

1965

Robert Pierce et al v. Robert W. Pepper et al : Brief of Appellant

Utah Supreme Court

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

ROBERT PIERCE, E. A. TIFFANY,
FRED WALTERS, and DEWAYNE
WALTERS, aka WAYNE WALTERS,
Plaintiffs and Respondents

vs.

ROBERT W. PEPPER, dba R. W. PEP-
PER CONSTRUCTION COMPANY
Defendant

and
MAJESTIC CORPORATION, a Utah
Corporation,
Defendant and Appellant

Case No.
10209

FILED
JAN 22 1965

Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

Appeal from the Judgment entered by
The Fourth District Court, Utah County, State of Utah
Honorable R. L. Tuckett, Judge

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STATEMENT OF THE KIND OF CASE

This action was commenced by a group of laborers, alleged employees of one Robert W. Pepper, hereinafter referred to as "Pepper," who claimed that they were not paid by Pepper for some of their wages earned while working for him. They brought suit against said Pepper, their employer, who failed to defend the action, and against Majestic Corporation, a Utah Corporation, hereinafter referred to as "Majestic," (whose president is Dr. Roy W. Humpherys, hereinafter referred to as "Humpherys"), the owner of the property upon which Pepper and his workmen performed certain services which, in part, form the basis of the workmen's claim. The suit against Pepper was prosecuted by reason of Pepper's direct breach of contract. The suit against Majestic was prosecuted because Majestic had failed to require

of Pepper that he post bond according to the requirements of 14-4-1 Utah Code Annotated, 1953, and that by reason of the penalty provisions set forth in 14-2-2, Majestic was jointly liable with the contractor for the unpaid wages.

DISPOSITION IN LOWER COURT

Pepper defaulted, but curiously enough, the judgment rendered June 10th says nothing about Pepper's liability. Majestic defended on the theories of estoppel, release, accord, settlement, satisfaction, and payment. The case was tried and a decision was rendered. In the court's decision, findings, conclusions, and judgment, the issues of estoppel and release of joint obligors were wholly ignored. The holding merely recites that the releases given by the workmen, releasing Majestic, were void for lack of consideration. Judgment was rendered against Majestic only and in favor of the plaintiffs Pierce, Tiffany, Fred Walters and DeWayne Walters, in the amounts of \$510.10, \$555.10, \$474.48, and \$471.23, respectively, together with interest thereon and costs of court.

RELIEF SOUGHT ON APPEAL

The Defendant Majestic seeks to have the judgment of the lower court reversed in its entirety, as to itself, and to have judgment of no cause of action entered in favor of Majestic and against all of the plaintiffs, and to have the costs of this appeal awarded to it.

STATEMENT OF THE FACTS

The defendant Majestic owned certain properties in Tooele, Utah upon which the plaintiffs worked. Pepper

contracted with Majestic to do certain phases of construction for agreed amounts. (See exhibit 19 wherein Pepper is erroneously called a *Sub-Contractor*) and in fact worked on these projects during part of 1962. Pepper hired his own workmen. The plaintiffs were among those he hired. How long the workmen had worked for Pepper is not ascertainable from the record, but is not an important fact. They had first worked in Provo, then Moab, then Tooele. Things apparently went well between the three parties. Majestic the owner, Pepper the contractor, and the workmen the plaintiffs, until August 13th. According to the agreement between the parties (See paragraph 4(e) of Exhibit 19) and the actual practice of the parties, the workmen periodically executed and delivered written statements stating they had been paid their wages and delivered appropriate lien releases to Pepper who in turn delivered the same to Majestic. Upon delivery he, Pepper, was able to get his draws. (See Exhibit No. 10, dated 7/30/62; Exhibit 11, dated 8/6/62; Exhibit 12, dated 8/13/62). This arrangement was in compliance with the contract and worked well. This, of course, necessitated Pepper's having enough solvency to float one complete payroll. He couldn't get a draw from Majestic on the completed work until he himself had paid the workmen therefor, and in fact, received their lien waivers, evidencing receipt of payment of their wages earned. In other words, it wasn't Majestic's money that was used to pay for the workmen's lien waivers, it was Pepper's. Only after Pepper's money had been used to pay the workmen for the completed work, could Pepper get paid by Majestic. When Majestic then paid Pepper, Pepper could replenish the fund and

have money of his own in reserve to pay the next week's payroll. Shortly before August 13, Pepper's payroll checks started bouncing.

