

1961

# John S. Davis dba Geneva Lumber Co. v. Payne and Day, Inc. : Brief of Respondent

Utah Supreme Court

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

**FILED**

**JUN 2 - 1961**

**JOHN S. DAVIS, d.b.a. GEN-  
EVA LUMBER COMPANY,**  
Plaintiff and Respondent,

**Vs.**

**PAYNE AND DAY, INC.,**  
A Corporation,  
Defendant and Appellant

Clerk, Supreme Court, Utah

**CASE  
NO. 9386**

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**Respondent's Brief**

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**ALLEN B. SORENSEN**

**For**

**YOUNG, YOUNG & SORENSEN**

**Attorneys for Respondent**

**227 North University Avenue**

**Provo, Utah**

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Plaintiff and Respondent,

Vs.

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A Corporation,

Defendant and Appellant

**CASE**  
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## Respondent's Brief

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### STATEMENT OF FACTS

This is the second appeal for this case. John S. Davis, d.b.a. Geneva Lumber Company Vs. Payne and Day, Inc., a corporation, 10 Utah 2d 53, 348 P2d 337. Respondent took the first appeal from an order of dismissal granted by the court at the end of respondent's case. This court stated that the evidence, if believed by the trier of the facts, showed that the respondent here was entitled to relief, and remanded the case for a new trial.

Upon the second trial, made to the court sitting without a jury, the Hon. Will L. Hoyt granted plaintiff judgment based upon detailed findings of fact. Defendant below prosecuted this appeal from that judgment and an order denying a new trial.

Because we believe that at this stage of the proceedings there remains only fact questions, we quote the Findings of Fact, citing the record relied upon for each finding. It is remembered that the plaintiff below is the respondent.

“1. That at all times involved herein, the plaintiff, John S. Davis, was doing business under the name and style of Geneva Lumber Company; the defendant, Payne and Day, Inc., was at all times involved herein a corporation organized under the laws of the State of Utah. (Tr. 15, 21, 461.)

“2. That, during the year 1957, the defendant corporation caused to be constructed sixty-one homes in the Orem and Provo areas, for sale to prospective purchasers. (Tr. 250, 368, 463, 533).

“3. That C. E. Slavens was employed by the defendant as a general construction superintendent, to oversee and supervise the construction of the homes; that he was so employed under written contracts which are in evidence herein and which, among other things, provide that he should share in the profits arising from savings effected through construction of the houses at less than the estimated costs; that Mr. Slavens acted as construction superintendent throughout the construction period and the houses were built under his direction by various contractors. (Tr. 252-6, 368, 513-14; Exh. 20, 21, 22.)

“4. That between February 21, 1957, and September 23, 1957, plaintiff and defendant entered into and executed a series of six written contracts, substantially similar in form, and identified as plaintiff's exhibits 6, 7, 8, 9, 10, and 11, in which the plaintiff agreed to furnish to the defendant corporation certain specified materials in specified quantities to be used in the construction of the sixty-one homes and the defendant

agreed to pay stipulated prices for such materials. (Tr. 11 ff, 16; Exh's. 6 to 11 inclusive).

"5. That C. E. Slavens, construction superintendent of defendant, prepared these contracts and the material lists attached thereto as part thereof, and negotiated with the plaintiff for bids upon such materials and procured the signing of the contracts by the plaintiff and by the corporate officers of the defendant; that all transactions between plaintiff and defendant concerning the furnishing of material for the sixty-one homes herein involved were conducted on behalf of defendant by its construction superintendent, C. E. Slavens. (Tr. 16, 164, 252-6, 258-264, 274-9, 392-3, 497-500, 511, 534).

"6. That there was attached to each contract, plaintiff's exhibits 6 to 11, inclusive, a detailed list of the materials to be furnished, with quantities indicated; that in each case these were set forth in two groups referred to as "Package 1" and "Package 2", respectively; that the "Package 1" list covered items known as framing materials, and "Package 2" lists covered finishing materials. (Tr. 6 ff; Exh's. 6-11 inclusive).

