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**W. W. & W. B. Gardner, Inc. v. Jim Pappas and Russ Wallace
Roofing and William R. Wallace : Appellant's Brief**

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In The Supreme Court of the State of Utah

W. W. & W. B. GARDNER, INC.

Plaintiff and Respondent

- vs -

JIM PAPPAS and RUSS WALLACE
ROOFING, a corporation,

Defendants

WILLIAM R. WALLACE,

Defendant and Respondent

APPELLANT

Appeal from the Judgment of the
Court for Salt Lake County
Hon. Leonard J. ...

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FILED
JAN 1954

Clk. ...

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In The Supreme Court of the State of Utah

W. W. & W. B. GARDNER, INC.,

Plaintiff and Respondent,

- vs -

JIM PAPPAS and RUSS WALLACE
ROOFING, a corporation,

Defendants, and

WILLIAM R. WALLACE,

Defendant and Appellant.

11684
Case No.

APPELLANT'S BRIEF

Nature of the Case

Plaintiff and Respondent did asphaltic concrete paving work at the site of a warehouse being constructed by defendant Jim Pappas for defendant Russ Wallace Roofing, a corporation, also known as Wallace Corporation. Plaintiff and respondent has not been paid, and seeks judgment against defendant Jim Pappas, defendant Russ Wallace Roofing, a corporation, also known as Wallace Corporation, and against defendant and appellant William R. Wallace, also known as Russ Wallace, president of the corporate defendant.

Disposition in Lower Court

The trial court, sitting without a jury, dismissed plaintiff and respondents' complaint against defendant Jim Pappas, and entered judgment for plaintiff and respondent against defendant Russ Wallace Roofing, a corporation, and against defendant and appellant William R. Wallace, president of the defendant corporation.

Nature of Relief Sought

Defendant and appellant seeks to vacate the judgment entered against him by the trial court.

Statement of Facts

Plaintiff and respondent (hereinafter: "Pappas" tiff") is a corporation engaged, among other things, in doing asphaltic concrete paving work for other contractors. (T-14, 15)

Defendant Jim Pappas (hereinafter: "Pappas") is a building contractor. (T-52)

Defendant Russ Wallace Roofing, a corporation (hereinafter: the "corporation"), is a corporation of the state of Utah. (Exh's 10, 11)

Defendant and appellant William R. Wallace (hereinafter: "appellant") is the president the corporation. (Exh.s 10, 11)

Pappas constructed three warehouses for the corporation. In each case, the warehouses were

constructed on land owned by Pappas and the land was conveyed by Pappas as part of the transaction. One of these warehouses (hereinafter: "the Wallace warehouse") was constructed by Pappas in the year 1964. Construction was commenced in the fall of 1963, or the spring of 1964, and was completed in about July of 1964. (T-52, 53; 2dT-11, 12, 13, 14)

Some confusion exists as to the grantees under the various deeds executed by Pappas on the various parcels of land on which the warehouses were constructed. Confusion also exists as to the parcel of land on which the Wallace warehouse is situated. Pappas deeded one parcel of land to the defendant and his wife on August 13, 1963. (2dT-11; Exh. P-15) but Pappas asserts that he did not deed the land on which the Wallace warehouse is located until after it was completed, around July of 1964. (T-53, 62) And Pappas is not sure of the identity of the grantee in the deed for the Wallace warehouse property. (T-62, 74) Furthermore, one of the deeds prepared by Pappas in conjunction with the sale of the three parcels of property on which the various warehouses were constructed contained an erroneous description. The wrong piece of property was deeded, and a new deed had to be prepared. Pappas is not certain which of the three parcels was involved. (2dT-13)

An agreement existed between Pappas and the plaintiff that plaintiff would perform black topping for Pappas at a specified rate on several of Pappas' construction projects. The agreement for the con-

struction of the Wallace warehouse called for some black topping, and Pappas had arranged for plaintiff to do the job. (T-53) However, before the Wallace warehouse was completed, defendant called Pappas and told him not to do any black topping at the Wallace warehouse site. On July 30, 1964, Pappas, in turn, advised plaintiff not to do the Wallace warehouse job. Pappas finished the Wallace warehouse and was paid in full. (T-14, 53)