What the immediate cause of the bouncing check problem was is somewhat vague, but it seemed to have been caused by government action. Page 213 of the Transcript discloses (on line 20 to 24) that the "government beat Pepper to the money to pay the workmen." Perhaps a treasury seizure or levy depleted the funds to that the checks of Pepper to the workmen wouldn't clear the bank. The matter was obviously one of concern especially to the workmen. Until then Dr. Roy W. Humpherys, Majestic's president, had hardly noticed the workmen, having perhaps seen them on the job a few times as Pepper's employees, but having never really known their names, status, or terms of employment. Trying to unravel the record as to how the problem of the bounced checks came to the attention of Pepper and Humpherys is interesting but unimportant. The fact is simply, that in spite of the conflicting evidence, the knowledge of the bounced checks did come to the attention of the workmen, Pepper, and Humpherys in the course of things, and was the main reason for the series of meetings which produced the settlement agreement, the efficacy of which is one of the major issues in this law suit.

At the meeting between Pepper, Humpherys and the workmen the various workmen made demands of Majestic for their unpaid claims. Trying to find the basis of these is an interesting pursuit. Each one of the workmen has about three different versions as to what he had coming. While each version turns out to be an unproven con-

clusion, one version is contained in the separately published deposition of each plaintiff. Another version is found in the affidavits offered in opposition to the defendant's motion for summary judgment, and another version is found in the testimony given at trial. The testimony at trial is most interesting. It indicates that the men don't have any affirmative recollection of the number of hours they worked during the week after August 13th, but yet they claim that Majestic's earlier payment to them covered only the wages earned after August 13th. They only remember presenting a written invoice, which curiously turns out to be prepared by Pepper for the workmen who themselves could not testify as to the number of hours they worked or their rate of pay. The incompetence of the compounded hearsay evidence upon which a finding was based will be discussed later, but whatever may be said for the reliability of the evidence in this respect, the fact remains that for each of the men there was approximately one week's work involved, give or take one or two days. These were men who were employed at about \$100.00 to \$150.00 per week. Their wage claim, apart from the bounced checks, would have been for less than \$150.00 each for the wages earned after August 13th.

Majestic was faced with the demand of the workmen that Majestic reimburse them for Pepper's bounced checks. The workmen were faced with the potential counterclaim of Majestic against them for having misled Majestic by representing not once, but on several occasions, in writing, that they had been paid by Pepper and had waived their lien rights, on the basis of which Majestic had permitted Pepper to make progress draws. Majestic was further faced with the dubious, doubtful, vague

“invoices” prepared by Pepper for some claim by the workmen for wages that the workmen themselves, much less Majestic knew nothing about. At the conclusion of the demands and counter-demands, the parties entered into a beautifully simple, uncomplicated agreement: Majestic as one party, Pepper as another party, and the Workmen separately as third parties simply agreed that Majestic would not question the invoices of the workmen, but pay them at face value. The workmen would, upon receiving payment, completely and fully release Majestic from any further liability and Pepper would pay to the workmen any residual claim that they might have.

The agreements were fully executed on all sides. Written releases were prepared by Majestic and signed by the workmen, which notwithstanding the inadequacies of the language thereof, were understood, according to the testimony given at the trial not only by Humpherys, but also each of the workmen and Pepper to be the document which evidenced the complete, unequivocal and final release of Majestic from further liability. Humpherys paid without questioning the full amount of the invoices, to these men who might have each had a claim of \$100 to \$150 for a week's wages, the sum of \$208.93 to Fred Walters, the sum of \$276.13 to Wayne Walters, the sum of \$228.13 to R. R. Pierce, and the sum of \$167.50 to E. A. Tiffany. Pepper, the party who agreed to pay any residue did not pay and was sued. A default has been entered against him and the plaintiffs may obtain a judgment against him at their pleasure.

