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J. L. Pulsipher, Jr. and W. L. Pulsipher v. Irwin D. Tolboe and United Pacific Insurance Co. : Brief of Appellants

Utah Supreme Court

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CLERK

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

FILED

FEB 13 1962

J. L. PULSIPHER, JR., and
W. L. PULSIPHER,
Plaintiffs and Appellants,

—vs.—

IRWIN D. TOLBOE, and
UNITED PACIFIC INSURANCE
COMPANY, a Corporation,
Defendants and Respondents.

Clerk, Supreme Court, Utah

No. 9571

APPELLANTS' BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County

HON. STEWART M. HANSON, *Judge*

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—vs.—

IRWIN D. TOLBOE, and

UNITED PACIFIC INSURANCE

COMPANY, a Corporation,

Defendants and Respondents.

No. 9571

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action against a Contractor and his bondsmen to recover losses to Plaintiffs-Appellants for Defendants-Respondents failure to discharge liens and for failing to perform certain work in a satisfactory manner. Defendants-Respondents counter claimed for an amount due under the contract.

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a judgment dismissing plaintiffs' complaint and awarding defendants judgment on their counter claim, plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of the judgment and a judgment in their favor, as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Plaintiffs and defendant Irwin D. Tolboe, executed a Construction Contract by which defendant Tolboe was to construct on plaintiffs' land at Mesquite, Nevada, a motel, service station, bulk plant, restaurant, and swimming pool and for which plaintiffs agreed to pay defendant \$149,149.00, subject to adjustment.

The Construction Contract, inter alia, provided:

"10. Contractor agrees to *save harmless and indemnify* owner from and against *all losses, claims, demands, payments, expenses, attorney's fees, injuries (fatal or non-fatal), or damage* to persons or property, *suits or actions*, directly or indirectly occurred or *resulting from any act or omission* of contractor or contractor's agents or employees in the execution of this agreement or work done hereunder."

"Contractor agrees promptly to pay for all labor, materials, supplies and equipment furnished or used for or in connection with said work."

“Contractor agrees to protect owner, its lands and other property, from and against all liens or claims of liens filed or made in connection with the work done hereunder, and agrees to cause any such lien which may be filed or made to be immediately released and discharged of record.”
(Emphasis added)

Defendant Tolboe, as Principal, and defendant United Pacific Insurance Company, a corporation, as Surety, executed a performance bond in favor of plaintiffs and conditioned as follows :

*“*** this Obligation is such that, if the Principal shall faithfully perform the Contract on his part and shall fully indemnify and save harmless the Owner from all cost and damage which he may suffer by reason of failure so to do and shall fully reimburse and repay the Owner all outlay and expense which the Owner may incur in making good any such default.”*

“and further, that if the Principal shall pay all persons who have contracts directly with the Principal for labor or materials, failing which such persons shall have a direct right of action against the Principal and Surety under this Obligation, subject to the Owner’s priority,

“then this obligation shall be null and void, otherwise it shall remain in full force and effect.”
(Emphasis added)

During the construction, certain changes were made in specifications and compensation, as provided in the contract (Section 6, Construction Contract). On or about

July 27, 1959, defendant Tolboe submitted to plaintiffs' construction engineer, Mr. Robert W. Sorensen, a list of claimed extras totaling \$6,094.73 and including, among other things, a claim for "16, Extra Plumbing: \$275.14." (See Exhibit A). Mr. Sorensen replied by letter on August 3, 1959 (Exhibit E) and proposed an adjusted figure of \$4,684.19 for all extras, and that the sum of \$1,000.00 be withheld until the defendant Tolboe installed some screens and toilet stalls and replaced certain concrete areas around the swimming pool. These proposals were embodied into a Memorandum Agreement (Exhibit D) on August 19, 1959, and which specifically provided:

"* * * this agreement will effect only the amount due and owing contractor from owners, *** and shall in no way effect any other rights or duties, as provided in the aforementioned contract." (Emphasis added)

H. D. Abbott was employed and did the work described in the "Specifications," (Exhibit C), "Article 61, Plumbing" and "Article 61, Addendum to Plumbing." He also did the piping to the bulk plant as described in "Article 63, Equipment Installation." Defendant Tolboe was required to do this work under the Construction Contract. Plaintiffs paid defendant Tolboe for this work.

