 858, at 863; *Stanton v. Stanton* (1957) 213 Ga. 545, 100 SE 2d 289, 66 A.L.R. 2d 1401 at 1409; 2 *Jones Commentaries on Evidence* (2nd Edition), Section 895 pages 1636-37, and Section 896 page 1640; *Salt Lake City Brewing Company v. Hawke et al*, 44 Utah 199 at 208, 66 Pac. 1058.

It was prejudicial error for the Court to admit such evidence.

POINT IV

THE COURT ERRED IN MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT, FINDING AND HOLDING THAT APPELLANT'S GENERAL SUPERINTENDENT HAD BOTH APPARENT AND ACTUAL AUTHORITY TO WAIVE THE PROVISIONS OF THE CONTRACT REQUIRING A WRITING SIGNED BY APPELLANT FOR EXTRA MATERIAL NOT CALLED FOR BY THE CONTRACT. THERE BEING NO EVIDENCE TO SUPPORT SAME.

It is our poition that Slavens' contract as construction superintendent and the provision as to "additions and

deletions" in the contracts with respondent precludes finding any apparent authority or actual authority in Slavens to waive the extra provision in question. Respondent relies upon statements which Slavens is supposed to have made, but which he denied making, to respondent at his office. Respondent admits that he knew of the "additions and deletions" provision of the contract, but that the most he did to procure the written authority of appellant was to make an attempt to call appellant by phone, which was unsuccessful. We have shown above that these statements were not admissible and that it was error for the Court to receive same in evidence.

The record shows that appellant hired Slavens under a written contract to supervise the construction of the building project. In all of the contracts made by appellant for the labor and materials that went into the construction, it provided that a writing was required in the event there were "additions or deletions" needed. Although respondent well knew of this provision, he proceeded in the teeth of it to secretly make some claimed deal about extras with Slavens in which Slavens is alleged to have made the alleged statement about his authority. The farthest respondent seems to have gone to procure the required writing, according to his own testimony, was to make an attempt to get in touch with appellant, which he never really accomplished.

Exhibit 19, dated July 1, 1957, was never sent to appellant, and no such claim was ever disclosed to appellant during construction. All of the contracts in question made it clear to Slavens and the respondent, as well as all of the subcontractors, that if any extra material or labor were needed, authority to put them into the project had to be

procured from appellant in writing. This is not a case where appellant's construction superintendent was making representation about his authority to some third party to procure materials. The most that can be made out of respondent's claim is, if the same were taken to be true, that he secretly furnished Slavens materials which he calls extras without ever contacting appellant at any time during the existence of the contracts in question. However, respondent relied upon and tied his claimed extras into each one of the contracts in question, accepting payments and receiving same in full, and several months after such completed performance, he asserts a claim for extras. Significantly, he did not send the claim to appellant, but rather mailed it to Slavens, who had completed his contract and was working in Blanding, Utah. Respondent wants us to believe that appellant indulged in some conduct from which it can be inferred that Slavens had actual or apparent authority to do what respondent claims he did. We submit that the statements made by Slavens in his letter of January 27, 1958, attached to Exhibit 31, correctly reflects the situation when he said, "I need not say that the entire bill is utterly ridiculous". It is our position that the trial court erred in admitting the extra-judicial oral declarations of an agent whose authority was limited by all of the contracts in question, and findings and Judgment based on such evidence should be reversed.

The authorities cited under Point II *supra* are again cited under this point. Also, we call attention to *Hilyar v. Union Ice Company* (Cal. 1955) 286 P. 2d 21, at page 28, involving a statement by the agent that he was "employed" by the principal where the Court observed as follows:

"In the case at bar, the uncontradicted facts show a wholesaler-retailer relationship. The only evidence to the contrary is Ingram's statement to the officer that he was "employed" by the Union Ice Company. In *Fesler v. Rawlins*, 43 Cal. App. 2d 541, 544, 111 P. 2 380, 382, it was said: "It is axiomatic that agency cannot be established by the declarations of the agent not under oath or in the presence of the principal. As stated in 1 Cal. Jur. 698, 'if the rule were otherwise any rogue could use the name of an honest man to facilitate his roguery'." See, also, *Mechem Outlines Agency*, 3d Ed., Para. 112, p. 68."

Also in *Brownell v. Tidewater Associated Oil Company* (1941) 121 F. 2d 239 beginning at the bottom of page 243, the Court had the following to say on the matter of the agent's extra-judicial declarations as proving agency:

"The trial judge stated that he was satisfied that there was no authority in any of the employees to make any agreement to enter into the contract which the plaintiffs claim was made. We agree. There was no evidence of any sort given to establish the actual authority of Mr. Whelan except his own alleged statement that he had such authority. It is, of course, well settled, as the judge ruled at the trial, that agency and authority cannot be proved by the hearsay statements of the alleged agent himself. *Orvis v. George*, 5 Cir., 47 F. 2d 1045, 1931; *E. A. Strout Farm Agency v. Hosford*, 81 N. H. 507, 128 A. 685, 1925; *Bohanan v. Boston & Maine R. R.*, 70 N. H. 526, 49 A. 103, 1901; *Am. L. Inst. Restatement of Agency* Para. 285. There was no competent evidence to submit to the jury proving that Mr. Whelan had any actual authority to make a binding agreement

to enter into a commission agency agreement with the plaintiffs.”

