

1970

**William v. Davis, Db a Davib Electric Company v. Stanley L. Barrett
and Iris Barrett and Perc Peterson, Db a Timberlan Sales : Brief of
Appellant**

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In The Supreme Court of the State of Utah

WILLIAM V. DAVIS, d/b/a DAVIS
ELECTRIC COMPANY,

Plaintiff and
Appellant,

vs.

STANLEY L. BARRETT and IRIS
BARRETT and PERC PETERSON,
d/b/a/ TIMBERLAN SALES,

Defendants and
Respondents.

Plaintiff and Appellant

Appeal from the judgment of the
Court for Sevier County, the Honorable
District Judge.

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TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	3
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
ARGUMENT—POINT I	6
POINT II	13
POINT III	14
CONCLUSION	16

AUTHORITIES CITED

Utah Code Annotated 1953 as amended

Title 38-1-3	13
Title 38-1-7	13
Title 38-1-11	13

In The Supreme Court of the State of Utah

WILLIAM V. DAVIS, d/b/a DAVIS
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STANLEY L. BARRETT and IRIS
BARRETT and PERC PETERSON,
d/b/a/ TIMBERLAN SALES,

Defendants and
Respondents

Civil No.
11675

Brief of Defendant and Appellant

STATEMENT OF THE NATURE OF THE CASE

That at all times herein Plaintiff was an individual, doing business as Davis Electric

That the Defendants, Stanley L. Barrett and Iris Barrett, were at all times the owners and reputed owners of the real property located in Sevier County, State of Utah.

That on or about the 1st day of April, 1966, the said Defendants, Stanley L. Barrett and Iris Barrett, did enter into a written contract with one Perc Peterson, d/b/a Timberlan Sales Company, a general contractor, who subsequently did enter into a verbal contract with the Plaintiff herein to furnish material and labor to the premises above described for the purpose of constructing a retail store. According to said oral contract, Defendant Perc Peterson, d/b/a Timberlan Sales Company, would pay to the Plaintiff the reasonable value of labor and materials furnished for said electrical work, and the reasonable value would be paid as billed upon completion for the work performed. That in addition to the oral contract entered into with Perc Peterson, the Plaintiff was contacted directly by Defendant Stanley L. Barrett on or about the 1st day of April, 1966, on the job site, and requested that Plaintiff provide further electrical services consisting of labor and materials, and that the Defendant Stanley L. Barrett did agree to pay for said services and materials at the completion of the work.

Between the 13th day of April, 1966, and the 29th day of July, 1966, at the special instance and request of the Defendants, and particularly the Defendant Perc Peterson and the Defendants Stanley L. Barrett and Iris Barrett, the Plaintiff did per-

form the work and furnished labor and material for the construction and improvements on the premises as described in his oral agreement, and did the additional work and provided the additional materials as required by Defendant Stanley L. Barrett, at a total reasonable value of \$7,861.15. That Defendants have refused to pay a balance due of \$1,861.15.

A lien was timely filed and the action brought to perfect the lien, for judgment, for principal, costs, and attorney's fees and interest.

DISPOSITION IN LOWER COURT

The Lower Court granted judgment to Plaintiff against Defendant Perc Peterson d/b/a Timberlan Sales Company, for the sum of \$1,861.15, plus interest to date of judgment, attorney's fees in the amount of \$518.00, but denied any judgment against Defendants Barrett and denied the validity of the lien.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks judgment against Defendant Stanley L. Barrett for \$1,861.15, interest, costs and attorney's fees, and seeks to have his lien declared valid as to the described property.

STATEMENT OF FACTS

About April 1, 1966, Defendants Stanley L. Barrett and Iris Barrett entered into a written contract

with Defendant Perc Peterson, d/b/a Timberlan Sales Company (R-95) (Defendant's Exhibit D) as a general contractor, to build a building to be used for a grocery store in Salina, Utah. The written contract provided for a "turn-key job." Defendants Barrett understood "turn-key job" to mean that the building would be complete in all respects and that the contractor would hand to Barrett a key at the completion of the building. Peterson claimed that his contract did not include the installation of electrical connections for certain refrigeration equipment (R-59).