Abbott performed other work outside the Construction Contract, upon order of plaintiffs, for which he was paid by plaintiffs. (Transcript, page 48).

There was a dispute between Abbott and defendant Tolboe over the amount to be paid and the work to be included in the sub-contract agreement.

Abbott made certain claims upon Tolboe as follows:

(Items numbered for convenience of reference.)

Item 1 "Motel, running extra to sewer line for east end of motel (Septic tanks position was changed) — \$161.14"

Item 2 "Bunk House, changing water line from original plan and installation. Roughing in for service sink not in specifications and cooler hook up — \$75.17"

Item 3 "Service station cooler hook up — \$9.25"

Item 4 "Labor and material bulk plant — \$1,027.00"

Item 5 "Septic tank permits — \$15.00",
for a total of \$1,287.56. (See Exhibit B)

Tolboe testified that Items 1, 2 and 3, above, were included in Exhibit A "16 Extra Plumbing: \$275.14" (Transcript, page 124) and were considered in adjusting extras later incorporated in the Memorandum Agreement, Exhibit D, aforementioned.

In substance, Abbott's position was that he had agreed to do the plumbing work as set forth in "Article 61, Plumbing" and "Article 61, Addendum to Plumbing" for which he was paid (except for some claimed extras, Items 1, 2 and 3, above). Abbott further contended that in agreeing to do the plumbing work for a certain price he had not promised to do the piping to the bulk plant

as described in "Article 63, Equipment Installation" (Item 4, above), that this was an extra (Abbott deposition, page 8, line 19) as between Abbott and defendant Tolboe for which he should be paid extra. Defendant Tolboe contended he had hired Abbott to do all of the plumbing work described in the specifications, including the bulk plant piping (Item 4, above).

Tolboe claimed payment in full and introduced Exhibit Z for this purpose (Transcript, page 109). He called attention, specifically, to the following endorsement on the last check, "Endorsement of this check constitutes payment in Full of Contract. No Extras." and signed "H. D. Abbott." Abbott explains this endorsement as payment for the work done on the plumbing contract (Abbott deposition, page 14, line 6), but no payment for "extras" as claimed.

The Construction Contract also required Tolboe to furnish and spread stone chips upon certain areas. A trucking company was employed by Tolboe to furnish and spread the chips but refused, apparently because oil had been spread on the areas upon which the stone chips were to be placed. Vern Green was employed and did spread the stone chips. Green was not paid by defendant Tolboe for his services in spreading the chips and therefore made claim upon plaintiffs and defendant Tolboe. Tolboe claimed he had not employed Green and should therefore not be required to pay him.

On or about June 14, 1960, Abbott and Green filed a lien on the property of plaintiffs (Exhibits Q and R). Exhibit Q, Abbott's lien claim of \$1,271.51, plus other items, among other things, provided:

"that the undersigned *** entered into a written contract with the said contractor (Tolboe) under and by which he was to perform certain labor and furnish certain materials *** and the following are the terms of said contract, to-wit: The undersigned was to furnish all plumbing per plans and specifications for the construction of motel, bunk house, cafe, service station, bulk plant and utility building ***, with extras thereon."

The lien claim of Green, Exhibit R, claiming \$350.00 plus other items, indicated:

"*** that the claimant, on or about the 13th day of June, 1960 entered into an express contract, to-wit: for loading and distributing *** lime chips, upon the aforesaid premises.

"That said materials and said labor in connection therewith was performed for the aforesaid Irwin D. Tolboe, Inc., *** and were actually used and performed in and about the improvements on said premises ***."

The aforementioned Abbott and Green each made claims upon plaintiffs who timely notified defendants (See Exhibits F, J, L and P) of the claims and liens.

On or about July 18, 1960, Abbott and Green brought action against plaintiffs and defendants in Clark County, Nevada, to obtain a money judgment and to cause plaintiffs' property to be sold to satisfy the judgment. De-

defendants were notified thereof and again requested to pay the claims and to defend the action. On or about September 2, 1960, the aforementioned Abbott and Green obtained a judgment against plaintiffs and a Decree of Foreclosure of Mechanics Lien (See plaintiffs Exhibit S). Defendants were again timely notified and requested to pay.

On or about October 19, 1960, plaintiffs paid the aforementioned judgment in the sum of \$2,303.73, to prevent a foreclosure against their property (See Exhibit T).