The same Court then went on to say as to apparent authority the following:

“Nor do we believe that there was sufficient evidence to justify a jury in finding that Mr. Whelan had apparent authority to enter into the alleged agreement. The actions of the principal and the knowledge of a reasonable man in the position of the third person are the important factors in establishing apparent authority. The New Hampshire court has defined apparent authority as “that authority which a reasonably prudent man, induced by the principal’s acts and conduct, in the exercise of reasonable diligence and sound discretion, under similar circumstances, with the party dealing with the agent, and with like knowledge, would naturally suppose the agent to have”. *Atto v. Saunders*, 77 N. H. 527, 529, 93 A. 1037, 1039, 1915. In *Davison v. Parks*, 79 N. H. 262, 263, 108 A. 288, 289, 1919, the court said that in order to find aparent authority it was necessary to show “that the principal has either so conducted his business as to give third parties the right to believe that the act in question is one he has authorized his agent to do, or that it is one agents in that line of business are accustomed to do”. Cf. *Sullivan v. John Hancock Mutual Life Insurance Co.*, 86 N.H. 184, 165 A. 277, 1933. We do not believe that the plaintiffs have come within these rules.”

We conclude that there is no valid evidence to support the findings and judgment entered by the trial court and therefore same should be reversed and set aside.

POINT V

THE DOCTRINE OF THE "LAW OF THE CASE" DOES NOT PRECLUDE THE COURT FROM CONSIDERING APPELLANT'S POINTS MADE HEREIN DESPITE THE ADVERSE HOLDING ON THE FIRST APPEAL.

At the conclusion of the first trial of the instant case on motion of defendant, Payne and Day, Inc., the trial court made an order dismissing plaintiff's complaint. No findings were made as provided by 41 (b) U. R. C. P. Plaintiff appealed from the order of dismissal. The only issue before this Court on its first appeal was "Did plaintiff's evidence, when considered in the light most favorable to him, show that he was entitled to relief?" The Court then reviewed the record in the light most favorable to the plaintiff and held that the "Court could reasonably have found" for the plaintiff. There was no evidence in the record adduced by the defendant, and the only evidence considered was that of plaintiff. No issues of law were raised by the appeal other than a consideration of the evidence in the most favorable light to the plaintiff. The Court's function on the first appeal, therefore, was a consideration of the facts found in the record, which the Court was compelled to construe in favor of plaintiff.

The "law of the case" doctrine is stated in 3 American Jurisprudence, Section 985, beginning page 541 as follows:

" . . . The decisions agree that as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the "law of the case" upon a subse-

quent appeal, **provided the same facts and issues which were determined in the previous appeal are involved in the second appeal.** But if the facts are different, so that the principles of law announced on the first appeal are not applicable, as where there are material changes in the evidence, pleadings or findings, a prior decision is not conclusive upon questions presented on the subsequent appeal; . . .”

See also *ibid.*, Section 1000, page 553.

The Utah law is in accord with the foregoing general rule. In *Petty v. Clark* (1948) 113 Ut. 205, 192 P. 2d 589, our Supreme Court recognized the general rule but refused to apply the “law of the case” doctrine where the issues were different on the second appeal. In the first trial the jury found in favor of the defendant and the trial court disregarded the jury’s findings and held for the plaintiff. On first appeal, the case was reversed on the grounds that the issues were legal and not equitable, and therefore the court was bound by the findings. The case was remanded for a new trial, and the legislature passed an amendment between the two trials making the findings of the jury in such a case advisory only. At the conclusion of the second trial, the jury again found in favor of the defendant and so did the judge who tried the case the second time. On the second appeal, this Court refused to apply the doctrine of the “law of the case” because that “doctrine [does not] require us to adhere to our former decision on this question.” The reason assigned was that the amendment made by the Legislature between the two trials changed the “policy of the law” and that the change was procedural only and not substantive. It would seem that the

Court meant by this that the issues considered in the first appeal had been changed by the amendment when it came before the Court on the second appeal.

We submit that in the instant case the issues in the second appeal are different from the single issue considered on the first appeal. There the only issue was considering the plaintiff's evidence and indicating what favorable findings might have been reasonably made for plaintiff; whereas, in the second appeal, the evidence of both the plaintiff and defendant were in the record to be weighed and considered in the light of same having been admitted over the objections of the parties. Serious issues of law are raised by defendant's insistence upon the parol evidence rule and that the extra-judicial oral statements of an agent are not binding on his principal under the facts of this case, the trial court having overruled and deined defendant's objection in this regard. Also, this appeal presents the issue of law as to the alleged agent's apparent authority, which the trial court found to exist over appellant's objection and without any foundation in the evidence. Also, we now raise on this appeal the issue of the sufficiency of the evidence to support the findings, conclusions, and judgment that the agent had either real or apparent authority to waive the provision of the contracts requiring that appellant would not be bound for "additions" (extras) unless respondent procured a writing. We submit that under these circumstances, the first appeal did not determine the major issues which are before this Court on the second appeal, and therefore the "law of the case" doctrine does not apply here.

CONCLUSION

Because the trial court erred in (1) allowing in evidence extra-judicial statements of the appellant's construction superintendent, Slavens, the effect of which was to extend his authority, (2) allowing in evidence oral and written statements which varied the "additions and deletions" provision of the contracts in question in violation of the parol evidence rule, (3) admitting incompetent and self-serving evidence, both written and oral, of the account for additions or extras where no compliance with the terms of the written contract were shown, and (4) by making and entering findings of fact, conclusions of law, and judgment based upon evidence erroneously admitted at the trial, we conclude that the judgment of the trial court should be reversed and the case should be remanded to the trial court with directions that same be dismissed.

Respectfully submitted,

GEORGE S. BALLIF

GEORGE E. BALLIF

For BALLIF AND BALLIF

Attorneys for Defendant
and Appellant