Peterson employed the Plaintiff on an oral contract to do the electrical work which the Plaintiff did according to specifications contained in the plans. The Plaintiff was at the job site making electrical connections on the day that the refrigeration equipment arrived and was installed by one Scott who was one of the witnesses in this case. In order for the equipment to be installed, it was necessary to do some additional electrical work. Mr. Peterson was not present. Mr. Barrett was present and claimed that the additional electrical work was the responsibility of the contractor, Mr. Peterson. Mr. Scott of the refrigeration company affirmed that the electrical work was not his responsibility. The Plaintiff, William V. Davis, stated that he was employed to do the work which was on the specifications and this did not include the additional electrical connections for the installation of the refrigeration equipment. Finally, Mr. Barrett stated for Mr. Davis to go ahead and do the wiring, in other words, to get the store

open, and if there was any discrepancy about who was going to pay for it, he would deduct the amount from Mr. Peterson's contract (R-46).

The Plaintiff then proceeded to do the electrical wiring work required. He has been paid the amount of the original contract price as covered by the specifications, but both Defendants Peterson and Barrett have refused to pay the amount necessary to do the extra work.

In paying the total balance due to the Plaintiff, except the amount due on the extras, the Plaintiff granted a lien release in the amount of \$2,800.00 only (Defendant's Exhibit C and Plaintiff's Exhibit 4). The lien release there granted clearly states that the Plaintiff was not releasing his lien with respect to any sums due in excess of the \$2,800.00.

When the Plaintiff was not paid fully for his services, he filed with the Sevier County Recorder a Notice of Lien under recording no. 160611 in Book A-27, page 623 of the records of Sevier County Recorder's office on September 26, 1966. The amount of the lien was in the amount of \$4,861.15. Certain amounts were paid after the lien was filed, leaving a balance due and owing of \$1,861.15. This amount was never paid and this action was commenced within the one-year period allowed by law (R-1).

ARGUMENT

THE COURT ERRED IN FAILING TO GRANT A
JUDGMENT AGAINST THE DEFENDANT BARRETT

IN THE FULL AMOUNT REQUESTED AND IN FAILING TO SUSTAIN A LIEN AGAINST THE PROPERTY OF THE DEFENDANTS BARRETT.

POINT I

THE PREPONDERANCE OF THE EVIDENCE SHOWS THAT DEFENDANT BARRETT HIMSELF TOLD PLAINTIFF THAT PLAINTIFF WOULD BE PAID FOR THE EXTRAS.

POINT II

DEFENDANT BARRETT AUTHORIZED THE EXTRAS, AND THE LIEN WAS TIMELY FILED AND COMPLIED WITH ALL STATUTORY REQUIREMENTS FOR VALIDITY.

POINT III

THE LIEN WAIVER SPECIFICALLY EXCEPTED THE EXTRAS AND DOES NOT WAIVE THE LIEN FOR ANY BALANCE NOT PAID.

POINT I

The determination of the issue under this Point should be fairly simple, and would follow the suggestion of the Court on page 55 of the record in which the Court states:

“It seems to me that proof can be pretty much limited to whether or not some additional services were performed and who agreed to pay for them.”

Plaintiff's Exhibit 4 was submitted for identification and accepted in evidence showing a list of the

extras which were performed on the job. Nowhere in the record was this list basically refuted and it was accepted as the basis of the judgment granted against Perc Peterson by the Court. With respect to these extras, the Plaintiff stated on page 58 of the record, lines 24 and 25:

By the Court—

Q—You say you were called upon; by whom were you called upon to do this extra work, Perc or who?

A—No, Mr. Peterson was very seldom on the job when I was there, and all the extras that I have here were ordered by the owner.

Q—By Mr. Barrett?

A—Yes, Sir.

Q—And did he order them of you or of your employees?

A—He ordered them through—some of them was ordered through an employee of mine, but the majority of them through me personally.

Q—By Mr. Barrett?

A—Yes, Sir.

In further explanation of the itemied work on page 60 of the record the Plaintiff stated:

"I was ordered to work with Mr. Scott on this, under his direction, and those were the things that he needed by Mr. Barrett."

On page 61 of the record:

Q—Now referring again to those items opposite "r", you stated that you were ordered by Mr. Barrett to work with Mr. Scott and provide for what Mr. Scott needed?

A—Yes, Sir.

Q—And did you do that?

A—Yes, Sir.

On page 62 of the record:

A—Well, Mr. Scott brought out that it was definitely not part or included in his contract for the wiring and I brought out also that it was not included on my plans or part of my contract. And at this time Mr. Barrett said that he would see I was taken care of and to go ahead and do it.