Subsequently, the defendant advised Pappas that the black topping was needed and asked Pappas if he could get it done. On August 19, 1964, Pappas called plaintiff and asked plaintiff to go ahead with the Wallace warehouse black topping. Pappas told plaintiff that Pappas would pay for the job. (T-14, 15, 54, 55)

On August 31, and September 9, 1964, Pappas again made calls to plaintiff about starting the job. The notes kept by plaintiff show that "a Mr. Wallace" called on September 3, 1964, to ask when the black topping was going to be done. The identity of the person making this notation does not appear. (T-15, 16; 2dT-9)

Plaintiff started the Wallace warehouse job on September 14 and finished it on September 22, 1964. At the time plaintiff did the job, plaintiff did not know who owned the property or what Pappas' position was with regard to it. Plaintiff did not know whether or not Pappas owned the building. (T-27, 28)

On October 7, 1964, plaintiff sent an invoice to Pappas requesting payment in the amount of \$2,601.28 for the Wallace warehouse job. A notation made by plaintiff on the bottom of plaintiffs copy of this invoice states: "Jim Pappas says 'Send this billing direct to Russ Wallace Roofing 3209 So. 8th West Street'." (Russ Wallace Roofing is the "corporation") Subsequently, monthly billings were sent to Pappas with copies to the corporation. (T-18, 19, 20, 29; Exh.s P-1, D-4)

On January 12, February 5th and 15th and on the 15th of March, 1965, plaintiff called defendant about payment of the bill. On March 16, 1965, plaintiff directed a letter to the corporation together with a promissory note to be signed by the corporation. The letter states as follows:

**"Wallace Roofing Company
3209 South 8th West Street
Salt Lake City, Utah**

Gentlemen:

At this time we wish to confirm our agreement with you, made over the telephone on March 15, 1965, with Mr. Wallace.

The agreement is that you will pay \$500.00 per month or or before the tenth day of each month with interest at 6% on the unpaid balance, until the total amount remaining is paid. This timetable should put the final payment in September of 1965. We are to receive these payments regularly as specified without necessity of solicitation on our part. As of this date your remaining balance is \$2,601.28.

WALLACE ROOFING COMPANY

.....
 Title

W. W. & W. B. GARDNER, INC.

.....
 JACK E. RINGWOOD, Gen'l Mgr.

Please sign original and return" (T-21, 22;

Exh. D-3)

On March 12, 1966, plaintiff directed a letter to Pappas which states, in part, as follows:

"It is very important that your account be paid without any further delay. We expect the payment to come through you because:

1. All arrangements were made to Jim Pappas.
2. Notice to proceed came from Jim Pappas.
3. Our quotation was based on the volume of work from Jim Pappas.
4. No prior credit knowledge of Russ Wallace was determined because the Warehouse Building was constructed by Jim Pappas." (Exh. D-5)

When plaintiff did not receive payment, plaintiff brought this action.

A R G U M E N T

POINT I

**THE COURT ERRED IN ENTERING JUDGMENT
 AGAINST THE DEFENDANT WILLIAM R. WALLACE**

BECAUSE THE RECORD CONTAINS NO EVIDENCE ON WHICH SUCH A JUDGMENT COULD BE PREDICATED.

In this case the court entered judgment against Russ Wallace Roofing (the corporation) and also against defendant William R. Wallace, the president of the corporation. A judgment against the defendant president of the corporation must necessarily be based on one of the following:

1. **The defendant had agreed to pay the obligation of the corporation.**
2. **An express contract between between the plaintiff and the defendant.**
3. **An implied contract between the plaintiff and the defendant.**
4. **An agency relationship between Pappas and the defendant pursuant to which Pappas created a contractual relationship between the plaintiff and the defendant.**
5. **Unjust enrichment.**

Section 25-5-4, Utah Code Annotated, 1953, as amended, provides (in part) as follows:

"In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(2) Every promise to answer for the debt, default or miscarriage of another."

No evidence of any kind or nature whatsoever appears in the record of this case that the defendant subscribed any agreement, note or memorandum under the terms of which he agreed to pay any obligation of the corporation.

No evidence was offered by the plaintiff to show any express contract, either oral or written, between the plaintiff and the defendant.