At the trial the defendants claimed the liens were not filed in accordance with Nevada law and, therefore, they had no duty to pay the same. Plaintiffs claim their validity is immaterial, but that they were nevertheless valid.

The Memorandum Agreement (Exhibit D) provided for the replacement of certain cement around the swimming pool. The cement around the pool was uneven, not level, joints were off, and there were cracks around the clean-out valve (Transcript, page 71). Plaintiffs testified cement had never been approved (Transcript, page 72), that no cement had been replaced (Transcript, page 72) but that some "patching" had been done which fell out in about a week (Transcript, page 161). Defendant Tolboe testified he had done some chipping and

patching but had not replaced the slabs (Transcript, page 137). The Sorensen deposition (page 90, line 26) indicated estimated cost to replace the cement to be \$600.00.

Plaintiffs testified the planter walls proved to be defective and on several occasions called this to the attention of defendants (Transcript, pages 77-70). Upon Tolboe's refusal to do anything about the walls, plaintiffs hired others to remove them. Plaintiffs paid Tolboe \$654.00 for this work and testified this would be a reasonable amount to replace the same.

Plaintiffs contended there was a duty under Section 8 of the Construction Contract by which defendant Tolboe was to clean up the adjacent area where Tolboe had obtained fill dirt. Plaintiffs evidence indicated that Tolboe never cleared the area, that he left a flood channel under the highway filled, that a fence was left down and that the hill was left in a very rough condition. Plaintiffs replaced the fence at a cost of \$30.00 and estimated a cost of \$200.00 to clean up the hill. The deposition of Sorensen contained an estimate of \$250.00 for this purpose (Sorensen deposition, page 17).

Pursuant to Paragraph 10 of the Construction Contract, plaintiffs claimed a duty on defendants to pay attorney's fees. Evidence was presented that plaintiff's attorney was hired to write various letters, to get defendant Tolboe to complete his work, and to draft the Memo-

randum Agreement, Exhibit D, and that the reasonable value of his services was \$150.00.

Plaintiffs claimed an expenditure (Exhibit V) of \$96.10 for power provided the contractor while on the project. (Transcript, pages 83 and 84). Defendant testified that he had never purchased any power and charged it to Western Village (Transcript, page 158).

Plaintiffs presented expenditures of \$6.17 (Exhibit W) for freight and \$25.88 for gasoline, oil and diesel (Exhibit X). Defendant Tolboe stated he would be willing to pay both of these items.

Plaintiffs also claimed an expenditure of \$65.00 Exhibit Y) to send their attorney to Las Vegas.

The Court found that Abbott had been employed to and did perform all of the plumbing work required by the Construction Contract; that Tolboe had paid Abbott for the same; that plaintiffs had employed Abbott to do work outside the Construction Contract; that Abbott filed a lien for this work, filed suit, and obtained a judgment, and that plaintiffs paid the same. The Court further found that Tolboe was required to scatter the stone chips; that Frenher Trucking Company was employed by Tolboe to furnish and scatter the same but had refused to scatter the chips because the area had been covered with oil; that plaintiffs hired Green to scatter

the chips and promised him payment; that Green did scatter the chips; that Green filed a lien for this work, filed suit, and obtained judgment; that plaintiffs paid the same; and that plaintiffs had paid defendant Tolboe \$330.00 for the purpose of spreading the stone chips.

The Court further found that defendant had fully completed his contract and was entitled to the sum of \$1,000.00 withheld by plaintiffs, less the sum of \$330.00 aforementioned. Defendants were, therefore, given judgment for \$670.00.

ARGUMENT

POINT NO. I.

THERE IS NO EVIDENCE TO SUPPORT THE FINDING THE ABBOTT CLAIM AND LIEN WAS FOR WORK OUTSIDE THE CONSTRUCTION CONTRACT.

The claim of Abbott upon which the lien was based was clearly established to consist of:

1. Extras in connection with the plumbing work, and
2. Piping to the bulk plant.

Extras. It is clear from the evidence that Abbott submitted to Defendant Tolboe certain extras in connection with the plumbing work. The work was performed by Abbott at the instance of Tolboe and reimbursement was claimed by Tolboe as extras to which he was entitled as General Contractor. These extras were the subject of

negotiation between Tolboe and Plaintiffs resulting in the execution of Memorandum Agreement (Exhibit D). Tolboe clearly treated them as within his agreement. It is unconscionable for him to claim reimbursement for them, to compromise them by negotiation, and then disavow knowledge thereof.