ARGUMENT

POINT I

THE PARTIES PLAINTIFF ARE BY THEIR OWN ACTIONS ESTOPPED FROM ASSERTING ANY CLAIMS OF ANY NATURE WHATSOEVER AGAINST THE DEFENDANT MAJESTIC.

Estoppel is concisely defined by Williston on Contracts, Third Edition, Volume 1, Section 139, Page 601, as follows:

“The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such persons to loss or injury by disappointing the expectations upon which he acted.”

Nothing could better describe the facts in this case. The plaintiffs all joined in signing a series of hand-written lien waivers for R. W. Pepper, the last of which was dated August 13th, 1962. These same lien waivers, evidencing payment were used by Pepper to exhibit to Majestic to obtain his progress draws. Majestic acting in reliance thereupon issued a series of checks to Pepper, the last two of which were issued on August 13th and August 15th, 1962. Had the plaintiffs not signed these lien waivers, Pepper could not have obtained his draws from Majestic. Now the plaintiffs say they weren't paid because their various checks from Pepper, the last of which were also dated August 13th, 1962, bounced. While this is extremely regrettable, one is forced to observe that Pepper's checks weren't legal tender to the workmen, and

they didn't have to sign lien waivers or anything else until they had been paid in legal tender. If by their own election and in reliance upon previous favorable experience with Pepper's checks, they accepted the checks of Pepper instead of legal tender as their pay, they cannot be heard to complain, and if their representations have been relied upon by Majestic in disbursing to Pepper, the courts will close its ears to the plaintiffs' wailing and tell them in the future not to sign any more representations that they have been paid, until they have either been paid in legal tender, can be sure that their checks will clear, or are willing to assume the risk of looking solely to the maker of the checks for satisfaction. Had Majestic only known that Pepper's checks were bouncing and that the workmen weren't being paid, it would have taken all sorts of protective measures to protect not only the workmen, but itself as well. In this case, the workmen went on misleading Majestic because there was not only one bouncing check, but a series of bouncing checks, yet the workmen went on letting Majestic think that they were paid and that all was well. They are now by reason thereof estopped from changing their story.

Strangely, the court in its Minute Entry decision, and later in its findings, conclusions and judgment brushed aside the entire matter of estoppel. This principle alone is dispositive of the whole case and renders moot any other issues, facts, or questions involved. Majestic respectively submits that the trial court erred repeatedly in overlooking this most important principle, and missed a wonderful opportunity to save time, money, and feelings when it failed to grant Majestic's motion for summary

Taking the documents separately, we find that the invoices were admitted and used by the trial court to prove the wages the workmen had earned after August 13th. The invoices were presented by the workmen but were prepared by Pepper. Pepper prepared them from information furnished him by the workmen who gave him their time cards. Following the information from its source to the trial court we find this situation: The workmen presumably knew their hours and rate of pay. They told this to Pepper. Pepper prepared the invoices for the workmen, based upon what the workmen told Pepper. The workmen gave the invoices to Humpherys to tell him what Pepper had told them what their hours were based on what they had told Pepper. The invoices get into evidence for the purpose of clarifying and explaining the background of the releases. Now the invoices tell the trial judge what Pepper had told the workmen what their hours were, based upon information which the workmen had told Peper. We can't exactly tell whether this is third or fourth-handed hearsay. The bottom part of the invoices, where the calculating was done, was torn off and thrown away before they were presented to Humpherys. Trying to conquer this plethora of information having a pyramided degree of incompetence is interesting mental gymnastics, but at the risk of being naive, one might ask why all of the deviousness and circuitry? Why didn't the men simply tell the court how many hours they had worked and what their rate of pay was? Had they forgotten the number of hours, they could have consulted their time cards to refresh their memories. (Pepper testified that he still had them). Certainly they hadn't forgotten their rate of pay. Pepper was pulled like a rabbit

out of a hat at the last minute of the trial to testify against Majestic. Why didn't he bring the men's time cards with him?

