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

Utah Supreme Court

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

APR 9 1962

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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.

FILED
MAR 1 - 1962

CASE
Supreme Court, Utah
NO. 9571

RESPONDENT'S BRIEF

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

Hon. STEWART M. HANSON, Judge

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In the Supreme Court of the State of Utah

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.

**CASE
NO. 9571**

RESPONDENT'S BRIEF

STATEMENT OF FACTS

This case was heard by the Honorable Stewart M. Hanson, sitting without a jury, and after hearing the evidence, he dismissed appellants' complaint and granted respondents judgment upon their counterclaim, and from that judgment appellants prosecute this appeal. The defendant below is the respondent. All references to the defendant refer to Irwin D. Tolboe.

We believe that there are only fact questions before the Court. Therefore we quote the applicable Findings of Fact, citing the record relied upon for each Finding.

"1. On the 2d day of February, 1959, the plaintiff, J. L. Pulsipher, and the defendant, Irwin D. Tolboe, entered into a construction contract. By the terms of the contract, the defendant, Tolboe, was to construct a motel, service station, bunk house, cafe, bulk plant, and a utility building for the plaintiffs. The contract was to be performed at Mesquite, Nevada on plaintiffs' premises. During all the times herein mentioned, Robert W. Sorensen was plaintiffs' agent (Tr. 1, 11).

"2. In performance of his contract, the defendant, Tolboe, entered into a sub-contract with one H. D. Abbott, by the terms of which Abbott was to perform all of the plumbing work required by the contract between Pulsipher and Tolboe (Exh. N. 106-8). The Court finds that Abbott completed his contract with the defendant, Tolboe, before the 1st day of August, 1959, and that Tolboe made final payment to Abbott for the work and materials furnished by Abbott in October, 1959 (Exh. Z; Tr. 108-9). The Court finds that at the time the said H. D. Abbott was performing his contract with defendant, Tolboe, that the plaintiffs, or their agent, employed the said H. D. Abbott to do extra work on the project contemplated by the contract between plaintiffs, Pulsiphers, and the defendant, Tolboe, (Abbotts Deposition, pp. 4, 14-15; Tr. 124, 130) but which work was not included within the contract of Tolboe (Abbott's Deposition, p. 8); Exhs. K, M, N).

"3. Under the terms of defendant's and plaintiffs' contract, defendant was required to scatter chips on plaintiffs' premises. In carrying out this contract,

defendant, in June or the early part of July, 1959, employed the Frenher Trucking Company to furnish and scatter the chips with the understanding with the Frenher Trucking Company that the area upon which the chips were to be scattered would be dry. A few days before Frenher delivered the first load of chips to plaintiffs' premises, the plaintiffs' agent, without contacting defendant or obtaining his permission to do so, covered the area upon which the chips were to be spread with a heavy coating of oil. Because of this, the Frenher Trucking Company refused to scatter the chips and dumped them on the edge of the oiled surface. Defendant then refused to scatter the chips unless he was paid extra for so doing and plaintiffs, or their agent, refused to pay defendant for this extra work. Plaintiffs or their agent then hired one Vern Green to scatter the chips and agreed to pay him for his services (Tr. 112-115; 137, 146, 147).

"4. On October 9, 1959, defendant had fully completed his contract but plaintiffs have ever since that time refused to pay the defendant in full and have withheld \$1,000.00 which they owe under the terms of the contract to defendant (Exh. D); Tr. 52, 117, 120, 121, 150; Exh. Sp. 2, Sp. 6, 7 and 8).

ARGUMENT

POINT I

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

This is a law case. Most of the cases cited by appellants are equity cases and are not authority for the propo-

sition contended for by appellants, and those which are not equity cases sustain our contention.

Our Supreme Court has said in a case tried before the Court without a jury, that upon appeal, the Court would examine the record in the aspects most favorable to the prevailing party to determine whether there is evidence to support the judgment of the Court below. *Mt. States T. & T. Co. v. Consolidated Freightways*, 121 Pt. 379; 242 P. 2d, 563. For the same effect see *Beagley v. U. S. Gypsum*, 120 Ut. 487; 235 P. 2d, 783.