Bulk Plant Piping. This consisted of running the piping to the bulk plant for which Abbott claimed the sum of \$1,027.00. This was stipulated to be a responsibility of Tolboe under the Construction Contract and that Abbott had performed the work.

There is absolutely no evidence presented by Defendants even suggesting the Abbott claim was outside the Construction Contract, except a statement made by Defendant Tolboe in Exhibit D-D to the effect that it must have been work ordered by Plaintiffs, or their Construction Engineer. This, however, was repudiated by Defendant Tolboe in his next sentence, also contained in Exhibit D-D, to-wit: "I have no knowledge of any of this other than his bills."

Here is the testimony upon which the finding must stand.

1. On direct examination, Defendant Tolboe testified (Transcript Page 124, Lines 21-23) :

"Q. Here is one, 'labor and material, Bulk Plant, \$1,027.00.' Do you know what this is about?"

A. I wouldn't have the slightest idea."

2. On cross examination, (Transcript, Page 130, Lines 15-19) Defendant Tolboe testified as follows:

“Q. Now when Mr. Abbott submitted this bill for extras, did I understand you to say that you thought this was for labor and materials over and above his contract?”

A. This \$1,027.00, yes.

Q. That is what you say?

A. Yes.”

On Line 29 of the same page (130), the Defendant testified as follows:

“A. At the time of his deposition at Las Vegas was the first I knew what the \$1,027.00 was for.”

3. Exhibit C-C listed the extras claimed by Defendant Tolboe, as mentioned above, and a statement (acknowledged by Defendant Tolboe to be in the handwriting of Abbott) as follows:

“Labor and material piping bulk plant \$1,027.00. If you are willing to make a settlement now of one-half of the cost of bulk plant piping I will settle for that. If this is not settled within ten days, I will place a lien on the buildings. At that time I will place lien for the full amount of bulk plant piping. I feel that I am being fair with you on this.”

Mr. Tolboe sent Exhibit C-C to plaintiffs’ construction

engineer, by letter (Exhibit D-D) and which contained the following statement:

“I am sending a bill from the plumber once again to you. This bill is work authorized either by you or the Pulsiphers direct to him, not through me. I have no knowledge of any of this other than his bills.”

4. Defendant Tolboe testified as follows, Page 132, Lines 20 to 23:

“Q. (by Mr. Larson), Now you understand, then, that the primary claim of Mr. Abbott on these liens was for piping to the bulk plant?

A. In large amount, apparently yes.”

As pointed out above, the lien (Exhibit Q) on its face was for work ordered by Tolboe. This claim was reduced to judgment (Exhibit S) and paid by Plaintiffs (Exhibit T).

The law as stated by this Court is well established. The Court has authority to review the evidence and reverse the judgment on the facts. See *Barker v. Dunham*, 342 P.2d 867, 9 Utah 244; *Walton v. Coffman*, 110 Utah 1, 169 P. 2d 97; *Peterson v. Peterson*, 112 Utah 554, 190 P.2d 135; *Nokes v. Continental M. & M. Co.*, 6 Utah 2d 177, 308 P. 2d 954.

Even under the rule announced in *Chugg v. Chugg*, 9 Utah 2d 256, 342 P. 2d 875, by indulging considerable credit to the findings of the trial court, the finding here

discussed cannot be sustained by the evidence. The trial court's conclusion is obviously against the weight of evidence. See *Hall v. Hall*, 7 Utah 2d 413, 326 P.2d 707.

It is conceded that where the record shows a fair preponderance, or evenly balanced evidence, the trial court's finding should be sustained, but where the evidence is vague and uncertain, as in the instant case, the finding cannot be sustained. *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 305 P. 2d 480. The above evidence, viewed in the light most favorable to defendants, could not possibly support a finding that the claim and lien was for work outside the contract between Plaintiffs and Tolboe.

POINT NO. II.

THE EVIDENCE FAILS TO SUPPORT A FINDING OF FULL PAYMENT TO ABBOTT BY DEFENDANTS FOR WORK DONE AND MATERIALS FURNISHED PURSUANT TO THE CONTRACT.