"7. That each of the contracts contained provisions substantially identical, as follows:

" 'It is mutually agreed that any additions or deletions in the materials to be furnished are to be given in writing by the Party of the Second Part (defendant) to Party of the First Part (plaintiff), and the value of the change, based upon prices quoted in the attached lists, shall either be added or subtracted from the original contract.

\*\*\*\*

" 'It is understood that delivery will be made and billed by package number as per attached lists.'

(Exh's. 6-11 inclusive).

"8. That the plaintiff furnished to the defendant the materials specified in the material lists attached to the contracts, plaintiff's exhibits 6 to 11, inclusive, and from time to time billed the defendant for such materials, each such billing being identified by package number as provided in the contracts; that plaintiff received payment for the materials in the stated quantities as specified in the materials lists, parts of the contracts, and makes no claim herein for any part of such specified materials. (Tr. 415, 435).

"9. That in addition to the materials as specified in the material lists, parts of plaintiff's exhibits 6 to 11, inclusive, plaintiff delivered to the projects for use in construction of the homes other materials not mentioned in the respective material lists, referred to in this case for convenience as "extras," of the nature and in the quantities as specified in plaintiff's exhibit 4, and plaintiff also delivered to the projects for use in construction of the homes materials of the kind mentioned in the respective materials lists, but in excess of the quantities therein listed, referred to in this case for convenience as "overages" in the quantities specified in plaintiff's exhibit 5. (Tr. 27, 85-8, 93-7, 186-7, 332, 401, 417, 605-6; Exh's 4, 5, 17).

"10. That the defendant gave no written orders for delivery of any "extras" or "overages" to any of the construction projects. (Tr. 85, 88, 163).

"11. That the materials thus delivered were furnished by plaintiff on the oral direction and instructions of C. E. Slavens, defendant's construction superintendent, and such materials were used in the course of construction of the sixty-one houses. (Tr. 29-32, 85-88, 160, 181, 232, 320).

"12. That no record was kept by defendant of materials delivered to the job sites, and that no receipts for deliveries were signed by anyone on behalf of de-



fendant. (Tr. 64-67, 175-176, 214, 266, 270, 303-4, 307-9, 327, 373-4, 501).

"13. That plaintiff kept itemized book records and an invoice file showing "extras" and "overages" delivered to the respective job sites, plaintiff's exhibits 1, 2, 3, and 17, and that deliveries were in fact made as shown by these records. (Tr. 33-37; Exh's. 1, 2, 3, 17).

"14. That at the times when plaintiff billed defendant for materials specified in the materials lists, parts of the contracts, exhibits 6 to 11, inclusive, and received payment therefor, plaintiff was required to sign receipts prepared by defendant's construction superintendent, C. E. Slavens, or under his direction; that these were on printed forms supplied by the First Security Bank of Utah, N.A., through which bank the defendant was procuring funds for financing construction of the homes, such receipts being parts of defendant's exhibits 12, 13, 13-B, 14, 14-B, 14-C, 15, 15-A, 15-B, 15-C, 16, 16-A, 16-B, 16-C, and 16-D. (Tr. 204-211, 276-8; Exhibits named).

"15. That these receipts and lien waivers were required and payments of the amounts therein specified were made upon invoices or billings made by plaintiff to defendant; that said invoices or billings were for materials delivered as per the material lists, parts of the contracts, plaintiff's exhibits 6 to 11, inclusive, without itemization; that these invoices or billings were for the exact sums specified in such material lists, "Package 1" or "Package 2" totals, as the case may be; and that payments in each instance also corresponded with the contract price total for material listed in the particular "packages." (Tr. 204-211; Exh's. 6-11 inclusive; Exh's. 12-16 inclusive).

"16. That at the times of presentation of these bills and invoices and executions of the receipts and lien waivers no discussion was had between the parties as to materials being supplied other than or in addition to

the materials specified in the so-called "packages" or material lists attached to the contracts, plaintiff's exhibits 6 to 11, inclusive. (Tr. 566).

"17. That duplicate deliveries were made by plaintiff to the first project in Orem, Utah, for the reason that orders placed were delayed in delivery, necessitating the plaintiff obtain some of the same materials elsewhere; that as result thereof, there was some carry-over throughout the construction of the projects; that in each instance, plaintiff inventoried materials thus left over, and that defendant was in each instance given proper credit in plaintiff's accounts for all items charged against one project which were thereafter transferred for use upon subsequent projects. (Tr. 18-27, 134-35, 140-41, 266, 325, 395).