The only evidence presented by plaintiff to show any contractual relationship between the plaintiff and the defendant was:

1. Plaintiff had an express oral agreement with Pappas to do work on various jobs for Pappas. (T-53, 54)

2. Plaintiff performed work at the Wallace warehouse pursuant to plaintiff's prior arrangement with Pappas and at the request of Pappas. (T-53, 54, 55)

3. When Pappas requested that plaintiff do the work, Pappas said that he (Pappas) would pay for it. (T-15, 54, 55)

4. The only record of any contact whatsoever between plaintiff and defendant prior to the completion by plaintiff of the Wallace warehouse job was a notation in plaintiff's files (made by an unknown person) that a Mr. Wallace had called to ask when the job would be started. (T-15, 16; 2d T-9)

5. Plaintiff did not even know who owned the premises on which the Wallace warehouse was constructed, or who owned the warehouse itself. (T-27, 28)

As stated in 58 AmJur Sect. 32, pages 536 and 537:

“Where an express contract is in force, the law does not recognize an implied one. When, therefore, services are performed under an express contract, the action to recover for such services must be under the express contract, in the absence of the fault or the consent of the defendant. Thus, where work and labor is performed under a contract, suit must be between the parties to the contract; and third persons, although benefitted by the work, cannot be sued on an implied assumpsit to pay for that benefit because an implied undertaking cannot arise, as against one benefited by work performed, where the work was done under a special contract with other persons.” (See: **Walker v. Brown**, 21 Ill. 378, 81 Am Dec 287; **Phelps v. Sheldon**, 13 Pick (Mass) 50, 23 Am Dec 659; **Clendennen v. Paulsel**, 3 Mo 230, 25 Am Dec 435; **Chandler v. Washington Toll Bridge Authority**, 17 Wash2d 591, 137 P2d 97; **Waite v. Merrill**, 4 Me 102, 16 Am Dec 238; **More v. Luther**, 153 Mich 206, 116 NW 986, 117 NW 932, 18 LRA NS 149, 126 AmStRep 479.)

Thus, where an express agreement exists between the plaintiff and Pappas that plaintiff will perform jobs for Pappas: where Pappas requests the performance and tells plaintiff that if plaintiff will perform Pappas will pay for what is done; and

where plaintiff is not even aware that the defendant is involved, no implied contract can exist between plaintiff and defendant.

There is no evidence that Pappas was acting for the defendant William R. Wallace, rather than the corporation, when Pappas requested that the plaintiff black top the Wallace warehouse area. Plaintiff thought plaintiff was dealing with Pappas. (T-14, 15, 27, 28, 54, 55; Exh. D-5) The first plaintiff knew that anyone else might be involved was when plaintiff sent an invoice to Pappas and Pappas told plaintiff: "Send this billing direct to Russ Wallace Roofing 3209 South 8th West Street," which is the corporation. (T-18, 19, 20; Exh. P-1)

Thereafter, plaintiff sent original invoices or billings to Pappas with copies to the corporation. There is no evidence that Pappas ever advised the plaintiff that plaintiff was sending the invoice copies to the wrong party or that this ever occurred to the plaintiff. (T-18, 19, 20, 29; Exh. D-4)

When plaintiff prepared a letter agreement in an attempt to obtain payment, the letter was prepared in the name of the corporation. (Exh. D-3)

The record reflects no attempt to place personal liability on the defendant until this action was commenced—and the record contains no evidence that either Pappas or the plaintiff ever believed they were dealing with other than the corporation in the construction of the Wallace warehouse.

No facts are presented in the record which could in any way justify a judgment against the de-

fendant under any theory involving unjust enrichment or quantum meruit. As stated above, the record reflects no contractual relationship between the plaintiff and the defendant. Furthermore, the record does not establish ownership of the land which was benefited by plaintiff's work. (T-52, 53, 62, 74; 2dT-11, 13)

CONCLUSION

No basis whatsoever exists for a judgment against the defendant William R. Wallace. Any judgment must be sustained by the evidence in the record. There is no evidence in the record of this case on which to predicate a judgment against the defendant on any theory of law or equity.

The actions of the trial court should be reversed insofar as the judgment against the defendant William R. Wallace is concerned.

Respectfully submitted,

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