On page 77 of the record, counsel for Defendant Barrett questions Plaintiff:

Q—You are claiming some contract today against Mr. Barrett, are you not?

A—Yes, Sir—a verbal contract.

On page 88 of the record:

Q—Would you like to tell me again what Mr.

Barrett said at the time or what was said by the parties?

A—Well, it was Mr. Scott brought out that it was not his obligation or his contract to wire these machines or the electrical portion of this, and I said it was not in my contract either, and so it needed to be done, and Mr. Barrett said to go ahead and he would see that I was taken care of on it.

On page 130 of the record Mr. Scott testifies, beginning on line 15:

Q—Now could you tell me, Mr. Scott, whether or not you had or were present at any conversation between yourself and Mr. Barrett or Mr. Davis and Mr. Barrett concerning the charges for this work necessary for the installation of that refrigeration equipment?

A—Yes.

Q—Is it possible for you to establish when that conversation took place if you remember?

A—To establish the exact day would be very difficult because of the lapse of time.

Q—With respect to when you started to do your work, could you tell me approximately what happened?

A—I would say a conversation took place in the early part of July at the time the fixtures were being moved into the place and the need arose to have them all hooked up.

Q—Can you tell me who was present?

A—Mr. Barrett, Mr. Davis and myself.

Q—And yourself.

A—There were other workmen around, but I don't recall them being in the conversation.

Q—Can you tell me what was said?

A—When we started moving the fixtures into position, the fact came up, brought up by Mr. Davis that he had nothing figured for installing these fixtures, also the alarm system, the heating and air-condition controls the various equipment that it took to make a grocery store, and he of course looked to me for payment. I told Mr. Davis at the time that we did not include this in my contract. I have my original proposals that I made to Mr. Barrett and Associated Foods Stores in my portfolio there if the need arises to look at them, but we did not include the electrical with my equipment, and at that time Mr. Barrett and Bill and myself discussed this matter from this conversation I arrived or not arrived at, but from the conversation.

Q—Could you tell us what the conversation was?

A—We were talking about of course who was going to pay for it, and I told him that I wasn't going to pay for it. Mr. Barrett indicated that he bought a "turn-key job", and he didn't feel that he should have to pay for it, and at the end of the conversation Mr. Barrett stated for Mr. Davis to go ahead and do this wiring in order, in other words, to get the store open, and

then if there was a discrepancy in about who was going to pay for it, he would deduct that amount from Mr. Peterson's contract. Now as much as my memory can serve me that's the way the conversation progressed.

The Defendant Barrett testified beginning on page 146 of the record:

Q—About when was the first of these conversations, Mr. Barrett.

A—Probably the latter part of June, first of July. It was just before we was getting ready to open, and we were in a hurry, in fact we were just a month late in getting opened, and the equipment came in and they wouldn't connect it up. I asked Davis if he wouldn't connect it, and he said no, it wasn't on the contract. I said, well it was on somebody's contract.

Q—Who was there at the time?

A—Just I and Mr. Scott.

Q—And was Mr. Davis there, too?

A—Yes, and Mr. Davis—the three of us.

Q—All right, now go ahead and give us the conversation.

A—I said that it was on somebody's contract. He said my contract was fully covered—all the wiring, all the installation. Mr. Davis had the wiring. Mr. Scott had all the installation. To my understanding that was

the complete wiring—not just partially.

Q—Now is that what you told him at the time?

A—Yes, Sir. I said I don't know who is going to pay for it, but I'm not.

Q—And did you make any other statements about withholding money on the contract?

A—I said it would be up to Perc because he was on the contract, and my contract called for complete wiring.

Q—Do you recall any conversation in which you told Mr. Davis that you would personally assume these items he is talking about?

A—No, I did not.

Q—Then your testimony is, as I understand it, that as a matter of fact you told him you weren't responsible.

A—That's right.

Q—Now in the early stages of this contract, in the planning, were you present in any meetings where the equipment and hook-up were discussed with Mr. Peterson.

A—No.

Notwithstanding the above testimony of Defendant Barrett, he also testified beginning on page 151 of the record that he directed the Plaintiff to install certain pieces of equipment and to do certain work (R-151). Defendant Barrett also admitted the items on Exhibit 1 of Plaintiff were installed by the Plaintiff and that Defendant Barrett received the benefit of the installation.