"18. That there was no understanding or agreement between the plaintiff and the defendant that the plaintiff was required under the contracts, plaintiff's exhibits 6 to 11, inclusive, to deliver any materials other than those specifically listed upon the material lists part of the contracts, in the amounts therein specified. (Tr. 211, 238-9, 566; Exh's. 6-11 inclusive).

"19. That not later than July 1, 1957, defendant was on notice by reason of written billing that plaintiff was charging and expecting to be paid for "extras" and "overages" he delivered to the projects, but defendant, through its construction superintendent, C. E. Slavens, continued to authorize and order such "extras" and "overages" without requiring written order therefor. (Tr. 60, 404-5, 410-11; Exh. 19).

"20. That plaintiff on January 31, 1958, presented defendant with his statement for all extra and additional materials furnished for construction of the sixty-one houses; and that payment has never been made by or on behalf of defendant to plaintiff on this statement. (Tr. 413-15, 446; Exh. 30).

“21. That plaintiff and defendant entered into other contracts, not in issue herein, for the roofing of the sixty-one homes herein involved, these contracts containing a similar prohibition against changes without prior written order of defendant; that under those contracts plaintiff provided roofing materials in addition to the amounts required by those contracts upon oral order of the said C. E. Slavens, without written order, and that defendant paid plaintiff for such additional roofing materials, without regard to the contract provision requiring prior written order. (Tr. 101-108, 193-4, 197-8, 407-13).

“22. That subsequent to the execution of certain of the contracts, plaintiff’s exhibits 6 to 11, inclusive, and without prior notice to plaintiff, defendant changed plans of some of the houses being constructed, used materials delivered by plaintiff in making such changes, and plaintiff learned thereof only after the fact, when additional materials were required of him. (Tr. 99-101, 285-6, 294-6, 301-03, 376, 500-1, 516-17, 596, 602).

“23. That plaintiff at all times herein involved believed and relied upon the belief that defendant’s construction superintendent, C. E. Slavens, had authority to order extras and additional materials for use in construction of the homes and to do so without signing orders in writing therefor. (Tr. 160, 211, 421-3, 452).

“24. That neither plaintiff nor his employee, Clyde Davis, in signing the receipts referred to in finding of fact no. 14, above, intended such receipts or any of them to constitute acknowledgment of payment in full for all material furnished by plaintiff for construction of the house or houses referred to in the respective receipts, but on the contrary, intended such receipts to acknowledge payment for the materials specified in the respective material lists and referred to collectively as “Package 1, or Package 2”; that the plaintiff and Clyde Davis did,

however, intend said receipts to operate as waivers of any lien which plaintiff might claim against the real estate referred to in the respective receipts. (Tr. 211, 437-446, 455-7).

“25. That neither the defendant nor its construction superintendent, C. E. Slavens, was misled or deceived by the signing of the receipts in the form in which they were signed, and that the defendant did not suffer damage by reason of the signing or delivery of such receipts. (Tr. 160, 211, 455-7).”

On the foregoing findings, the trial court concluded that appellant's construction superintendent had apparent and actual authority to order the extra materials not on material lists, part of the contracts, and materials on the lists in greater amounts than therein called for, that on the facts the requirement of the contracts for written modification was in effect waived, that the receipts and lien waivers were not a bar to this action, and that respondent was entitled to judgment.

## STATEMENT OF POINTS

### POINT I

QUESTIONS OF LAW RAISED ON THIS APPEAL WERE SETTLED BY THIS COURT ON THE FIRST APPEAL AND ARE “THE LAW OF THE CASE.”

### POINT II

THE TRIAL COURT FOUND THE FACTS AGAINST APPELLANT; THE RECORD SUPPORTS THESE FINDINGS; AND UNDER THE PRIOR DECISIONS OF THIS COURT, THE JUDGMENT SHOULD STAND.

## ARGUMENT

### POINT I

QUESTIONS OF LAW RAISED ON THIS APPEAL WERE SETTLED BY THIS COURT ON THE FIRST APPEAL AND ARE "THE LAW OF THE CASE".

