

1963

# Joseph P. McCarren dba McCarren Plumbing and Heating Co. v. Charles S. Merrill : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED  
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Supreme Court, Utah

JOSEPH P. MCCARREN d/b/a  
MCCARREN PLUMBING AND  
HEATING CO.

*Plaintiff and Respondent*

vs.

CHARLES S. MERRILL,

*Defendant and Appellant*

Case No.

9857

Appellant's Brief

*Appeal from the Judgment of the Third District Court  
for Salt Lake County  
Honorable Stewart M. Hanson, Judge*

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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JOSEPH P. MCCARREN d/b/a  
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Appellant's Brief

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STATEMENT OF KIND OF CASE

This is an action for recovery under a written contract for the supplying of plumbing materials and services by the Plaintiff, together with Plaintiff's claim for quantum meruit for work performed. The Defendant filed a counterclaim for damages by reason of Plaintiff's abandonment and breach of the written contract.

DISPOSITION IN LOWER COURT

The lower court, Judge Stewart M. Hanson presiding, awarded judgment to the Plaintiff under quantum meruit in the sum of \$1510.90 and dismissed the counterclaim of the Defendant.

RELIEF SOUGHT ON APPEAL

Defendant asks that the judgment of the lower court be reversed and that the Plaintiff be awarded nothing by reason

of his complaint and that the Defendant be awarded his damages in the sum of \$889.83, for expenses involved in excess of the contract price, together with \$600.00 as loss of rent occasioned by delays resulting from Plaintiff's abandonment.

### STATEMENT OF FACTS

The Defendant, Charles Merrill, in construction of a multiple dwelling unit, entered into a written bid proposal agreement with the Plaintiff on October 5, 1960, wherein it was agreed that the Plaintiff would perform the plumbing required upon said building providing both labor and materials for the contract price of \$2,981.00 (Exhibit #1). Under the terms of the agreement the manner in which payment was to be made was not set forth, the contract being silent as to this matter. The Plaintiff testified that account statements were to be issued to him monthly and that payment was to be made on the 10th of each month upon said statements (R6). Defendant testified that the only discussion with reference to payment was that payment would be made upon completion of the work done (R 48-49); and that the work to be performed under the contract should have taken approximately 30 working days (R 26). The Plaintiff worked for approximately 20 days and then withdrew his men and equipment from the job premises (R 19). Plaintiff testified that he withdrew from the job because of the fact that the Defendant had not paid the sum of \$1800.00 as requested by the Plaintiff on a billing made November 1, 1960. The Defendant testified that under the terms of the contract he was not obligated to make payment until the work had been completed in accordance with the contract. On January 10th, 1961, after numerous calls from the Plaintiff, the Defendant paid \$500.00 to the Plaintiff upon Plaintiff's representation that he would return to the job (R 49). Plaintiff did not return to the job and in order to complete the job, the Defendant engaged the services of L. G. Christensen, a plumbing contractor, to complete the plumbing work on the premises (R 50). When Mr. Christensen appeared on the job, he found that there were numerous plumbing errors that had to be corrected in order that the job be completed (R 60, 61, 62), including the fact that the sewer connection could not be

made (R 61). Mr. Christensen completed the job and was paid for the work and materials provided, which work and materials amount to \$889.83 more than the contract price under the Plaintiff's written contract (R 90). As a result of the Plaintiff's failure to complete the contract and by reason of his abandonment of the job, the Defendant was unable to complete the premises within the scheduled time and was unable to rent the premises although the same had been pre-rented and renters were waiting to take over said premises, which resulted in a loss of rent to the Defendant in the sum of \$600.00 (R 12).

## ARGUMENTS

### POINT I.

THE COURT ERRED IN FINDING FOR THE PLAINTIFF UNDER THE THEORY OF QUANTUM MERUIT AND AWARDING TO THE PLAINTIFF JUDGMENT IN THE SUM OF \$1510.90.

### POINT II.

THE COURT ERRED IN DISMISSING THE COUNTERCLAIM OF THE DEFENDANT.