Focusing our attention on Pepper's bounced checks, we find them even less enlightening in proving the plaintiffs' case. One check contained \$80.00 for a saw rental. The trial court having the checks before it in evidence simply presumed that they were written for wages, even disregarding the \$80.00 saw rental. It is unnecessary to trace the genealogy of the checks and prove them unworthy of cognizance in proving the number of hours the plaintiffs worked and their rate of pay. Pepper also wrote the bounced checks, and they are of as little value as the invoices in proving the elements of the plaintiff's case.

What do the invoices and checks tell us about the plaintiffs' hours and their rate of pay? Nothing — absolutely nothing. The only thing that can be said of the checks and invoices is that they exist and formed the backdrop against which the release and settlement agreement were negotiated.

Element No. 5 is also unproven. If rules of evidence are to be abandoned and facts like reasonable rate of pay are to be judicially noticed, and if decisions are to be decided on the basis of human experience and the laws of probability, there is no need to fuss over this point. However, if we are to retain the integrity of the judicial system and the rules of evidence, it shouldn't be asking too much to require plaintiffs to prove each element of their causes of action.

judgment at pre-trial and again when it failed to grant Majestic's motion to dismiss when the plaintiffs first rested.

POINT II

THE PLAINTIFFS HAVE FAILED TO ESTABLISH BY COMPETENT EVIDENCE A PRIMA-FACIA CASE FOR RELIEF AGAINST MAJESTIC.

The statute upon which the suit is based is contained in Utah Code Annotated, 1953, Title 14, Chapter 2, Paragraph 2. (Cited for brevity's sake as UCA 14-2-2) which provides inter alia and in effect that Majestic is personally (presumably corporately) liable to all persons who have not been paid who performed labor under Pepper's contract.

In substance the statute provides that if Majestic had a contract with Pepper in excess of \$500.00 and did not require of him that he post a bond as required by 14-2-1 for the protection of the workmen, that Majestic is liable together with Pepper for the reasonable value of the work performed and unpaid provided that the reasonable value does not exceed the agreed value.

Needless to say, the plaintiffs have the burden of proving their case by competent evidence. The necessary elements of proof would be:

1. The existence of a contract between Majestic and Pepper in excess of \$500.00.
2. The failure of Majestic to require and the failure of Pepper to post a bond.

3. The number of hours worked before August 13th, 1962 and the rate of compensation per hour Pepper had agreed to pay them.

4. The number of hours worked after August 13th, 1962 and the rate of compensation Pepper had agreed to pay them.

5. That the agreed rate both before and after August 13th, 1962 was a reasonable rate.

6. That they had not been paid. (Payment is ordinarily the duty of the defending party to prove, but it is counsel's private theory that in suits under the bonding law, that non-payment is the burden of the plaintiffs to prove.)

By sifting the evidence, there is probably enough in the record to prove elements No. 1 and No. 2. Element No. 3 and Element No. 4 fail miserably. The plaintiffs act like it is difficult for them to testify to something as simple as their hours worked and their rate of pay. Of course the checks and the invoices are in evidence, and were properly admitted for the purpose of laying a foundation for the release agreement hereinafter referred to. But, admitting the checks and invoices for the purpose of proving hours worked and rate of compensation is not only to rely on incompetent hearsay evidence but to rely on evidence, the hearsay nature of which is geometrically compounded.

Written documents, when introduced to prove a fact stated thereon, are themselves hearsay evidence. When the documents are prepared by someone who has learned the information he puts on the documents from someone else, this compounds the hearsay.