Our Supreme Court in the case of *In Re Swan's Estate*, 4 Ut. 2d, 277; 293 P. 2d, 682, said: "A will contest being an action at law we are bound by the trial court's findings unless such findings are unreasonable in view of all of the evidence and all reasonable inferences therefrom when considered in the light most favorable to supporting the judgment."

Our Supreme Court has said that in an action of law, the decision of the lower Court cannot be overturned if there is substantial evidence to support it. See *In Re Lavelle's Estate*, 122 Ut. 253; 248 P. 2d, 372; *In Re McCoy's Estate*, 91 U. 212; 63 P. 2d, 620.

It would appear that appellants concede that the court's finding that the appellant hired and agreed to pay Green for scattering the chips was correct. This is understandable because there is no evidence in the record to the contrary.

The evidence supports the court's finding that the work done by Abbott for which he claims a lien, was not part of a contract between respondent and appellants and the court's finding that the appellants' or appellant's agent

hired Abbott to do this work is supported by competent evidence.

As shown by the evidence, the appellants withheld \$1,000.00 which was due respondent pending the installation of balance of screens, toilet stalls, and replacing certain concrete areas, and their pleadings raised no issue regarding respondent's duty to replace or repair planter walls or respondent's duty to replace a fence or to clean a hill or to clean out a flood channel, but upon the trial of the cause, appellants introduced evidence regarding the claimed failure of respondent to do the last above mentioned things. Even though appellants had interposed proper pleading, there was no competent evidence to support any claim by appellants regarding these matters, and, therefore, we will make no further reference to these claims.

Appellants, on page 12 of their brief, state that respondent stipulated that the bulk plant piping to the bulk plant was the responsibility of Tolboe. The record does not support such assertion. The record shows that when the stipulation referred to was made, all testimony just prior to that time was referring to Exhibit C, the contract between respondent and Abbott. Under that contract, it was the responsibility of Abbott to do all plumbing. We therefore stipulated that any work that Abbott did under his contract with respondent was covered by the basic contract. We did not stipulate that work performed by Abbott at the behest of appellants or their agents, and for which we had not been paid, and which was not embraced within the plumbing contract, was embraced in the basic contract. The record shows that respondent has at all times claimed that he did not order Abbott to do the work for

which the lien is claimed and did not know what the work consisted of until he heard Abbott's testimony on his deposition, and the court found that the work was ordered by appellants or their agent and that it was not work that was to be performed by respondent. To now claim that respondent stipulated something contrary to all of his former contentions before the trial and during the trial assumes that respondent and his counsel were bereft of their reason. Certainly the court knew the meaning of the stipulation. It is hardly conceivable that the court would find contrary to the stipulation if the court had understood the stipulation.

Appellants also state, on page 12 of their brief, that it is unconscionable for respondent to claim reimbursement of the extras as shown on Exhibit B, then to compromise them by negotiation and then disavow knowledge thereof. Respondent has never disavowed knowledge of what the extras were for, but he has said that in view of the fact that appellants refused to pay him, that he was not going to dig down into his own pocket and pay for extras which were furnished by Abbott and which were for the benefit of appellants.

CONCLUSION

The judgment of the Trial Court should be affirmed for the following reasons:

(1) There is substantial evidence that the respondent had fully paid Abbott for all work performed by Abbott as set forth in the contract between respondent and Abbott.

(2) There is substantial evidence that the appellants, or their agent, employed H. D. Abbott on the project contemplated by the contract between appellants and respondent.

ent and that this work was not included in the contract between respondent and appellants.

(3) There is substantial evidence that the chips were to be scattered on dry ground and that the extra work entailed in scattering the chips was made necessary by appellants' agent and that appellants' agent hired and agreed to pay for this extra work.

(4) There is substantial evidence that appellants withheld \$1,000.00 due respondent until respondent did certain things as set forth in a memorandum agreement and that these things were done by respondent.

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