### POINT III.

THE DEFENDANT IS ENTITLED AS A MATTER OF LAW TO DAMAGES BY REASON OF PLAINTIFF'S ABANDONMENT AND BREACH OF CONTRACT.

### POINT I.

THE COURT ERRED IN FINDING FOR THE PLAINTIFF UNDER THE THEORY OF QUANTUM MERUIT AND AWARDING TO THE PLAINTIFF JUDGMENT IN THE SUM OF \$1510.90.

From the evidence presented to the court it is uncontroverted that the Plaintiff entered into the employment of the Defendant under the terms of a written contract, which contract was prepared by the Plaintiff and submitted to and ac-

cepted by the Defendant. This contract should be construed strictly against the Plaintiff since he was the author thereof and set forth the terms and conditions to be undertaken. *Maw vs. Noble*, 10 Ut 2nd 440, 354 P2 121.

Although the contract is silent as to the manner of payment, and it is reasonable that the court should not assume to add to the contract something not there, since the contract did have a specific blank providing for the manner of payment. The failure of the Plaintiff to specify payments in the place provided by his own document supports the Defendant's statement that payment was to be made upon the completion of the contract. In view of this, it would appear that an uncertainty shows itself in the contract and under the rule set forth by this court in the case of *Maw vs. Noble*, supra, the court should construe this contract strictly against the plaintiff as the author thereof.

In view of the contract, the Plaintiff's abandonment thereof, based upon the failure of the Defendant to pay immediately upon presentation of the billing on November 1, 1960, would not give rise to the Plaintiff's position that he could walk away from the job and expect to be paid for the services rendered.

The rule most applicable is set forth in 58 Am. Jur., Work and Labor par 41, page 544, as follows:

“ . . . where a contract is entire, and one party, not in default, is willing to complete its performance, the other party, who abandons the contract or refuses to perform it, cannot recover, on the contract or on a quantum meruit, the value of the labor he has expended in its partial performance.”

To permit the Plaintiff to abandon his work and then seek to obtain the value of his services under a quantum meruit basis, would be to place an unfair burden upon the Defendant as purchaser of his services. He could not be assured of the costs of the service, and it would be impossible for Defendant as one of the parties to the written contract to rely upon the terms of that contract.

The Plaintiff was without excuse for his abandonment of the work contracted for and should be controlled by the ruling in the case of *Miller vs. Young*, 172 P 2nd 176; see also Am. Jur. Vol 12, pages 881, 887, incl., 892, 895, incl: Vol 49, pages 53 and 54. See also *Lowe vs. Rosenlof*, 12 Utah 2d 190, 364 P2d 8, citing *Miller vs. Young*.

In the present case the Plaintiff has failed to establish his own performance or a valid excuse for his failure to perform since his only basis for not completing the contract was the fact that the Defendant failed to pay upon the first and only billing made to him.

The evidence presented by the Plaintiff to establish the value of his services under the theory of quantum meruit was not sufficient to sustain the award of the lower court.

## POINT II.

### THE COURT ERRED IN DISMISSING THE COUNTERCLAIM OF THE DEFENDANT.

In dismissing the counterclaim of the Defendant for the damages sustained by reason of the abandonment and improper work of the Plaintiff, the lower court committed error.

The record discloses numerous instances as set forth in the testimony of Mr. L. H. Christensen, wherein it was conclusively established that the Plaintiff failed to perform the work undertaken by him in a workman-like manner, and that it was, in fact, necessary to re-do a great deal of the work done by the Plaintiff as well as complete the work contracted by the Plaintiff. The testimony established by Mr. Christensen and the Defendant Mr. Merrill showed a sound basis for the counterclaim of the Defendant.

Where the Plaintiff held himself out to be a qualified tradesman he impliedly agreed that his work would be performed in a skillful, workman-like manner. If he fails to do so and his work is without value, he should not be entitled to recover for his labor and should in fact be responsible for his failure to comply with the standards of his trade. See 58 Am. Jur., Work and Labor, par 40, p 543-4.

### POINT III.

#### THE DEFENDANT IS ENTITLED AS A MATTER OF LAW TO DAMAGES BY REASON OF PLAINTIFF'S ABANDONMENT AND BREACH OF CONTRACT.