We take the rule to be that where an appellate court in its opinion states a rule or principle of law which is directly raised on such appeal, it is necessary that the appellate court's decision on such rule or principle must be adhered to throughout all the subsequent proceedings in such case, both in the trial court and upon a subsequent appeal, unless: (a) A change in the law has in the meantime been made by legislative action; or (b) a change in the law has in the meantime been effected by a decision on precisely the same question by a higher appellate court. *Petty Vs. Clark* (1948) 113 Utah 205; 912 P2d 589. Of course, the conditions set forth under (a) and (b) above do not prevail in this case.

Under Point I of its brief, appellant argues its theory on the effect of the "Parole Evidence" rule on certain evidence admitted by the trial court. This point was argued on the first appeal; it was directly before this court; and it was resolved by this court in its decision therein. *John S. Davis, etc. v. Payne and Day, Inc.*, *Supra*, Headnote 2. We belabor this question no further.

Under Point II of its brief, appellant argues error on the question of evidence admitted to show the extent of Mr. Slavens', the construction superintendent's authority. There is no essential difference between this evidence offered on the first trial and the evidence offered and admitted on the second trial. This question was urged before this court on the first appeal; it was



argued extensively, and the question was decided against the appellant. We point out that there was never any question as to whether Slavens was an agent of the corporation. The sole question was the extent of the authority. The trial court in following the decision of this court on the first appeal admitted the evidence complained of. We submit that the trial court did not commit error and that the decision on the first appeal herein laid this issue at rest.

The evidence objected to under Point III of appellant's brief concerning payments made to respondent under other contracts not in issue herein in connection with the same construction project, though changes were not authorized in writing, was offered at the first trial, objected to by appellant, its admissibility argued before this court on the first appeal, and considered in this court's opinion. We deem this point sufficiently answered.

The argument of the appellant under Point IV of its brief that Slavens did not have the apparent authority claimed by respondent was on the first trial presented before the court at pretrial, and upon the trial. It was argued before this court on the first appeal, and the question was decided by this court in that decision. The trier of the fact on the second trial found that Mr. Slavens had the *actual* authority from the corporate principal to take the action he did regarding extras and overages. The court further found that he in fact did make such changes, and we submit that the record amply supports this finding.

We deem one matter raised by appellant in its brief should be answered, though we assert that we have answered it step by step throughout this long and arduous proceeding. Appellant attempts to point out that there was some "secret agreement" between respondent and Mr. Slavens. Appellant completely ignores the fact that

Mr. Slavens was the agent of the appellant; that he was not the agent of the respondent; and that under his written contract of employment, and under his testimony at the trial, he was under a duty as agent to the appellant, not to the respondent. We do not know what claim appellant might be able to successfully assert against Mr. Slavens, but that issue is not before the court.

## POINT II

THE TRIAL COURT FOUND THE FACTS AGAINST APPELLANT; THE RECORD SUPPORTS THESE FINDINGS; AND UNDER THE PRIOR DECISIONS OF THIS COURT, THE JUDGMENT SHOULD STAND.

This is a law case. We deem it horn book law that upon a finding of fact made when the evidence is in dispute, should there be evidence upon which the trier of the fact could have relied to resolve the dispute, this court will not upset that finding.

In the statement of facts, we have set forth the findings of the trier of the fact and referred to extensive evidence in the record to support these findings.

Of course, there is a dispute of fact. Were there not, there would be no litigation. The Hon. Will L. Hoyt, trier of the facts, personally observed the witnesses, and in fact, participated actively in their interrogation. He chose which witnesses and what evidence to believe. Without again reviewing this extensive record, under this point, we submit that the findings of fact heretofore quoted are amply supported by the record, and that as a matter of fact, the evidence affirmatively refutes appellant's contention as to what the facts were.

## CONCLUSION

There is no difference between the evidence presented at the first trial and that on the second trial. The law of this case was decided on the first appeal. The trier of the fact on the second trial found against appellant, and there is substantial evidence to support this finding. We respectfully submit that there is no basis for disturbing the findings and judgment of the trial court.

Respectfully submitted,

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