Element No. 6 is also unproven, but since counsel's theory on this point has never been decided, the most that can be hoped for here is that the court might indulge itself in some dictum to clarify the matter for future litigants.

While plaintiffs' counsel pursued with commendable perserverance and diligence, his theory that Majestic had only paid the wages earned since August 13th, the plaintiffs failed to make their point, and the evidence leaves us with proof on two of the elements of a cause of action and with nothing on the other four elements. There is not one word in the record as to the number of hours worked, the rate of pay, the reasonableness of the rate and the fact of non-payment, and the actions of the plaintiffs and Pepper create some grave suspicions as to why they withheld from the court the direct evidence they were undisputedly capable of giving.

POINT III

THE PLAINTIFFS' CLAIM IS DEFEATED BY AN AGREEMENT SUBSEQUENT, WHICH IS AT LEAST A VALID RELEASE OF ONE OF TWO JOINT OBLIGORS WITH RIGHTS RESERVED AGAINST THE OTHER.

The psychology of the plaintiffs appears to persuade the court that they will be turned away without just compensation for their work if they are not given judgment against Majestic, and to engage the court in some sub-conscious speculation that since Pepper's checks bounced and Majestic's didn't that Pepper isn't solvent

and that if Majestic isn't held for the obligation, the plaintiffs simply won't be paid. There is, of course, nothing in the record on this matter and as a matter of law, for whatever it's worth, the plaintiffs still have a valid claim against Pepper, although it is hard to understand why the memorandum decision, findings, conclusions, and judgment do not even mention Pepper and his responsibility to these plaintiffs.

A cursory reading of the applicable statute, however, shows that its obvious intent and purpose is to make any person subject to its provision contingently but jointly liable with the primary obligor, who is the contractor, for the unpaid bills. The statute does not expressly or inferentially release the contractor and substitute the owner in his place as being the sole party liable to whom the unpaid workman must look for satisfaction. The contractor's liability to the workmen survives and the owner's liability to the workmen is added. The only time a problem in cases like this arises is when the owner pays the contractor and the contractor forgets, neglects, or refuses to pay the workmen, and the unfortunate owner finds himself in the same position as the hapless accommodation co-signer on a promissory note who finds out that the principal obligor isn't going to perform.

Since the law in Utah on the matter of joint obligations has been codified in Chapter 4, of Title 15 of Utah Code Annotated, it will be of little consequence to review the matter of joint obligations and the legal consequences that flowed from releases given by creditors to one of two joint obligors at Common Law. It should be observed

however, that there never was a time, at least in contract law, when a creditor couldn't deal separately with one of two obligors on any terms he chose to deal. His separate dealings did not affect the rights of the two debtors against each other. It simply affected the rights of the creditor as first against one and secondly against the other debtor.

Under the facts of the instant case, Majestic found itself in the position of having paid once for the work to Pepper and then being confronted with a second demand by Pepper's creditors because Majestic didn't require of Pepper that he post a bond as required by law and Pepper forgot to pay his workmen. There is absolutely no reason why Majestic, Pepper and the Plaintiffs could not deal with each other on any basis they saw fit. The plaintiffs were the creditors and Pepper and Majestic were the joint debtors. The three parties, the plaintiffs separately as one party, Majestic as the second party and Pepper as the third party after their mutual confrontation, simply agreed tri-laterally that Majestic would honor the plaintiffs' so-called "invoices" at face value. Pepper would pay any balance owing to the plaintiffs and the plaintiffs would release Majestic from any further liability. What a simply uncomplicated arrangement and what a wonderful way for businessmen to resolve their disputes.