From the evidence presented by all of the witnesses, it was clearly shown that the Plaintiff failed to perform his work in a workman-like manner, and that he left the job in such a condition that the subsequent contractor was unable to utilize much of the work that was done by the Plaintiff and had to re-do the greater portion thereof. There is no evidence to rebut the Defendant's evidence that he was required to expend \$889.83 in excess of the contract price quoted by the Plaintiff in order to complete the plumbing construction on the building. This testimony the lower court failed to take into consideration.

The general rule as set forth in 15 Am. Jur. p 446, par 46, is as follows:

"In case of defective performance the measure of damages is generally the reasonable cost of making the work performed or the article furnished conform to the contract."

This rule was upheld in the case of *Newton vs. Canty*, a Colorado case cited in 203 P 2nd 910.

In *Buxbom vs. Smith*, 149 P 2d 305, the court in referring to the determination of damages stated as follows:

"Where, without fault on his part, one party to a contract who is willing to perform it is prevented by doing so by the other party, the measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance and the anticipated profits which he could have derived from performance."

See also the case of *Odgers vs. Held* P 2d, 261.

It would appear that the reasonable rule of damages to be



applied in this case would be the rule of damages applied by the Oregon Supreme Court in the case of *Turner vs. Jackson*, 11 P 2d 1048, wherein the court stated the applicable rule as follows:

“The rule of damages generally applied to breaches of the character before us (contractor’s breach of building contract) is to award to the injured party an amount of money equal to the cost of curing the defects provided repair is the prudent remedy to apply.” (explanation ours)

The evidence presented by the Defendant shows that he was required to expend the sum of \$889.83 over and above the original contract cost in order to cure the defects created by the Plaintiff and to complete the job as abandoned by the Plaintiff. The court, therefore, should have awarded to the Defendant this sum as damages sustained by the failure of the Plaintiff to perform the written contract.

The record further discloses that the Plaintiff only remained upon the job created by the contract between the parties for approximately 20 days. The Plaintiff himself testified that the job should have taken only 30 days to complete. The delay caused by the Plaintiff’s failure to complete the job in accordance with the contract, and the unnecessary delay occasioned by his refusal to return to the job resulted in a delay in the completion of the job with a subsequent delay in renting of the units by the Defendant. The Defendant testified, as did Defendant’s witness Marian Merrill, that the premises had been leased before their construction and that the delay in finishing the construction cost rental in the sum of \$600.00. This amount could have been received by the Defendant had the Plaintiff completed his job in order that the construction could be finished thereafter. This was clearly established by the Defendant although the lower court failed to accept that evidence.

## SUMMARY

From the evidence it is clear that the contract bid as sub-

mitted by the Plaintiff established the requirements of the Plaintiff for the completion of the work undertaken. In view of the fact that there was no specific mention made as to method of payment, it is reasonable that the payment should be made upon the completion of the contract by the Plaintiff. The Plaintiff is without justification for his abandonment of the contract and his failure to return to the job even upon payment of \$500.00 at his request, lays a basis to justify the Defendant in obtaining another contractor to complete the work of the Plaintiff. It is also quite apparent from the evidence presented to the court that the reason for Plaintiff's abandonment of the contract was not the failure of the Defendant to pay upon presentation of a statement, but was in fact, as claimed by the Defendant, the acknowledgment by the Plaintiff that he had made numerous errors in his work, which errors would be extremely costly to repair and which repairs could not be made within the contract price agreed upon. This certainly would not give rise to an abandonment and would not justify the payment to the Plaintiff for the work done on a quantum meruit basis. Conversely it would give rise to the court's finding in favor of the Defendant and awarding to the Defendant the actual damages sustained by him in the repairs of the mistakes made by the Plaintiff together with the necessary work done to complete the project taken by the Plaintiff. In addition, the failure of the Plaintiff to complete in the time reasonably required, thus preventing the Defendant from completing the building project and receiving the rent available therefrom would justify the court in awarding to the Defendant the loss of income from rents sustained by the Defendant.

Respectfully submitted,  
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