Tolboe claimed payment in full and introduced Exhibit Z for this purpose. Exhibit Z, the last check in the series, contained the following statement:

“Endorsement of this check constitutes payment in full of contract. No extras. H. D. Abbott.”

It is obvious there was a misunderstanding as to the agreement between Tolboe and Abbott. Your attention is called to the Abbott Deposition, Page 8, Line 11:

“Q. Maybe we can refer to the index, here. In any event, what you’re saying was that this was part of the basic contract, but not part of your basic plumbing contract, is that right?

A. No, it wasn’t in the plumbing at all. There was some discussion on that, right at the first.
*** It was never figured in on my contract at all.”

And at Page 14, commencing on Line 2:

“Q. And on the back of that he stated, “endorsement of this check constitutes payment in full of contract, no extras’—and you signed it?

A. That’s right.

Q. And that was your understanding, that that paid you off in full?

A. On the contract.”

While there was evidence that a written contract was drafted, it was never signed. The testimony of Abbott was admissible to clarify the terms of their agreement. See *Moody v. Smith*, 9 Utah, 2d 139, 340 P. 2d 139. Upon consideration of the Abbott testimony the “payment in full” claim of Defendant Tolboe is not inconsistent with Plaintiff’s position.

The testimony of Tolboe of “payment in full” is self-serving and should be considered in evaluating his testimony. See *Cottrell v. Grand Union Tea Co.*, 5 Utah 2d 187, 299 P. 2d 622. At the time of his deposition, the testimony of Abbott was not self-serving since he had been paid for his services.

POINT NO. III.

THE EVIDENCE FAILS TO SUPPORT THE FINDINGS THAT DEFENDANTS HAD COMPLIED WITH THEIR CONTRACT WITH PLAINTIFFS.

The evidence failed to support the finding that defendants had complied with the terms of the contract and bond. Specifically, the defendants were in default for failure to perform the work as prescribed, failure to save plaintiffs harmless, to discharge liens, to indemnify owner for certain losses and expenses, and failure to comply with the special conditions imposed by the Memorandum Agreement, Exhibit D.

The defendants by the Construction Contract and performance bond made the following promises, to-wit:

“Contractor agrees promptly to pay for all labor, materials, supplies, and equipment furnished or used for or in connection with said work.”

“agrees to protect owner *** from and against all liens or claims of lien filed or made in connection with the work done hereunder.”

“agrees to cause any such lien which may be filed *** to be immediately released and discharged ***.”

The evidence is not in dispute that Green and Abbott each filed lien claims against the property of plaintiffs, that the claims were for work required of Tolboe under the Construction Contract, and that defendants each knew the nature of the said Abbott and Green claims. Each

was repeatedly notified and asked to pay and discharge the claims and liens. (See statement of facts above.)

Abbott and Green were agents of defendant Tolboe. (Note Section 15, Paragraph 2 of the Construction Contract):

“sub-contracting any part of the work shall not relieve contractor of any obligation of this agreement. As between contractor and owner, any sub-contractor shall be considered the agent of contractor. ****”

The defendants promised plaintiffs to save them harmless and to indemnify them for any losses, payments, expenses, attorney’s fees, etc., incurred or resulting from any act or omission of contractor. (Note Section 10, 1st paragraph of Construction Contract):

“Contractor agrees to save harmless and indemnify owner from and against all losses, claims, demands, payments, expenses, attorney’s fees, *** suits or actions, directly or indirectly incurred or resulting from any act or omission of contractor or contractor’s agents or employees in the execution of this agreement or work done hereunder.”

As pointed out above, the claims and demands of Green and Abbott were the result of their employment by Tolboe, to perform work which Tolboe was required to perform for plaintiffs. Liens were filed, suit was instituted, a judgment was obtained and plaintiffs expended money to satisfy the judgment. The defendants failed to

either pay the claims, release the liens, defend the law suit, or to pay the judgments. As a result of all of this, plaintiffs were required to hire an attorney and to pay his traveling expenses. In other words, defendants did not do what they had promised to do.

Plaintiffs were required, as a direct result of defendants' failure to keep their basic promises, to pay a power bill (there is some dispute over this), a freight bill, and a gasoline and oil bill over which there was no dispute.

The evidence with respect to the nature of the work performed also failed to support the fact found by the Court, viz., that defendants had complied with their contract.