While it is submitted that the language in 15-4-4, and 15-5-5, is more helpful in Tort law than in Contract law (Torts being expressly included by the provisions of 15-1-1) it is submitted that the worst consequence

that could follow Majestic under the facts of this case would be those defined in 15-4-5, and the defenses available under 15-4-5 against the plaintiff would be those available to Pepper. Which of the two sub-paragraphs of 15-4-5 would apply here would depend on the plaintiffs' knowledge of the respective extent that Majestic and Pepper were severally primarily obligated to the plaintiffs. Since the primary obligation was that of Pepper's and Majestic was simply the guarantor by operation of law, it seems to be useless mental exercise to try to interpret in the light of 15-4-5 how much credit Pepper can claim against the plaintiffs for the monies that Majestic paid to them.

To talk about the sufficiency or lack of sufficiency of consideration at this point is to get ahead of the story, but since its importance permeates the proceedings it may be well to consider its bearing upon this point, although its full significance will be considered in the next point in this brief.

Since respondents' trial brief has been made a part of the trial record (pages 36 through 39) and since the conclusions of law mention the question of consideration, its presence in respondents' brief may be fairly anticipated and its bearing on this question analyzed.

Counsel cites (on page 37 of the record) a very fundamental principle of contract law, namely that a promise (including a release) not supported by consideration is unenforceable, and a release which relies upon the performance of a pre-existing legal duty as the consideration

Now it is important here to bear in mind that Humpherys was scarcely aware that the plaintiffs even existed until they started making demands upon him. Their total claims consisted of some of Pepper's bounced checks that were given to pay for wages allegedly earned before August 13th, for a saw rental, and for some allegedly unpaid wages earned after August 13th. In the settlement negotiations, no attempt was made to differentiate between the three items. Invoices prepared by Pepper were presented by the plaintiffs and paid by Majestic and each invoice reflects an amount that could not possibly have been earned in one week by the workmen, and \$80.00 of the bounced checks represents payment for a "saw rental!" The argument made against the validity of the releases is that the very existence of the bounced checks liquidated the claim for wages until August 13th. If it had been the checks of Majestic that had bounced, this would be a rather strong argument, or if the checks were being used against Pepper, they would be rather conclusive evidence against him, but when Pepper's checks are used against Majestic they leave much to be desired. Since Majestic had no knowledge of the existence of Pepper's bounced checks until later, their existence can hardly be said to be an admission of Majestic or any other legal significance as between the plaintiffs and Majestic.

As to the unpaid wages accruing after August 13th, it can hardly be asserted that this was a liquidated amount. The plaintiffs never worked under Majestic or even under any of Majestic's employees. No time cards were turned in to Majestic.

There was no way of knowing whether the plaintiffs came to work late, confined their coffee-breaks to pauses of acceptable length, slept or loafed on the job, left for and came back from lunch periods at the correct times, never went home early, and worked with reasonable diligence while on the job. Nor was there any profit in Majestic's pursuing this question at any length. Important is only the fact that the plaintiffs were to present "invoices," which Majestic paid without question, in order to get rid of a vague, bothersome claim of some workmen who allegedly hadn't been paid by their employer. Now how can anything be more *un-liquidated* and more questionable than this claim?

Aside from the question of liquidity, there is the question of the presence or absence of a dispute. The interrogation of Dr. Humpherys went on endlessly with monotonous repetition in an attempt to establish the fact that the whole dispute between Majestic and the Plaintiffs was because Dr. Humphreys quarrelled with his *legal* liability to pay these men (because he, like most owners didn't even know the bonding statute existed), but did not have a bona-fide quarrel with the *amount* of the workman's claim. There may be two schools of thought as to whether the plaintiffs succeeded in establishing that the dispute was the former and not the latter question, but it really doesn't matter. The question is more academic than practical.

To illustrate the point that there is no difference whether the dispute is as to amount, liability, or both, assume that two cars collide in an open intersection,

given for its validity, must fail for lack of an independent and separate consideration. This is an obviously true statement and hardly merits further comment. However, this principle is not very helpful in the case at hand. It merely says that if a debtor owes a creditor the sum of \$100.00 and the debtor pays the creditor \$50.00 for a full release of his liability, the agreement of the creditor to accept a lesser sum than the full sum is void for lack of consideration and the creditor may pursue the collection of the balance. No one can quarrel with this proposition. It's obviously true.