POINT II

The formal requirements of the filing of the lien of the Plaintiff were not contested by Defendants Barrett except to claim that a lien waiver and release had been given to the Defendant Barrett by the Plaintiff. The Plaintiff's Notice of Lien was filed on September 26, 1966 (Plaintiff's Exhibit 2).

The Plaintiff himself was doing work on the premises. The work on the job was terminated in October, 1966 (R-64). The charges made were reasonable (R-143, line 27). In addition, no attack was made either in the pleadings or in testimony as to the reasonableness of the charges.

Utah Code Annotated, 1953, as amended, Title 38-1-3 states:

Contractors, sub-contractors and all persons performing labor upon or furnishing materials in the construction or alteration or addition to or repair of any building, structures or improvement . . . shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials for the value of the services rendered, labor performed or materials furnished by each, respectively, whether at the instance of the owner or of any other person acting as his agent, (emphasis ours) contractors or otherwise.

Within the meaning of the statute, the Plaintiff is entitled to file a lien. Under Title 38-1-7, Utah Code Annotated, 1953, as amended, and under Title

38-1-11, Utah Code Annotated, 1953, as amended, all of the requirements of Law as to filing and initiating foreclosures were honored and complied with.

POINT III

The Defendants Barrett rely heavily upon a purported lien release designated as Defendant's Exhibit C and Plaintiff's Exhibit 4. It is not necessary to go deeply into this purported line waiver as on its face it shows that it does **not** waive any liens **except** for the **amount of labor and material as per contract only**. Since the amount which has not been paid and for which this action was brought was for extras beyond the contract, this lien waiver is not applicable. In the 5th line the Plaintiff specifically states that the waiver is "for electrical labor and materials on new building **as per contract only**." Plaintiff also states "Payment is **not** received for **extra work performed and materials furnished in addition to contracted labor and materials**." (Emphasis ours.)

Then in the middle of the paragraph below, in addition to other things, the Plaintiff states that he grants a waiver for the contract price of \$2,800.00 only. Then in order to clarify he states: "I hereby specifically reserve any and all rights I may have or may be entitled to under and by virtue of the mechanics and materials lien laws of the State of Utah by reason of **extra** labor performed and materials furnished by me to said property or in connec-

tion, **over and above** the said contract price of \$2,800.00. It is also testified to on page 72 of the record in a discussion between the Court and counsel in which the Court recognises in lines 12, 13 and 14:

“Of course the conditional release apparently would indicate there was \$2,800.00 due and said nothing about the \$1,861.15.”

On page 107 of the record, lines 15, 16 and 17, discussion of the \$2,800.00 payment was conducted and questions propounded of Mr. Perc Peterson:

Q—Now there was an additional \$2,800.00 payment that was testified to. Could you tell me whether that was also a payment to be credited to you or was that a payment of Mr. Barrett's?

A—It was credited to my total contract.

Q—Could you tell me whether or not that was a payment on the \$6,000.00 contract?

A—Yes, it was.

Q—Can you tell me whether or not that was a payment on extras?

A—That was not.

It follows that if in fact extras on the contract were ordered by the Defendant Barrett, the purported lien release and waiver waives nothing beyond those items contained in the original contract, and shows no credit as against the amount claimed to be due by the Plaintiff.

CONCLUSION

In the amended decision of the Lower Court, the Court quotes testimony by Scott, and the Court states:

"... the only theory under which the Plaintiff can assert a claim against Barrett is on some oral promise. The testimony of the witness Scott is the most persuasive concerning this matter . . . (Scott: In other words to get the store opened, and then if there was a discrepancy on about who was going to pay for it, he would deduct that amount from Peterson's contract . . .) It negatives any promise to pay on the part of Barrett."

It seems to us that Scott's testimony shows just what the Court says it does not show: **that Barrett promised to pay.**

The issues before this Court are very simple questions of fact:

1. If Davis did the work for Peterson as a sub-contractor under Peterson's "turn-key job", then Plaintiff is entitled to a judgment against Peterson and a lien against the property.

2. If Davis did the work at the direction of Barrett or the promise of Barrett that he would pay, Davis is entitled to a judgment against Barrett and a lien against the property.

Notwithstanding the dispute as to the interpretation of the "turn key" contract between Defendants

Barret and Peterson, the Plaintiff did the work on the premises as part of the job. The work he did was extra and he is entitled to a judgment and to a lien on the property.

There is no testimony to sustain any other position.

Respectfully submitted,

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