Defendants made the following promise, to-wit:

“7. ***Work or material not in accordance with this agreement, condemned by owner, shall be at once removed and replaced by contractor at contractor's expense.”

Defendants were duly notified that the cement around the swimming pool was unsatisfactory and needed to be replaced. Defendant Tolboe expressly promised to replace the cement in executing Memorandum Agreement, Exhibit D and the evidence is clear that he did not do so.

Defendants were in default for failing to replace defective planter walls. They were dully notified of the

defective condition and the request made that they be removed and replaced (Exhibit I) and defendant Tolboe refused to do anything about it. The approval of the construction engineer, as required by the contract, was never obtained.

The evidence showed that defendants were in default for failing to clean up the building site as provided by Section 8 of the Construction Contract as follows, to-wit:

“8. Contractor at all times shall keep the work-site, public and private ways, roads, and means of ingress to and egress from site free from accumulations of new or waste materials or refuse. *** On completion of the work, contractor shall remove all rubbish, tools, equipment, and surplus materials and supplies from the area, and shall leave the work ‘broom clean’ or its equipment.”

Defendant Tolboe obtained fill dirt for the project on adjacent land and failed to contradict the evidence presented of his failing to clean the same up.

The cases cited above under Point No. 1 are here incorporated by reference. The finding that Defendants had complied with their promises simply is not sustained by the evidence presented.

POINT NO. IV.

THE COURT ERRED IN FAILING TO FIND DEFENDANTS HAD A LEGAL DUTY TO PAY THE ABBOTT AND GREEN CLAIMS, TO DISCHARGE THE LIENS, DEFEND THE SUIT, PAY THE RESULTING JUDGMENT, AND TO INDEMNIFY PLAINTIFFS FOR ALL COSTS IN CONNECTION THEREWITH.

Defendants promises are clearly set forth in the Construction Contract and Bond.

From the Construction Contract:

"To save harmless and indemnify owner from and against all losses, claims, demands, payments, expenses, attorney's fees, *** suits or actions, directly or indirectly occurred or resulting from any act or omission of contractor or contractor's agents."

"to protect owner *** against all claims of liens ***"

"To cause any such lien which may be filed or made to be immediately released and discharged of record."

And from the Bond:

"*** if the Principal shall faithfully perform *** and shall fully indemnify and save harmless the owner from all costs and damage which he may suffer by reason of failure so to do and shall fully reimburse the owner all outlay and expense which the owner may incur in making good any such default ***."

It is clear that a judgment was obtained against plaintiffs for work performed at the request of defendant

Tolboe. There is no dispute as to the payment of said judgment by plaintiffs.

The attempt of defendants to show the lien to be invalid, as not timely filed, cannot be here considered since a lien is merely an aid to collect a debt and not the debt itself. 36 Am. Jur. 19, Mechanics' Liens, Section 2. Even if the lien was not filed in accordance with law (which plaintiffs deny) the debt would not be extinguished. In the instant case it was, in fact, merged into the judgment.

The recognition of a foreign judgment is basic. Your attention is called to the Constitution of the United States, Article IV, Section 1:

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. ***”

This Court has repeatedly held that it has no power to review or modify a foreign judgment. *Burnham v. Reid*, 1 Utah 2d 390, 267 P.2d 915. The only challenge to a foreign judgment which is allowed is that to the jurisdiction of the court which entered it. *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871; *Dykes v. Reliable Furniture Co.*, 3 Utah 2d 34, 277 P. 2d 969; *McGriff v. Charles Antell*, 123 Utah 166, 256 P. 2d 703; *Western Gas Appliances v. Servel, Inc.*, 123 Utah 229, 257 P. 2d 950.

CONCLUSIONS

It is respectfully submitted that the evidence fails to support the finding that the Abbott claim and lien was outside the Construction Contract. Defendants did not establish as a fact that full payment was made to Abbott for work he performed under the contract. It is clear the defendants had not complied with the contract. The defendants breached their duty to pay the Abbott and Green claims, to discharge the liens, defend the suit, pay the resulting judgment, and to indemnify plaintiffs for all costs in connection therewith.

To sustain the lower court would be to go against the law as heretofore announced by the Supreme Court.

Appellants respectfully urge the Court to reverse the judgment of the trial court and grant the relief prayed for in their complaint.

Respectfully submitted,

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Appellants