This is completely different than a situation where the Debtor No. 1 is primarily indebted to the Creditor and Debtor No. 2 is jointly and contingently liable to the Creditor because of a contractual undertaking or by operation of law. Now what is there about the admittedly true principle of law urged by plaintiffs' counsel which would prevent the Creditor from dealing separately with Debtor No. 2, accepting partial payment from him, releasing him, and looking only then to Debtor No. 1 for the balance? Now this may precipitate a quarrel between Debtor No. 1 and Debtor No. 2, and may give Debtor No. 1 some windfall defenses if the Creditor hasn't been requisitely circumspect in his observance of the requirements of UCA 15-4-4 and 15-5-5, but that isn't going to change the legal status between the Creditor and Debtor No. 2.

Stated differently, who would question the right of an accommodation co-maker who, when he finds that his co-debtor friend is faltering in the payment of his

Pepper owes the plaintiffs a liquidated and undisputed debt for bounced checks of \$100.00. The plaintiffs have another claim against Pepper for unpaid wages earned after August 13th. Assume that Pepper disputed this claim. Pepper pays \$100.00 in return for the plaintiffs' agreement to accept the \$100.00 as payment of both claims. There wouldn't be sufficient consideration for the plaintiffs' agreement to release Pepper from the second claim, since Pepper has only paid what he was under a duty to pay.

This makes good sense. But where does it leave us when we interject a third party into the illustration?

Assume the plaintiffs claim that both Pepper and Majestic owe the plaintiffs a sum of money for bounced checks. While as to Pepper the claim may be unliquidated and disputed, Majestic doesn't know anything about it (part of one check being given to cover \$80.00 in a saw rental). The plaintiffs also have another claim against both Pepper and Majestic for wages earned after August 13th. Pepper accepts this, thinking Majestic is going to have to pay it anyway, and helps the plaintiffs prepare invoices to present to Majestic. Majestic doesn't know anything about the workmen's hours, rate of pay, or anything else, so as to Majestic, it is reasonably and honestly disputed, not only as to amount, but as to the more fundamental question of liability. Majestic pays the "invoices" at face value without attempting to differentiate between bounced checks, saw rental, and wages, in order to get rid of, once and for all, a troublesome claim, meritorious or not. Plaintiffs agree to accept the payment as payment in full from Majestic and to release Majestic from

all further liability of any kind. Now will someone argue that because Majestic only paid the amount that Pepper was under a primary duty (and Majestic *perhaps* under a contingent secondary liability) to pay anyway that Majestic isn't released? Especially when the rights were reserved as against Pepper when the plaintiffs accepted the money from Majestic?

The evidence on the question of what really happened hardly needs further summation. Each of the plaintiffs as well as Humpherys and Pepper all told the identical story. While they didn't like it, and protested, they signed written releases anyway and all of them testified that they intended the documents to constitute full and complete releases. While the wording and diction used to evidence the plaintiffs' intent to release are not the best chosen lawyer-words for the purpose (they were drafted by a layman), together with the oral testimony of the parties they leave no room for doubt that that parties intended them to be full and complete releases of any and all claims. The plaintiffs seek to avoid their effect not on the basis of factual intent, but rather on the basis of legal insufficiency of the consideration. The whole attack on the releases has been launched along the lines of legal insufficiency of consideration and not along the lines of factual intent.

Plaintiffs rely entirely on the rule stated in 12 Am Jur, Page 582, Section 88, which says:

"The performance or promise of performance of a legal duty imposed by law or arising from the contract with the other party is insufficient consideration for a promise."

A reading of the cases cited in the voluminous footnotes to this section readily discloses that in each case cited, said section is dealing with an agreement to compromise a liquidated and undisputed debt. One needs only to read the following section 12 Am Jur Contract, Section 89, page 583, to see that:

“Even in jurisdictions (adhering to the rule) the courts have frequently criticized the reasonableness or fairness of the rule. Since the rule is not favored, the decisions indicate in a striking manner the extreme ingenuity of the courts in avoiding its operation.”

Of course, section 88 and 89 deal generally with the problem of consideration in contracts, and do not focus on the question of consideration in release contracts, a special kind of contract, and so is full of general statements not helpful to the question at bar. Special treatment to this problem of releases is given in 45 Am Jur Releases, Section 13, where emphasis is lent to the proposition that the partial payment of a *liquidated* and debt. Conversely, if the debt is unliquidated *or* disputed, the opposite rule applies.

The Restatement of Contracts, Volume 1, Section 76 sets forth the correct principle in illustration No. 4:

“A owes B a debt which is unliquidated, or of which either the existence or amount is honestly and reasonably disputed. A payment of any amount by A is sufficient consideration for B’s agreement to accept it in full satisfaction.

This is the controlling statement of law on this fourth and final point, for the following undeniable reasons:

(1) While Majestic may have had a statutory secondary and contingent liability to the plaintiffs, it had no then presently existing and ascertained duty to them.

(2) Majestic's liability was exceedingly doubtful and the subject of an honest and reasonable dispute between it and the plaintiffs.

(3) There was no then presently existing legal duty established by the Pepper-Majestic contract and there was no contractual relationship between Majestic and the plaintiffs and

(4) The fact that the statute requires the owner to pay unpaid wages on construction jobs if the contractor does not pay them in the event no bond is furnished as required, creates only a contingent and not a presently existing duty. It would require a law suit and a judgment to liquidate the claim against the contingent co-obligor, Majestic.

The requirements of a valid accord and satisfaction are set forth in 1 Am Jur Accord and Satisfaction, Page 217, Sec. 4.

"The Discharge of claims by way of accord and satisfaction is dependent upon an (accord and satisfaction) contract, express or implied, and it follows that the essentials necessary to valid contracts generally must be present in a contract of accord and satisfaction. Therefore, the following elements are essential: (1) a proper subject matter (2) competent parties (3) an assent or meeting of the minds of the parties and (4) a consideration."

For a more thorough treatment of the subject and for authority to the effect that an accord and satisfaction need not be in writing (although it is in writing in the instant case) see 75 ALR 905, Section 3. At Page 916 we read:

“Generally where the amount is unliquidated or disputed, and a remittance of an amount less than that claimed is sent to the creditor, together with a statement that it is full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that, if the remittance is accepted, it is accepted in full satisfaction of the disputed claim, and the creditor is aware of such conditions, the acceptance of such remittance constitutes an accord and satisfaction, although the creditor protests at the time that the amount tendered is not accepted in full satisfaction.”

In this connection, it should be borne in mind that not only were written releases signed and delivered, the settlement checks of Majestic to the workmen contain within their four corners similar language pertaining to release, were issued only after extended disputes and contentions as to amount and liability on the part of Majestic, and were accompanied by statements on both sides that this was a complete and final release and that unless the plaintiffs agreed to release Majestic completely, they wouldn't get their checks. The plaintiffs did sign, they did release, and they did get their money.

CONCLUSION

It is submitted that upon finding estoppel, the balance of the questions raised by this brief are moot, like-

wise upon finding no prima-facia case, the remaining two questions are unnecessary to treat, and upon finding a release of one of two obligors that the last question is academic, and there failing, a finding of a valid release is a bar to any recovery by the plaintiffs, but that a finding on any one of the four issues is grounds to reverse the judgment of the trial court and that the evidence and the law allows for no conclusions other than a finding on each of the four points in favor of the defendant Majestic and against the plaintiffs.

Respectfully submitted,

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Appellant, Majestic*

CERTIFICATE OF MAILING

Mailed two copies of the foregoing to Heber Grant Ivins, Attorney for the Plaintiffs, 75 North Center, American Fork, Utah, this 12th day of January, 1965.

/s/ JOHN ELWOOD DENNETT